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Memorandum

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TO: Interested Persons

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SUBJECT: Overview of Issues Related to Electronic Nicotine Delivery Systems

Summary

This memorandum provides an overview of various Colorado laws and issues related to electronic nicotine delivery systems, including e-cigarettes.

Background

Electronic cigarettes (e-cigarettes), and other electronic nicotine delivery systems (ENDS), such as vape pens and e-cigars, heat nicotine, which is then inhaled. These devices generally use a battery to heat up a cartridge or refillable tank containing a liquid, which then produces an aerosol that is inhaled and exhaled by the user. The liquid used in ENDS devices, often referred to as eLiquid or eJuice, contains nicotine that has been extracted from a tobacco plant, along with other chemicals and flavoring agents. Some of the largest manufacturers of ENDS devices include Juul Labs, PAX Labs, R.J. Reynolds, and British American Tobacco.

In addition to ENDS, there are also electronic devices that vaporize other substances including marijuana/THC and caffeine.

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Youth ENDS Use

Youth Risk Behavior Surveillance System. The use of ENDS by youth under age 18 is monitored at the national and state level. The Youth Risk Behavior Surveillance System (YRBSS), administered by the federal Centers for Disease Control and Prevention (CDC), monitors health-related behaviors of youth, including behaviors that contribute to unintentional injuries and violence; sexual behaviors; tobacco, alcohol, and other drug use; unhealthy dietary behaviors; and inadequate physical activity. The YRBSS gathers data through national, state, territorial, tribal government, and local school-based surveys of representative samples of 9th through 12th grade students. These surveys are conducted every two years, and the most recent survey results were released in summer 2018. The 2015 and 2017 high school surveys have included questions about the use of electronic vapor products (which include ENDS). According to the 2017 survey results, approximately 26 percent of Colorado high school students reported current use of an electronic vapor product. Colorado's reported use was the highest in the nation and twice the national average.

Colorado Healthy Kids Survey. The Colorado Healthy Kids Survey is a biennial survey conducted by the Colorado Department of Public Health and the Environment (CDPHE), the Colorado Department of Education, and the Colorado Department of Human Services. The survey samples thousands of youth from a random selection of middle and high schools to understand youth trends regarding nutrition; physical activity; bullying; mental health; tobacco, alcohol, and marijuana use; and school and community engagement. Results from the 2017 survey showed that 27 percent of high school students had vaped nicotine in the last 30 days, compared to 7 percent of students who reported smoking cigarettes in the same period. In addition, although 87 percent of high school students think smoking one or more packs of cigarettes a day is risky, only 50 percent think those risks apply to daily vaping of nicotine.

National Youth Tobacco Survey. The 2018 National Youth Tobacco Survey, a nationally representative survey funded by the U.S. Food and Drug Administration (FDA) and the CDC, found ENDS use by high school students increased from 11.7 to 20.8 percent between 2017 and 2018, a 78 percent increase. In addition, respondents reported vaping 20 days or more in a 30-day period, an increase from 20 percent to 27.7 percent during that same time period. The most commonly reported reasons for using ENDS were use by a friend or family member and the availability of flavored products.¹

In December 2018, the U.S. Surgeon General declared youth use of electronic cigarettes a national public health epidemic. The declaration included information about increased youth ENDS use, the negative health effects from nicotine and aerosol found in ENDS, and provided resources for parents, teachers, and health professionals to protect children from all forms of tobacco product use.

¹2018 NYTS Data: *A Startling Rise in Youth E-cigarette Use*, Food and Drug Administration
<https://www.fda.gov/TobaccoProducts/PublicHealthEducation/ProtectingKidsfromTobacco/ucm625887.htm#reference>

School Property and Other Indoor Areas

Colorado law prohibits the use of all tobacco products, including ENDS, on school property.² During the 2019 legislative session, the General Assembly added ENDS to the definition of “smoking” for purposes of the Colorado Clean Indoor Air Act.³ A list of definitions in state statute for “tobacco” and “smoking” can be found in Appendix A.

Purchase Age Laws

Colorado law limits the purchase of ENDS to persons age 18 or older.⁴ Several Colorado communities, including Aspen, Avon, Basalt, and Carbondale, have increased the minimum age to purchase tobacco products, including ENDS, to age 21.

Retailer Licensing Laws

Colorado law does not currently require licensure for retailers of cigarettes or tobacco products. Several municipalities do require retailers of tobacco products, including ENDS, to be licensed.

At least four municipalities — Aspen, Avon, Basalt, and Edgewater — license retailers of all tobacco products, including cigarettes, electronic smoking devices, and other tobacco products. In addition, several municipalities, including Golden, Manitou Springs, and Pueblo, have enacted ordinances that require retailers of non-cigarette tobacco products, including ENDS, to be licensed.

Prior to July 1, 2019, municipalities that imposed fees or licensing requirements on cigarette retailers were not entitled to receive their share of cigarette tax dollar distributions from the state. However, with the passage of House Bill 19-1033, this penalty no longer exists as of July 1, 2019.

The Colorado General Assembly has recently considered bills related to the registration or licensure of tobacco or nicotine product retailers at the state level. Senate Bill 18-139 would have required retailers of cigarettes, tobacco products, or nicotine products (including ENDS) to be licensed by the state. In addition, the bill would have declared the regulation of cigarettes, tobacco products, and nicotine products through the uniform state licensure of retailers to be a matter of statewide concern. The bill was postponed indefinitely by the Senate Business, Labor, and Technology committee.

Colorado licenses tobacco distributors and cigarette wholesalers.⁵ However, neither of these provisions applies to ENDS.

²Section 25-14-103.5, C.R.S.

³Section 25-14-203, C.R.S.

⁴Section 18-13-121 and Section 44-7-103, C.R.S.

⁵Sections 39-28.5-104 and 39-28-102, C.R.S.

Taxation

ENDS are not currently covered under federal or state cigarette or tobacco product tax laws, and therefore are not subject to the excise taxes on these products.⁶

In 2017, however, Colorado saw local action on this issue. Voters in the city of Aspen approved a ballot measure increasing taxes on cigarettes and tobacco products, which specifically included ENDS.

Colorado Initiatives

Executive order. Governor Hickenlooper issued Executive Order B 2018 11 on November 2, 2018, which aims to reduce tobacco and ENDS use. The order:

- directs the Department of Revenue to increase compliance checks on tobacco and ENDS retailers to ensure they are not selling to underage persons;
- extends the current prohibition on smoking in state buildings and on state grounds to include ENDS; and
- directs CDPHE to issue a health advisory on ENDS and to research the association between ENDS use and other risky behaviors.

The executive order also included a number of legislative recommendations to reduce the availability of ENDS to youth in Colorado. These recommendations include:

- extending the existing cigarette excise tax to include vaping products and ENDS;
- requiring all retailers of tobacco products, vaping products, and ENDS to be licensed;
- requiring internet retailers that sell vaping products to implement age verification procedures;
- updating the Colorado Clean Indoor Air to restrict the use of ENDS in public spaces;
- raising the minimum age to purchase tobacco and ENDS to 21 years of age; and
- prohibiting the sale of flavored tobacco and vaping products in Colorado.

Public education campaigns. In response to increasing rates of youth ENDS use, CDPHE launched a statewide public education campaign to assist parents and other trusted adults in talking with youth about the use and risks of ENDS. A CDPHE website, TobaccoFreeCo.org, provides fact sheets and information regarding the health risks of using nicotine products.

CDPHE also offers numerous grants through the state Tobacco Education, Prevention, and Cessation Grant Program to fund community-based and statewide tobacco education programs in order to reduce tobacco use by children and youth, promote cessation of tobacco use, and reduce exposure to secondhand smoke. Approximately \$23 million in grant funds are awarded annually to nonprofits, local governments, and educational institutions to implement evidence-based programming. Grant funds are derived from state taxes on cigarettes and other tobacco products.

⁶26 U.S.C. § 5702; Colo. Const. art. X, § 21; and Articles 28 and 28.5 of Title 39, C.R.S.

Federal Law and Initiatives

In 1970, the U.S. Public Health Cigarette Smoking Act was signed into law. The act, among other provisions, banned the advertising of cigarettes on television and radio. However, as the act is currently written, the definition of “cigarettes” does not include ENDS.

In 1998, 46 states, including Colorado, entered into the Tobacco Master Settlement Agreement with the largest tobacco manufacturers. Among other provisions of the settlement, the tobacco manufacturers were required to discontinue outdoor and transit advertising (including billboards) of tobacco products. The settlement does not include ENDS in the definition of tobacco products.

In 2009, the Family Smoking Prevention and Tobacco Control Act was signed into law. The act gave the FDA the authority to regulate certain aspects of tobacco products, including cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco. The act also gave the FDA the authority to regulate any other tobacco products under the act. In 2016, the FDA enacted a rule to add ENDS to the definition of tobacco products for purposes of this act. Because of this inclusion, ENDS companies:

- may not use modified risk descriptors (e.g., light, mild, low) in their marketing unless approved by the FDA; and
- must include health warning labels on product packaging and in advertisements.

In April 2018, the FDA created a Youth Tobacco Prevention Plan that specifically targets ENDS use. As part of the plan, the FDA has:

- sent warning letters and citations to retailers who illegally sold ENDS to youth;
- sent warning letters to companies that labeled or advertised e-liquids to resemble children’s food products;
- requested research, marketing, and production information from certain ENDS manufacturers related to the youth appeal of ENDS; and
- launched a youth education and prevention campaign focusing on the risk of addiction and other health consequences from the use of ENDS.

The FDA has also proposed requiring all flavored ENDS products (other than tobacco, mint, and menthol flavors, or non-flavored products) to be sold in age-restricted, in-person locations and, if sold online, under stricter practices for age verification.

Appendix A. Summary of Relevant Definitions in Colorado Revised Statutes

Section	Definition
<p>Section 18-13-121 (5), C.R.S. <i>Furnishing cigarettes, tobacco products, or nicotine products to minors</i></p>	<p>(a) As used in this section, “cigarette, tobacco product, or nicotine product” means:</p> <ul style="list-style-type: none"> (I) A product that contains nicotine or tobacco or is derived from tobacco and is intended to be ingested or inhaled by or applied to the skin of an individual; or (II) Any device that can be used to deliver tobacco or nicotine to the person inhaling from the device, including an electronic cigarette, cigar, cigarillo, or pipe.
<p>Section 25-14-203, C.R.S. <i>Colorado Clean Indoor Air Act</i></p>	<p>(4.5) “Electronic Smoking Device” or “ESD”:</p> <ul style="list-style-type: none"> (a) Means any product, other than a product described in subsection (4.5)(c) of this section, that contains or delivers nicotine or any other substance intended for human consumption and that can be used by a person to enable the inhalation of vapor or aerosol from the product; (b) Includes any product described in subsection (4.5)(a) of this section and any similar product or device, whether manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, e-hookah, or vape pen or under any other product name or descriptor; and (c) Does not include: <ul style="list-style-type: none"> (I) A humidifier or similar device that emits only water vapor; or (II) An inhaler, nebulizer, or vaporizer that is approved by the federal Food and Drug Administration for the delivery of medication. <p>(16) “Smoking” means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe or any other lighted or heated tobacco or plant product intended for inhalation, including marijuana, whether natural or synthetic, in any manner or in any form. “Smoking” also includes the use of an ESD.</p> <p>(17) “Tobacco” means cigarettes, cigars, cheroots, stogies, and periques; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff and snuff flour; Cavendish; plug and twist tobacco; fine-cut and other chewing tobacco; shorts, refuse scraps, clippings, cuttings, and sweepings of tobacco; and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or for smoking in a cigarette, pipe, or otherwise, or both for chewing and smoking. “Tobacco” also includes cloves and any other plant matter or product that is packaged for smoking.</p>
<p>Section 39-28-202 (4) <i>Master Settlement Agreement Tobacco Escrow Funds</i></p>	<p>(a) “Cigarette” means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains:</p> <ul style="list-style-type: none"> (I) Any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (II) Tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette... <p>(b) The term “cigarette” includes roll-your-own, i.e., any tobacco that, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes.</p> <p>(c) For purposes of this definition of “cigarettes”, 0.09 ounces of roll-your-own tobacco shall constitute one individual “cigarette”.</p>
<p>Section 39-28.5-101 (5) <i>Tax on Tobacco Products</i></p>	<p>“Tobacco products” means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, Cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or for smoking in a pipe or otherwise, or both for chewing and smoking, but does not include cigarettes which are taxed separately pursuant to article 28 of this title.</p>