



Legislative Council Staff

Nonpartisan Services for Colorado's Legislature

Fiscal Note

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| Drafting Number: | LLS 24-1041 | Date: | March 27, 2024 |
| Prime Sponsors: | Rep. Herod | Bill Status: | House Business & Labor |
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Bill Topic: **SALE OF UNAUTHORIZED ELECTRONIC SMOKING DEVICES**

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| Summary of | <input checked="" type="checkbox"/> State Revenue | <input type="checkbox"/> State Transfer | <input checked="" type="checkbox"/> Local Government |
| Fiscal Impact: | <input checked="" type="checkbox"/> State Expenditure | <input type="checkbox"/> TABOR Refund | <input type="checkbox"/> Statutory Public Entity |

The bill creates a deceptive trade practice for the sale of smoking devices that are not approved by the federal Food and Drug Administration. The bill will increase state and local workload, and may increase or decrease state revenue, beginning in FY 2024-25.

Appropriation Summary: No appropriation is required.

Fiscal Note Status: The fiscal note reflects the introduced bill.

Summary of Legislation

The bill prohibits manufacturers of electronic smoking devices from selling their devices in Colorado unless the manufacturer has received federal authorization from the Food and Drug Administration (FDA) or if their application with the FDA is currently under review. Manufacturers may appoint an agent to communicate with the Attorney General for any legal services and enforcement activities. The Secretary of State serves as the agent if a manufacturer does not appoint an agent.

The Attorney General may request proof of authorization from any manufacturer of an electronic smoking device. By October 1, 2024, the Department of Law is required to post on its website a list of all approved electronic smoking devices that may be sold in Colorado. Selling an unapproved device is a deceptive trade practice.

If a retailer possesses electronic smoking devices that are not approved, they must be removed from inventory by December 1, 2024, and within 30 days after a device is removed from the list of approved devices.

Any penalties collected for violations of these rules must be used for administration. Finally, the Department of Law may adopt rules to enforce these provisions.

Background

FDA Authorization. Most tobacco products require premarket authorization in order to be legally marketed. However, the FDA deferred its enforcement of premarket authorization for certain electronic smoking devices that were available for sale as of August 8, 2016, so long as the manufacturer submitted an application for authorization by September 9, 2020. To date, the FDA has authorized marketing [of 23 electronic smoking devices](#), all of which are tobacco-flavored. Many product applications have not received a final decision from the FDA or are being appealed. Products submitted to the FDA in this timeframe that are pending a final decision are allowable for sale under the bill.

State Revenue

The bill has an indeterminate impact on state revenue. It may increase revenue from civil penalties and filing fees, and may decrease revenue from nicotine taxes, as discussed below.

Civil penalties. Under the Colorado Consumer Protection Act, a person committing a deceptive trade practice may be subject to a civil penalty of up to \$20,000 for each violation. Additional penalties may be imposed for subsequent violations of a court order or injunction. This revenue is classified as a damage award and not subject to TABOR. Given the uncertainty about the number of cases that may be pursued by the Attorney General and district attorneys, as well as the wide range in potential penalty amounts, the fiscal note cannot estimate the potential impact of these civil penalties.

Filing fees. The bill may increase revenue to the Judicial Department from an increase in civil case filings. Revenue from filing fees is subject to TABOR.

Nicotine tax. To the extent that the bill results in fewer sales of electronic smoking devices, revenue from the Proposition EE tax on nicotine products may be reduced, resulting in less revenue credited to the Preschool Programs Cash Fund. Revenue from the nicotine tax is exempt from TABOR as a voter-approved revenue change under Proposition EE.

State Expenditures

The bill minimally increases workload in the Department of Law, Judicial Department, the Department of Revenue, and the Department of State as discussed below.

Department of Law. Workload in the Department of Law will minimally increase to the extent that deceptive trade practice complaints are filed. The department will review complaints under the bill and prioritize investigations as necessary within the overall number of deceptive trade practice complaints and available resources. The Department of Law will also post and update the list of approved devices on their website and assist the Department of Revenue with any enforcement provisions. These activities can be accomplished within existing resources.

Judicial Department. The trial courts in the Judicial Department may have an increase in cases filed under the Colorado Consumer Protection Act from the addition of a new deceptive trade practice. It is assumed that manufacturers, wholesalers and retailers will abide by the law and that any violation of the legislation will result in minimal number of new cases. The fiscal note assumes that this can be accomplished within existing resources and that no change in appropriations is required.

Department of Revenue. The Liquor Enforcement Division will have a minimal change in workload when conducting criminal investigations to verify compliance with sales of electronic smoking devices. No change in appropriations is required.

Secretary of State. Workload will increase for the Secretary of State to serve as the legal liaison for any manufacturer that does not appoint an agent. The fiscal note assumes this additional workload will be minimal as most manufacturers will comply with the law.

Local Government

Similar to the state, to the extent district attorneys receive deceptive trade practice complaints related to the new deceptive trade practice under the bill, workload will increase to investigate complaints and seek relief when appropriate. It is assumed most such cases will be handled at the state level by the Attorney General.

Effective Date

The bill takes effect upon signature of the Governor, or upon becoming law without his signature.

State and Local Government Contacts

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| Counties | Judicial | Law |
| Municipalities | Public Health and Environment | Revenue |

The revenue and expenditure impacts in this fiscal note represent changes from current law under the bill for each fiscal year. For additional information about fiscal notes, please visit the [General Assembly website](#).