



Legislative Council Staff

Nonpartisan Services for Colorado's Legislature

Memorandum

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SUBJECT: Regulation of Electronic Nicotine Delivery Systems and Study of Youth Use

Summary

This memorandum provides an overview of Colorado's regulatory framework for electronic nicotine delivery systems (ENDS), including:

- taxes on ENDS products;
- a list of local governments in Colorado that prohibit the sale of flavored ENDS products;
- smoke-free policies;
- public education campaigns and grant programs;
- youth ENDS use surveys; and
- a summary of federal law on ENDS.

Background

Electronic cigarettes (e-cigarettes) and other ENDS—such as vaporizers, or vapes—are noncombustible tobacco products that heat nicotine for inhalation. ENDS 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 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 Fontem US, Inc.; Juul Labs, Inc.; Logic Technology Development LLC; NJOY, LLC; Nu Mark LLC; and R.J. Reynolds Vapor Company.¹

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¹FTC to Study E-Cigarette Manufacturers' Sales, Advertising, and Promotional Methods. Retrieved from: <https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-e-cigarette-manufacturers-sales-advertising-promotional>.

Regulation and Taxation of ENDS Products

In 2020, two measures passed to regulate and tax ENDS products, House Bill 20-1001 and Proposition EE. While these measures also impact cigarettes and other tobacco products, the summaries below focus solely on the ENDS-related impacts.

House Bill 20-1001

House Bill 20-1001 provides for statewide licensing and regulation of cigarette, nicotine, and tobacco retailers, including those that sell ENDS products. The bill also establishes a new minimum purchase age, requires new retail locations to be at least 500 feet away from schools, and restricts outdoor advertising.

Licensing and enforcement. The Liquor Enforcement Division (division) in the Department of Revenue must license retailers by July 1, 2021, for an annual fee not to exceed \$400 per year per individual retailer. Prior to this, 32 local governments had implemented a tobacco retailer licensing program that included ENDS products. The division is also required to maintain and post online a list of licensed retailers.

The division must conduct, or coordinate with local licensing authorities to conduct, at least two compliance checks at each retail location annually, or the federal minimum, whichever is greater. If a compliance check results in a violation, either the division or the local licensing authority must conduct an additional check within three to six months of the initial compliance check.

If a local authority suspends or revokes a license, the division must suspend or revoke the state license. The division may suspend or revoke a retailer's state license after an investigation and public hearing. It may also fine retailers for violations.

New minimum purchase and retailer ages. The bill raises the minimum age to purchase ENDS products from 18 years old to 21 years old, which aligns with changes to federal law. Prior to the state's passage of HB 20-1001, 34 local governments in Colorado had enacted ordinances increasing the minimum legal sale age for nicotine products. Retail employees must be 18 years old to handle ENDS products that are for sale.

Retail location distance from schools and advertising restrictions. New retailers applying to be licensed must be located at least 500 feet away from schools; however, local licensing authorities may eliminate types of schools from the distance restrictions or adopt shorter distance restrictions. ENDS retailers are prohibited from advertising products in a manner that is visible from outside the retail location.

Proposition EE

Effective January 1, 2021, Proposition EE, which was referred to voters by House Bill 20-1427 and passed by voters in the 2020 election, increases state taxes on tobacco products and levies a new tax on ENDS products. The ENDS products tax is assessed on the manufacturer's list price (MLP) on the following schedule:

- 30 percent beginning in January 2021;

- 35 percent beginning in January 2022;
- 50 percent beginning in January 2023;
- 56 percent beginning in July 2024; and
- 62 percent beginning in July 2027 and thereafter.

Prior to the passage of Proposition EE, 13 local governments in Colorado had implemented a tobacco tax that included ENDS products. These local taxes are not impacted by Proposition EE.

ENDS vaping products and devices that do not contain nicotine are not subject to the state tax. The measure establishes lower tax rates for modified risk tobacco products; however vaping products are not eligible for these lower tax rates, even if they are approved for this designation by the federal government.

The new tax collections will provide funding for preschool programs, rural schools, and K-12 education; housing development and eviction legal assistance; health care and tobacco education programs; as well as general state and local government spending.

Tax administration provisions. The bill permits ENDS distributors a vendor allowance of 1.1 percent for timely tax remittance. The DOR will administer similar regulatory requirements for ENDS retailers as those that currently exist for tobacco product distributors, including a \$10 annual license fee, quarterly tax filings, late payments, and penalties. Out-of-state ENDS product distributors who sell to Colorado consumers are also required to remit the appropriate taxes. Correspondingly, Colorado distributors who sell nicotine products to out-of-state consumers are allowed a tax credit equal to the amount of tax paid when the products were brought into the state.

Prohibitions on the Sale of Flavored ENDS Products

Local ordinances. Five local governments in Colorado—Aspen, Boulder, Carbondale, Glenwood Springs, and Snowmass Village—prohibit the sale of flavored ENDS products.²

State laws. Five states have either restricted or banned the sale of flavored ENDS products. Massachusetts (effective November 2019), restricted sales to only tobacco retailers, smoking bars, and adult-only retailers. The following list of states have banned the sale of flavored ENDS products:

- Rhode Island (effective March 2020);
- New Jersey (effective April 2020);
- New York (effective May 2020)— New York's ban exempts products that have received a marketing order from the federal Food and Drug Administration (FDA), which no ENDS products currently have; and
- California (effective January 2021).

Federal. Nationally, the FDA has issued an enforcement policy on unauthorized flavored cartridge-based e-cigarette products, including fruit and mint flavors that appeal to youth. This guidance is discussed further in the Federal Law and Initiatives section below.

²Tobacco Free Kids Factsheet. Retrieved from: <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>.

Smoke-Free Policies

ENDS products are included in the definition of "smoking" for purposes of the Colorado Clean Indoor Air Act.³ Prior to the passage of this legislation in 2019, 37 local governments had expanded their local smoke-free ordinances to include e-cigarettes, and many removed exemptions and extended policies to cover outdoor workplaces and high-density places.

Prohibition of ENDS Use on School Property

Colorado law prohibits the use of all tobacco products, including ENDS, on school property. The state Tobacco Education, Prevention, and Cessation Grant Program allocates funding to update the Tobacco-Free Schools policy, including implementation of a non-punitive disciplinary practices focused on educating youth and helping them get access to cessation services, rather than face suspension or expulsion.

Public Education Campaigns and Grant Programs

The Colorado Department of Public Health and Environment (CDPHE) administers a variety of tobacco education and prevention campaigns, programs, and grants, primarily funded through Tobacco Master Settlement Agreement funds.

- **Tobacco Free Colorado.** Tobacco Free Colorado is a project of the State Tobacco Education and Prevention Partnership of the CDPHE. The program supports public health organizations, policymakers, and advocates to implement tobacco cessation and prevention programs in local Colorado communities. TobaccoFreeCo.org provides resources on prevention, quitting tobacco, product facts, and policy.
- **Forward Together.** In Fall 2020, the CDPHE, along with the Colorado Department of Human Services (CDHS), launched a media campaign, ForwardTogether.org, focused on strengthening connections between youth and their parents, as well as their peers. The campaign aims to reduce the likelihood that youth will engage in risky health behaviors—including tobacco, marijuana, opioid, alcohol, and other substance use—by strengthening youth connections.
- **Colorado QuitLine.** The Colorado QuitLine, CoQuitLine.org, is a free service that provides tools, support teams, and nicotine replacement therapy to Colorado residents. In January 2021, the CDPHE will begin directing youth to a new resource, My Life My Quit. Advertising themes are tailored to youth and focus on coping with stress and anxiety; COVID-19; the confidentiality of the QuitLine; digital access to the QuitLine; and assistance for cutting back if they are not ready to quit yet.

CDPHE also offers numerous grants through the state Tobacco Education, Prevention, and Cessation Grant Program to support 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

³Section 25-14-201, *et seq.*, C.R.S.

secondhand smoke.⁴ Approximately \$19 million in grant funds are awarded annually to nonprofits, local governments, and educational institutions to implement evidence-based programming. The program operates on a three-year funding cycle. Grant funds are derived from state taxes on cigarettes and other tobacco products. A sharp decline in tobacco revenue in 2018 necessitated a funding reduction plan consisting of two rounds of funding cuts to the fiscal year 2019 to 2021 grants portfolio.

Youth ENDS Use Surveys

Colorado Healthy Kids Survey. The Colorado Healthy Kids Survey is a biennial survey conducted by the CDPHE, the Colorado Department of Education, and the Colorado Department of Human Services.⁵ 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 2019 survey showed that 25.9 percent of high school students vaped nicotine in the last 30 days, compared to 5.7 percent of students who reported smoking cigarettes in the same period. In addition, 73 percent of youth think vape products are harmful, up from 50 percent in 2017, and 85.6 percent of high school students think smoking one or more packs of cigarettes a day is risky. New in the 2019 survey, more than half of youth (53 percent) who report using e-cigarette products are trying to quit.

Youth Risk Behavior Surveillance System. 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.⁶ The YRBSS gathers data through national, state, territorial, tribal government, and local school-based surveys of representative samples of 9th through 12th grade students and, more recently, middle school students. The high school surveys are conducted at least every two years. Since 2015, the high school surveys have included questions about the use of electronic vapor products (which include ENDS). According to the 2019 survey results, approximately 29 percent of Colorado high school students reported current use of an electronic vapor product.

National Youth Tobacco Survey. The National Youth Tobacco Survey, a nationally representative survey funded by the U.S. Food and Drug Administration (FDA) and the CDC, reports that e-cigarettes have been the most commonly used tobacco product among youth since 2014.⁷ After increasing between 2017 and 2019, current use of e-cigarettes went down among middle and high school students from 2019 to 2020. Accordingly, about 1 of every 20 middle school students, or 4.7 percent, reported in 2020 that they used e-cigarettes in the past 30 days—a decrease from 10.5 percent in 2019. About 1 of every 5 high school students, or 19.6 percent, reported in 2020 that they used electronic cigarettes in the past 30 days—a decrease from 27.5 percent in 2019.

⁴Section 25-3.5-804, C.R.S. Online at: <https://cdphe.colorado.gov/chronic-disease-prevention/tobacco-education-prevention-and-cessation-grant-program>.

⁵Colorado Healthy Kids Survey. Online at: <https://cdphe.colorado.gov/healthy-kids-colorado-survey-data-tables-and-reports>.

⁶Youth Risk Behavior Surveillance System. Online at: <https://www.cdc.gov/healthyyouth/data/yrbs/index.htm>.

⁷National Youth Tobacco Survey. Online at: https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use.

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.

In January 2020, the FDA issued an enforcement policy on unauthorized flavored cartridge-based e-cigarette products, including fruit and mint flavors that appeal to youth. The guidance, **Enforcement Priorities for ENDS and Other Deemed Products on the Market Without Premarket Authorization**,⁸ states that the FDA will prioritize enforcement against:

- any flavored, cartridge-based ENDS product (other than a tobacco- or menthol-flavored ENDS product);
- all other ENDS products for which the manufacturer has failed to take (or is failing to take) adequate measures to prevent minors' access; and
- any ENDS product that is targeted to minors or whose marketing is likely to promote use of ENDS by minors.

⁸Online at: <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/enforcement-priorities-electronic-nicotine-delivery-system-ends-and-other-deemed-products-market>.

Further, the FDA intends to prioritize enforcement of any ENDS product that is offered for sale after September 9, 2020, and for which the manufacturer has not submitted a premarket application (or after a negative action by FDA on a timely submitted application).