

SENATE BILL REPORT

E2SHB 1873

As Reported by Senate Committee On:
Ways & Means, April 27, 2019

Title: An act relating to the taxation of vapor products as tobacco products.

Brief Description: Concerning the taxation of vapor products as tobacco products.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Pollet, Harris, Cody, Robinson, Tarleton, Frame, Bergquist, Ryu, Kilduff, Macri, Stonier, Dolan, Orwall, Doglio, Senn, Stanford, Appleton, Callan, Wylie, Peterson, Valdez, Walen, Leavitt, Kloba and Lovick).

Brief History: Passed House: 4/26/19, 58-38.

Committee Activity: Ways & Means: 4/27/19 [DPA, DNP, w/oRec].

Brief Summary of Amended Bill

- Establishes a tax on vapor products in an amount equal to \$0.8 per milliliter of nicotine solution for any accessible container and \$0.24 per milliliter of nicotine solution for all other vapor products.
- Creates the Foundational Public Health Account and provides that half of all vapor and heated tobacco tax revenues must be deposited into the account and used to fund foundational public health services; tobacco, vapor product, and other substance abuse prevention; and expanded access to training of public health professionals.
- Provides that half of all vapor and heated tobacco tax revenues must be deposited into the Andy Hill Cancer Research Endowment Fund Match Transfer Account.
- Authorizes the Governor to enter into vapor products taxation compacts with federally recognized Indian tribes, and establishes requirements for such compacts.

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Signed by Senators Rolfes, Chair; Mullet, Capital Budget Cabinet; Braun, Ranking Member; Billig, Carlyle, Conway, Darneille, Hunt, Keiser, Liias, Palumbo, Pedersen, Van De Wege and Wagoner.

Minority Report: Do not pass.

Signed by Senators Brown, Assistant Ranking Member, Operating; Becker, Hasegawa, Schoesler and Wilson, L..

Minority Report: That it be referred without recommendation.

Signed by Senators Honeyford, Assistant Ranking Member, Capital; Bailey, Rivers and Warnick.

Staff: Alia Kennedy (786-7405)

Background: Regulation and Taxation of Vapor Products. Vapor products are regulated by state law and are defined for such purposes as any noncombustible product that may contain nicotine that employs a heating element, or another electronic, chemical, or other means that can be used to produce vapor or aerosol from a solution or other substance. The term includes electronic cigarettes, electronic pipes, and any vapor cartridge or other container intended to be used with or in an electronic cigarette or other similar device.

In 2016 the Legislature established retailer, distributor, and delivery sale licenses administered by the Liquor and Cannabis Board (LCB) to regulate the sale and distribution of vapor products. Possession of one or more license type is required to sell, distribute, or deliver vapor products. Vapor products are required to be labeled with various health and safety warnings. It is illegal for a person under the age of eighteen to purchase or possess vapor products, and retailers must display signage clearly identifying that the sale of vapor products to persons under age eighteen is prohibited.

The use of vapor products is prohibited in various places including inside child care facilities, schools, within 500 feet of schools, school buses, and elevators. LCB has various enforcement powers related to the sale and distribution of vapor products, including the ability to enter and inspect businesses where vapor products are sold; to suspend or revoke a retailer, distributor, or delivery sale license; and to impose monetary penalties for licensee violations.

Vapor products are subject to normal sales and use taxes, but are not subject to any additional taxation.

Heated Tobacco Products. Heated tobacco products, or heated cigarettes, are tobacco products that produce aerosols containing nicotine and other chemicals, which are inhaled by users, through the mouth. According to the World Health Organization (WHO), there are several types of heated tobacco devices. In general, in order to produce a nicotine-infused vapor, the device heats tobacco up to 350°C—lower than what is required of conventional cigarettes—using battery-powered heating-systems. The heating-system enclosed in a device can be an external heat source to aerosolize nicotine from specially designed cigarettes or a heated sealed chamber to aerosolize nicotine directly from tobacco leaf.

WHO distinguishes heated tobacco products from e-cigarettes, or vapor products, in that heated tobacco products heat tobacco in order to generate nicotine, while e-cigarettes heat an e-liquid, which may or may not contain nicotine and in most cases do not contain tobacco.

Modified Risk Tobacco Product Orders. The Food and Drug Administration (FDA) is an agency within the United States Department of Health and Human Services that is responsible, in part, for regulating the manufacturing, marketing, and distribution of tobacco products to protect the public health and to reduce tobacco use by minors.

Modified risk tobacco products are tobacco products that are sold or distributed for use to reduce harm or the risk of tobacco-related disease associated with commercially marketed tobacco products. Any person may submit an application to the FDA seeking issuance of a modified risk tobacco products order under the Food, Drug, and Cosmetic Act. The FDA will issue an order authorizing the marketing of a modified risk tobacco product if the evidence submitted in the application meets certain requirements, including, if applicable, showing that the product will benefit the health of the population as a whole.

Tribal Compacting. The Governor is authorized by statute to enter into compacts and agreements with the Indian tribes of the state regarding matters of mutual interest or concern. Among these contracts are those regarding the sale and taxation of cigarettes. In general, cigarettes sold on Indian lands during a contract term are subject to a tribal cigarette tax equal to the total combined rate of state cigarette and state and local sales and use taxes. Cigarettes sold on Indian land are exempt from state cigarette taxes, and from state sales and use taxes.

Summary of Amended Bill: Tax on Vapor Products. The sale, use, consumption, handling, possession, or distribution of vapor products is subject to tax in an amount equal to \$0.8 per milliliter of nicotine solution for any accessible container and \$0.24 per of nicotine solution for all other vapor products. The tax on vapor products must be based on the volume of the solution as listed by the manufacturer.

The tax may be collected only once during the commercial distribution and retail sales process. The distributor is responsible for payment of the tax, but the tax may be imposed on the consumer if not otherwise collected by the distributor.

The Department of Revenue (DOR) is responsible for administering the tax and all agency administrative provisions apply with respect to tax collection and administration. DOR and LCB enforcement authority applies to the regulation of vapor products.

"Vapor product" means any noncombustible product containing a solution that contains nicotine, which employs a mechanical heating element, battery, or electronic circuit regardless of shape or size that can be used to produce vapor from the solution or other substance, including an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, any vapor cartridge or other container, or similar product or device.

The term does not include:

- any product approved by the FDA for sale as a tobacco cessation product, medical device, or for other therapeutic purposes;

- any product that will become an ingredient or component in a vapor product manufactured by a distributor; or
- any product that meets the definition of marijuana, useable marijuana, marijuana concentrates, marijuana-infused products, cigarette, or tobacco products.

"Heated tobacco product" means a product containing tobacco that produces an inhalable aerosol by:

- heating the tobacco by means of an electronic device without combustion of the tobacco; or
- heat generated from a combustion source that only or primarily heats rather than burns the tobacco.

Modified Risk Tobacco Product Order. Any tax imposed on a tobacco product, not including cigarettes, must be reduced by either 25 or 50 percent if the product is issued a modified risk tobacco product order by the United States Department of Health and Human Services, depending on the type of order issued.

Foundational Public Health Services Account. The Foundational Public Health Services Account is created in the state treasury. Half of all revenues collected on vapor products must be deposited into the Foundational Public Health Services Account. The Legislature intends to use the revenues generated from the tax on vapor products to fund foundational public health services; tobacco, vapor product, and other substance abuse prevention; and expanded access to training of public health professionals.

Distribution of Tax Revenues. All revenues collected on the vapor and heated tobacco products taxes must be divided evenly and deposited to the Andy Hill Cancer Research Fund and the Foundational Public Health Services Account. The revenue dedicated to those accounts is intended to supplement, but not supplant, general fund investments in cancer research and foundational public health services.

In addition, DOR must estimate the additional amount of retail sales and business and occupation taxes collected as a result of this act and remit those amounts equally to the Foundational Public Health Account and the Andy Hill Cancer Research Endowment Fund.

The expiration date on the Andy Hill Cancer Research Endowment Fund Match Transfer Account is repealed. The account is made into an appropriated account and the \$10 million limit on state match funds is removed.

Tribal Compacting for Vapor Products. The Governor may enter into vapor products tax contracts with federally recognized Indian tribes located within Washington. Contracts must require that the tribal vapor products tax rate be 100 percent of the combined sum of the state vapor products tax and state and local sales and use taxes. Contracts with the Puyallup Tribe may set the tribal tax rate at 90 percent of the state vapor products tax. Any vapor products tax agreement with the Puyallup Tribe may also require the tribe to remit to the state 30 percent of all vapor products tax revenue it collects. The tribal vapor products tax is in lieu of all state and local taxes that would otherwise be applicable to sales of vapor products.

The Governor may delegate the power to negotiate vapor product tax contracts to DOR. DOR must consult with LCB during any such negotiations.

Miscellaneous. If any provision of this act is held invalid or in conflict with federal requirements, then only those provisions are considered inoperative and the remainder of this act is not affected. Any rules adopted under this act must meet federal requirements necessary for the state to receive federal funds.

EFFECT OF WAYS & MEANS COMMITTEE AMENDMENT(S):

- Decreases the tax on products in an accessible container to 0.08 cents per milliliter of liquid nicotine or nicotine solution.
- Decreases the tax on all other vapor products to 0.24 cents per milliliter of liquid nicotine or nicotine solution.
- Removes appropriations from the Foundational Public Health Services Account to the Andy Hill Cancer Research Endowment Fund.
- Establishes a definition of heated tobacco products.
- Provides that all revenues from vapor and heated tobacco products must be divided evenly between the Foundational Public Health Services Account to the Andy Hill Cancer Research Endowment Fund.
- Provides for a reduction in tax for products issued a modified risk tobacco order.
- Repeals the expiration date on the Andy Hill Cancer Research Endowment Fund.
- Removes the limit on the state contribution to the Andy Hill Cancer Research Endowment Fund.
- Makes the Andy Hill Cancer Research Endowment Fund an appropriated account.
- Restores certain definitions and regulatory provisions necessary to implement a tax at wholesale.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.