



TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

PH 8-2020

CHAPTER 333
OREGON HEALTH AUTHORITY
PUBLIC HEALTH DIVISION

FILED
01/16/2020 9:53 AM
ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Immediate suspension of OAR 333-015-1000, rule banning the sale of flavored vaping products

EFFECTIVE DATE: 01/16/2020 THROUGH 04/11/2020

AGENCY APPROVED DATE: 01/15/2020

CONTACT: Brittany Hall
503-449-9808
publichealth.rules@state.or.us

800 NE Oregon St. Suite 930
Portland, OR 97232

Filed By:
Brittany Hall
Rules Coordinator

NEED FOR THE RULE(S):

The Oregon Health Authority (OHA), Public Health Division is suspending OAR 333-015-1000, the rule that prohibits the sale of flavored vaping products, effective immediately. The suspension will remain in place through the date the rule is set to expire.

The Oregon Court of Appeals has stayed enforcement of temporary rule OAR 333-015-1000 pending a decision on the merits of a judicial review proceeding regarding the rule's validity. Temporary rule OAR 333-015-1000 will expire before the Court of Appeals would reach a decision on the merits in that proceeding. OHA is therefore suspending temporary rule OAR 333-015-1000 through the date it is set to expire. OHA is pursuing other actions under the Governor's Executive Order # 19-09 to address the harm vaping is causing to Oregonians and individuals nationwide, including but not limited to: Warning the public about the potential harms from vaping and providing smoking cessation resources to the public.

JUSTIFICATION OF TEMPORARY FILING:

OHA finds that failure to act promptly will result in serious prejudice to the public interest and the Authority. Temporary rule OAR 333-015-1000 needs to be suspended immediately to avoid unnecessary litigation costs. The Court of Appeals has issued an order staying enforcement of OAR 333-015-1000 pending the outcome of an ongoing judicial review proceeding in which the validity of the rule is currently being litigated. However, OAR 333-015-1000 will expire before that proceeding can be completed. The effect of the Court of Appeals' order staying enforcement of the rule, therefore, is that OAR 333-015-1000 will never go into effect before it expires. In that circumstance, continuing to litigate the validity of the rule is a waste of resources and could create confusion about the status of the rule. Suspending OAR 333-015-1000 will allow OHA to immediately end the litigation, eliminating any public confusion about the status of the law and avoiding unnecessary expenses.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

SUSPEND: 333-015-1000

SUSPEND: Temporary 333-015-1000 from PH 21-2019

RULE TITLE: Prohibition on Flavored Vaping Products

RULE SUMMARY: The Oregon Health Authority (OHA), Public Health Division is suspending OAR 333-015-1000, the rule that prohibits the sale of flavored vaping products, effective immediately. The suspension will remain in place through the date the temporary rule is set to expire.

RULE TEXT:

(1) Definitions. For purposes of this rule:

(a) "Consumer" means a person who purchases, acquires, owns, holds or uses a vapor product other than for the purpose of resale.

(b) "Flavor" means an artificial or naturally-occurring substance that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary individual either prior to or during the inhalation of the product, including, but not limited to, any taste or smell relating to chocolate, coffee, cocoa, menthol, mint, wintergreen, vanilla, honey, coconut, licorice, nuts, fruit, any candy, dessert, alcoholic or non-alcoholic beverage, herb, or spice, or any concept flavor.

(c) "Inhalant delivery system" has the same meaning given that term in ORS 431A.175(1)(a).

(d) "Retailer":

(A) Means any person who sells or offers for sale vapor products containing a flavor to consumers.

(B) Does not mean a person licensed by the Oregon Liquor Control Commission under ORS 475B.105.

(e) "Sell" or "sale" means to transfer, deliver, exchange, redeem, or barter, in any manner or by any means whatsoever, for consideration, including but not limited to providing a vapor product containing a flavor as a gift or promotional item in combination with the sale of any other product or item, through any means, including but not limited to remote offerings such as sales outlets, catalogs or the Internet.

(f) "Vapor product" means a product intended for human inhalation using an inhalant delivery system that contains any substance.

(2) Prohibition. On and after October 15, 2019, a retailer may not sell or offer for sale a vapor product containing a flavor, to a consumer in Oregon.

(3) For purposes of determining whether a vapor product contains a flavor, a public statement or claim, whether express or implied, made or disseminated by a retailer or a person responsible for the manufacture of a vaping product, or by any person authorized or permitted by the manufacturer or retailer to make or disseminate a public statement concerning such products, that a product has or produces a taste or smell other than a taste or smell of tobacco will be considered by the Authority to constitute presumptive evidence that the vapor product contains a flavor.

(4) Penalties. If a retailer violates this rule the Authority may impose a civil penalty of up to \$500 per day per violation pursuant to ORS 431A.010, in accordance with ORS 183.745. Prior to issuing a civil penalty the Authority will issue a warning letter to a retailer notifying the retailer of the violation and how to come into compliance.

STATUTORY/OTHER AUTHORITY: ORS 183.360, 413.042, 431.110, 431.141, 431A.010, EO 19-09

STATUTES/OTHER IMPLEMENTED: ORS 183.360, 413.042, 431.110, 431.141, 431A.010, EO 19-09