

Electronic Cigarette Regulation



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Introduction

The percentage of middle school students in South Dakota who have tried electronic cigarettes has increased 64% in the two years from 2015 to 2017, rising from approximately 5% of the state's middle school students to 8.2%.¹ It is easier than ever to evade detection by using today's rising tobacco products of choice. Vaping products are the size of a USB drive, fit easily into a pocket or even in the palm of one's hand, and avoid the risk of crushing or crumbling as with traditional cigarettes. The new products release a sweet smelling odor that is distinctive but much less pungent or distinctively smelling of tobacco than traditional products. The new products come with the promise of less harmful chemicals, including the ever addictive nicotine. Questions arise and evolve with these new advances in alternative nicotine delivery. Are electronic cigarettes simply the 21st century evolution of the time honored tradition of tobacco usage into a healthier form? Are new regulations a modern day shell game that place additional burdens on retailers trying to make a living and on the right of adult individuals to consume tobacco products? This issue memorandum will provide information on recent history and developments in tobacco products.

Definitions

Electronic cigarettes, or e-cigarettes, are an alternative to traditional delivery devices that provide product to the user in the form of vapor.² The devices may be used to deliver nicotine or other related substances. The devices often take a form similar to familiar tobacco products, such as cigarettes. The Surgeon General stated in a 2016 report, "These devices are referred to, by the companies themselves, and by consumers, as 'e-cigarettes,' 'e-cigs,' 'cigalikes,' 'e-hookahs,' 'mods,' 'vape pens,' 'vapes,' and 'tank systems.'"³ This memorandum will refer to all similar products using the generic term "e-cigarettes" or "electronic cigarettes". The products are filled with e-cigarette liquids, or e-liquids, which are sold in containers often referred to as cartridges, pods, or other terms. The term vape may be used as either a verb, describing the act of inhaling and exhaling vapor from an e-cigarette or other alternative nicotine delivery device, or as a noun, referring to the device itself.⁴

Federal Regulation

According to the 2016 Surgeon General report, in as early as 1963 Herbert A. Gilbert applied for a patent for a smokeless cigarette heated by battery power. The current iteration of e-cigarettes came about in China in 2003 and soon was found on the U.S. market. The Food and Drug Administration (FDA) initially attempted to regulate e-cigarettes as medical devices, but the court ruled instead that e-cigarette products should be regulated as

¹ Da Rosa P., Jodozi-Molengraaf C. (2018). 2017 South Dakota Youth Tobacco Survey Report [Research Report]. South Dakota State University, Office of Nursing Research, <https://doh.sd.gov/prevention/assets/2017YTSReport.pdf>.

² E-Cigarettes, Public Health Law Center at Mitchell Hamline School of Law, <http://publichealthlawcenter.org/topics/tobacco-control/e-cigarettes>.

³ E-Cigarette Use Among Youth and Young Adults: A Report of the Surgeon General, U.S. Department of Health and Human Services, Public Health Service, Office of the Surgeon General, 2016.

⁴ Rafool, Mandy, "With cigarette sales down and e-cigarettes hot, lawmakers find themselves in a bit of a revenue quagmire", NCSL State Legislatures Magazine, January 2015.

tobacco products.⁵ On May 5, 2016, the FDA finalized its rule extending authority to all tobacco products, including e-cigarettes.⁶ This created a uniform federal regulation prohibiting the sale of e-cigarettes and related products to individuals under the age of 18. Prior to the final rule, states regulated sales to minors through a patchwork of state laws. The FDA issued its final rule, *Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act* (81 FR 28974, May 10, 2016). This rule sets forth the statutory requirement to submit a list of all ingredients in tobacco products and who is required to submit this information.⁷ In 2018, implementation was delayed.

South Dakota Laws

South Dakota includes e-cigarettes in its definition of tobacco products in SDCL 34-46-20. The statute refers to "Vapor product" as "any noncombustible product containing nicotine that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor from nicotine in a solution or other form [including] any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and any vapor cartridge or other container of nicotine in a solution or other form that is intended to be used with or in an [aforementioned] device."

South Dakota does not have a vapor specific excise tax or special tax for e-cigarettes, but sales tax applies to the purchase of these products. Vapor products are to be sold in the original manufacturer packaging and not removed before sale as per SDCL 34-46-21. SDCL 34-46-2 prohibits the sale and distribution of vapor products to individuals under the age of 18 and the possession, purchase, and use of such products by individuals under the age of 18. The statute also prohibits the distribution of the products within 500 feet of schools, playgrounds, or other child-focused facilities. Self-service displays, such as vending machines, may only sell vapor products in specialty tobacco stores or in locations where individuals under the age of 18 are not allowed.⁸ The state does not require a retail license or permit specifically to sell e-cigarettes. SDCL 10-50-99 prohibits the shipment or transport of tobacco products via internet or mail order directly to consumers.

Other Jurisdictions

As for neighboring states, Minnesota and Wyoming both include e-cigarettes in the definition of tobacco products. North Dakota has specifically included the products in its state comprehensive clean indoor air regulations. Minnesota is one of a minority of states that requires a retail license for the sale of e-cigarettes and similar alternative products and is one of a handful of states that has a e-cigarette or liquid nicotine excise tax in addition to or greater than regular tobacco product taxes.⁹ All states levy excise taxes on tobacco products, except Pennsylvania which levies the tax on cigarettes only.¹⁰

In June 2018, San Francisco voters upheld a citywide ban on flavored vaping products that was originally put in place by the San Francisco Board of Supervisors.¹¹ Interested parties successfully blocked the initial ban and

⁵ See *Sottera, Inc. v. U.S. Food and Drug Administration*, 627 F.3d 891 (D.C. Cir. 2011).

⁶ See FDA takes significant steps to protect Americans from dangers of tobacco through new regulation, FDA News Release, May 5, 2016, <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/UCM499234.htm>.

⁷ See <https://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/Manufacturing/default.htm>.

⁸ See [SDCL 34-46-2](#).

⁹ See Figure 1.

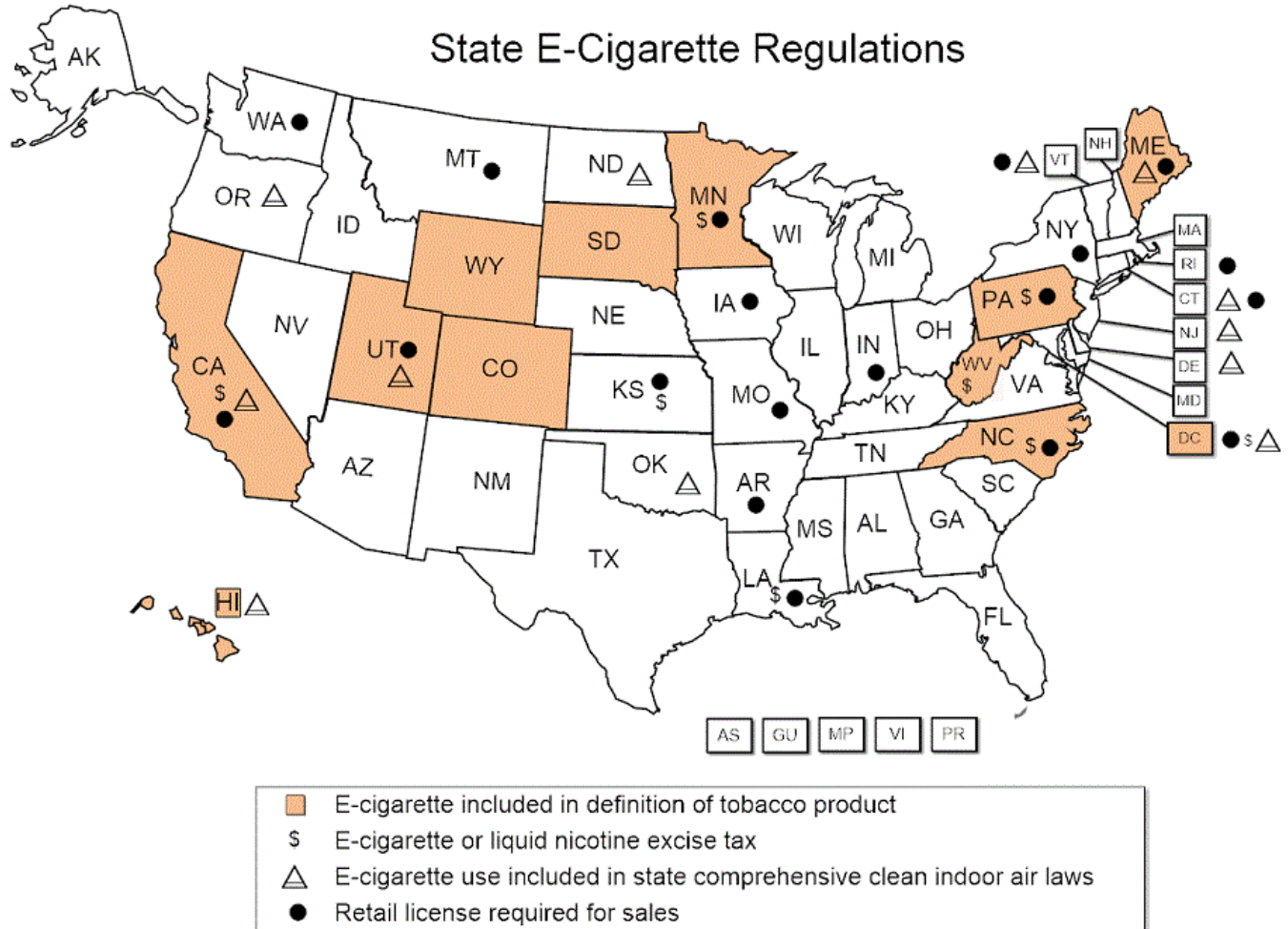
¹⁰ E-Cigarettes: Emerging Issues for State Public Health, Association of State and Territorial Health Officials, <http://www.astho.org/Prevention/Tobacco/E-Cigarettes/Issue-Brief/Emerging-Issues-for-State-Public-Health/>.

¹¹ Hoffman, Jan, "San Francisco Voters Uphold Ban on Flavored Vaping Products", *The New York Times*, June 6, 2018.



campaigned to have the initiative placed on the ballot. Sixty-eight percent of voters supported the ban. This is currently the most restrictive ban in the nation. Other municipalities and states have less restrictive regulations targeting youth access.

Figure 1 – State E-Cigarette Regulations



Source: State E-Cigarette Regulations Postcard, National Conference of State Legislatures, May 2, 2017, <http://www.ncsl.org/research/health/state-e-cigarette-regulations-postcard.aspx>.

Health Concerns

E-cigarettes have been touted as a way to quit using traditional tobacco products in favor of a healthier alternative, but the products are too new for long term studies to verify these claims. E-liquids vary among manufacturers and federal regulations are still in development to identify and set standards for ingredients. Levels of nicotine may be higher than those found in traditional tobacco products. Multiple studies have found that current e-cigarette



labeling is inaccurate.¹² E-cigarette products possess the capability to deliver marijuana and other drugs in addition to tobacco.¹³

Youth Exposure

New options in tobacco products and alternative nicotine delivery devices have raised awareness among consumers, including youth, and have offered a more appealing, tech-friendly option expanding the pool of potential users. The new products may offer an expanded gateway to regular tobacco usage. Tobacco use awareness and cessation information tools must catch up to the rise of these new products. Advances in products and delivery methods in combination with the internet have made it easier for youth to obtain the products, often without raising suspicion. In May 2018, the FDA and the Federal Trade Commission announced a joint action to issue warning letters and civil money penalties to companies offering vaping products in packaging potentially targeting youth.¹⁴ ¹⁵ FDA Commissioner Scott Gottlieb shared in September 2018 that preliminary data shows a 77% increase in 2018 over 2017 in underage vaping by high school students.¹⁶ In response to federal pressure, the Altria Group, the manufacturer of the Marlboro brand, announced in October it would stop selling e-cigarettes temporarily.¹⁷

Conclusion

The number of consumers trying these products is projected to continue rising, particularly among youth. Parents, schools, communities, and government entities will need to continue education and awareness to combat the challenge of keeping these products out of the hands of youth. Users, retailers, and states will face the challenge of staying abreast of ever changing federal regulations and state laws. Long term study is needed for conclusive information on the health effects of these products. The one constant for the future of e-cigarettes and alternative nicotine delivery devices is continued change.

This issue memorandum was written by Emily Kerr, Legislative Attorney, on November 9, 2018, for the Legislative Research Council. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.

¹² Kelly Buettner-Schmidt, Donald R. Miller & Narayanaganesh Balasubramanian, *Electronic Cigarette Refill Liquids: Child-Resistant Packaging, Nicotine Content, and Sales to Minors*, 31 J. PEDIATR. NURS. CARE CHILD. FAM. 373, 373 (2016).

¹³ U.S. Department of Health and Human Services, *E-Cigarette Use Among Youth and Young Adults*, A Report of the Surgeon General, 2016.

¹⁴ Thomas, Katie, "Vaping Products That Look Like Juice Boxes and Candy Are the Target of Crackdown", *The New York Times*, May 1, 2018.

¹⁵ See also <https://www.fda.gov/TobaccoProducts/NewsEvents/ucm605278.htm>.

¹⁶ McGinley, Laurie, "Marlboro maker Altria halts sales of flavored e-cigarettes amid concerns about youth-vaping surge", *The Washington Post*, October 25, 2018.

¹⁷ See McGinley article.

