



Legislative Council Staff

Nonpartisan Services for Colorado's Legislature

Fiscal Note

Drafting Number: LLS 23-0123
Prime Sponsors:

Date: September 20, 2022
Bill Status: Bill Request
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Bill Topic: TAXATION TOBACCO PRODUCTS REMOTE RETAIL SELLERS

Summary of Fiscal Impact:

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|---|--|
| <input checked="" type="checkbox"/> State Revenue | <input type="checkbox"/> TABOR Refund |
| <input checked="" type="checkbox"/> State Expenditure | <input type="checkbox"/> Local Government |
| <input type="checkbox"/> State Transfer | <input type="checkbox"/> Statutory Public Entity |

The bill makes several adjustments and clarifications to the remittance of taxes on tobacco and nicotine products. It minimally decreases state revenue, and increases state workload, on an ongoing basis beginning in FY 2023-24.

Appropriation Summary: No appropriation is required.

Fiscal Note Status: The fiscal note reflects the bill draft requested by the Legislative Oversight Committee Concerning Tax Policy.

Summary of Legislation

The bill makes several adjustments to the remittance of taxes on tobacco and nicotine products.

First, the bill separates the tobacco tax treatment of out-of-state retailers, which was established in Proposition EE, into two distinct, but largely parallel, tax treatments. The first is for “delivery sales” which includes the sale of smokeless tobacco and roll-your-own tobacco products. The second is for “remote retail sales” which includes the sale of cigars, pipe, and other smoking tobacco. The two types of sales are taxed in largely the same way, with the exception that remote retail sellers are not required to remit the excise tax if their annual sales fall below the economic nexus threshold established in the U.S. Supreme Court’s *South Dakota v. Wayfair* decision. If a remote seller performs fewer than 200 transactions and makes less than \$100,000 in sales to purchasers in Colorado, the seller is not liable for tax, and the consumer is required to remit the tax instead.

Second, the bill clarifies how the “manufacturer’s list price” (the price used to determine the amount of taxes owed) should be calculated in specific instances. For a manufacturer who is also a remote retail seller or a delivery seller of tobacco or nicotine, the manufacturer’s list price would be equal to the cost to manufacture the product. In cases where it is impracticable to determine the invoice price from the manufacturer, the average of the price paid for the product’s stock in the previous calendar year may be used.

Background

Proposition EE, approved by voters in 2020, raised taxes on cigarettes and tobacco products, created a new tax for nicotine, and created a minimum price for cigarette sales. The proposition also clarified that “delivery sellers,” defined as sellers who reside outside of the state and sell directly to consumers in the state via the internet or other means, are subject to the new taxes at the time of the sale to the consumer. Revenue from the taxes established in Proposition EE is exempt from TABOR as a voter-approved revenue change.

State Revenue

The bill minimally decreases state revenue on an ongoing basis beginning in FY 2023-24.

The bill limits the payment of tax from remote retail sellers (but not from delivery sellers) to those making sales in excess of the sales tax economic nexus thresholds established following the *Wayfair* decision. If the remote retail seller’s annual sales are below the economic nexus threshold, the consumer is required to remit the tax on the remote retail seller’s behalf. Requiring consumers to remit the tax on the behalf of the remote retail seller, rather than taxing the seller directly, is expected to have lower compliance and more difficult enforcement, thus minimally decreasing state revenue.

Additionally, the combination of the tobacco products listed under the new definitions of remote retail sales and delivery sales is not an exhaustive list. Specifically, the former definition of delivery sale included a catch-all category for other types of tobacco suitable for chewing or smoking, which is not included under either of the two new definitions. If the omitted tobacco products are not taxed under the new bill, revenue will be reduced by a greater amount.

Revenue from Proposition EE is deposited in the General Fund, transferred to the 2020 Tax Holding Fund, and distributed to fund affordable housing, eviction legal defense, rural schools, tobacco education programs and, in the future, preschool programs. Revenue from the taxes established in Proposition EE is exempt from TABOR as a voter-approved revenue change.

State Expenditures

The bill will minimally increase workload for the Department of Revenue on an ongoing basis starting in FY 2023-24 to administer the parallel tax treatments. Because most affected taxpayers would be able to file using existing returns and return layouts, this workload can be accomplished within existing appropriations.

Effective Date

The bill takes effect January 1, 2024, assuming no referendum petition is filed.

State and Local Government Contacts

Early Childhood
Personnel
Revenue

Health Care Policy and Financing
Public Health and Environment