

E-Cigarettes:

Challenges and Opportunities for California



A Report on the Regulatory, Tax Policy and Health Dangers of Nicotine's Newest Hook

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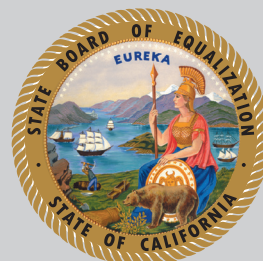
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Dear Legislator,

As part of the Legislature's deliberations on the availability, sale and popularity of "E-cigarettes" in California, and the several bills that have been introduced addressing these products, my office has released the enclosed report studying the scope of the industry, as well as the current state of regulation and taxation on these devices.

What is truly shocking about E-cigarettes is the total lack of regulation at the state and federal level. Unlike traditional tobacco cigarettes, there are no bans on marketing—including advertisements and product tie-ins that are clearly and overtly aimed at children. This is particularly insidious, considering the emerging body of research demonstrating that these devices are neither safe nor harmless—in fact, E-cigarettes contain dangerous chemicals like formaldehyde, cadmium, and nickel.

Perhaps the most important element that the Legislature needs to consider is the fact that in the eyes of the law, selling an E-cigarette device is no different than selling an iPod. Sales and use tax is paid by the consumer, but unlike other tobacco and nicotine products, the state does not recoup any additional revenues that can be used to offset the long-term costs the state incurs in providing healthcare to those who use these dangerous substances.

My office is ready and eager to assist you in your deliberations. There are a number of important challenges in regulating and taxing E-cigarette devices, and we are happy to facilitate further study and information as you debate these important questions.

In Peace and Friendship,

A handwritten signature in black ink, appearing to be 'Fiona Ma', written in a cursive style.

Fiona Ma, Second District
Board of Equalization

E-cigarettes:

E-cigarettes are battery powered devices that heat a liquid substance, which frequently contains nicotine and other harmful chemicals, for the purposes of inhalation by the user. When the charge from the battery warms the liquid it creates a vapor that resembles smoking a conventional cigarette. The liquid used in E-cigarettes comes in a variety of different flavors and is commonly referred to as “e-juice.” Some E-cigarettes, predominately those produced by major tobacco companies, supply the e-juice in sealed cartridges. However, vaporization pens are widely sold where a smoker can apply their own e-juice into the device. The use of E-cigarettes has skyrocketed since they were first introduced in the United States in 2007.

There is widespread debate about the health benefits of E-cigarettes. Tobacco companies claim that E-cigarettes are not as harmful as conventional cigarettes and that E-cigarettes can be used to curb cigarette smoking. However, these claims are refuted by strong scientific evidence that claims that E-cigarettes can be just as harmful as conventional cigarettes. In addition, claims that use of E-cigarettes curbs conventional smoking rates are, at best, limited, with numerous studies finding no demonstrable link between the use of E-cigarettes and smoking cessation.

E-cigarettes are marketed just as conventional cigarettes were before federal bans were instituted in 1970, meaning E-cigarette companies are free to advertise on television, radio, and print media. Numerous health advocates have cautioned that E-cigarette marketing is targeted very appealingly to minors. There is very little regulation at either the federal or state level for E-cigarettes.

Health Effects of E-cigarettes:

Nicotine is a highly addictive toxin whose addictive properties rival hard drugs like heroin or cocaine. Nicotine usage is responsible for a litany of health problems. For example, nicotine adversely affects the human cardiovascular system. Nicotine constricts blood vessels, which raises blood pressure and pulse rates. Nicotine adversely affects maternal and fetal health. Nicotine usage has been linked to premature births, low birth weights and stillbirths.

Preliminary reports show that nicotine from E-cigarettes has similar negative effects associated with conventional cigarettes. Studies show that smoking E-cigarettes containing nicotine for just five minutes produces a similar amount of lung irritation, blood pressure spikes and inflammation as smoking a conventional cigarette¹.

¹ Champan, Ron, MD, MPH, California Department of Public Health, State Health Officers Report on E-cigarettes, A Community Health Threat, (pg. 5).

There is a common misconception that E-cigarettes don't emit harmful chemicals. However, E-cigarettes emit a variety of chemicals that are toxic to the body. Many of these chemicals are listed as carcinogens by the State of California (Proposition 65) including benzene, cadmium, lead, nickel, and formaldehyde, all of which have been linked to negative health outcomes².

Another common misconception about the use of E-cigarettes is that they can be used to help smokers quit smoking entirely. This purported claim of E-cigarettes has already been used in advertisements for E-cigarette products. However, there is a lack of strong evidence that E-cigarettes are more effective in assisting smokers in quitting the habit. Recent studies show that 89 percent of E-cigarette smokers are still smoking a year later,³ a similar finding to other smoking-cessation therapies that incorporate nicotine (such as nicotine patches or gums).

In addition, accidental cases of poisoning of children aged five years or younger has increased dramatically, from 7 in 2012, to 154 in 2014⁴. E-cigarette liquids are available in a wide variety of flavors that appeal to small children. For example, e-juices are sold in a variety of different of candy flavors.⁵

Regulation:

E-cigarettes are not regulated federally or on the state level like tobacco. In fact, E-cigarettes are for the most part unregulated. There are no federal bans on E-cigarette advertising, or where E-cigarettes can be sold. The State of California also does not ban the use of E-cigarettes in public places, such as bars or restaurants, although many local governments have imposed bans within their own jurisdictions, including Los Angeles and San Francisco. Neither federal law nor California law treats E-cigarettes as tobacco products. Federally, there is no ban on selling E-cigarettes to minors. Many states also don't have bans on selling E-cigarettes to minors.

California banned the sale E-cigarettes to minors in 2011⁶. In January 2015, the California Department of Public Health issued a report stating that E-cigarette use is a major public health concern. Currently there are pending legislative proposals in California to regulate the use of E-

² Champan, Ron, MD, MPH, California Department of Public Health, State Health Officers Report on E-cigarettes, A Community Health Threat, (pg. 6); State of California Environmental Protection Agency, *Chemicals Known to The State To Cause Cancer Or Reproductive Toxicity*. January 23, 2015 (Online)

³ Champan, Ron, MD, MPH, California Department of Public Health, State Health Officers Report on E-cigarettes, A Community Health Threat, (pg. 3).

⁴ Champan, Ron, MD, MPH, California Department of Public Health, State Health Officers Report on E-cigarettes, A Community Health Threat, (i).

⁵ Champan, Ron, MD, MPH, California Department of Public Health, State Health Officers Report on E-cigarettes, A Community Health Threat, (pg. 3).

⁶ California Health and Safety Code, Section 119405

cigarettes. Senator Mark Leno has introduced legislation to ban the use of E-cigarettes in public places where tobacco use is banned⁷. This ban would include bars, restaurants, hospitals, etc. In addition, Senator Jerry Hill introduced legislation this year that would require retailers to apply for a license to sell E-cigarettes. Senator Hill's legislation would also require that e-juices for E-cigarettes be stored in child-proof packaging⁸.

Marketing:

Since federal legislation was enacted in 1970, conventional cigarette advertising in television and radio has been banned in the United States⁹. Cigarette advertising is also banned in many nations around the world. However, E-cigarette advertising currently does not have the same regulations. E-cigarette ads have been shown on many popular television programs. For example, the E-cigarette company NJOY ran commercials during the 2013 Super Bowl. E-cigarette companies also heavily advertise on social media sites like, Facebook and YouTube.

E-cigarette advertising employs many of the same techniques that large tobacco companies used before the 1970 advertising ban. E-cigarette advertising tends to promote the idea that smoking E-cigarettes is fun, cool, and sexy. Much of E-cigarette advertising is directed towards teens. For example, cartoon characters like "Hello Kitty" have been used to advertise E-cigarettes. Also, many of the e-juices on the market sell a variety of candy flavored liquid. Most E-cigarette companies publicly condemn marketing toward youth; nevertheless, marketing industry data suggests that E-cigarette advertising strategies are reaching children and teenagers. For example, 73 percent of youth 12-17 years of age were exposed to E-cigarette advertising by the company Blu¹⁰.

The major E-cigarette brands are owned by large tobacco companies. R.J. Reynolds currently owns the VUSE E-cigarette; Lorillard Tobacco Company owns Blu; and Phillip Morris owns HeatSticks¹¹. For example, as of 2013, Lorillard Tobacco Company owns 49% of the market share in the E-cigarette industry. HeatSticks is the first brand to heat leaf tobacco to create a vapor. One issue of particular note is the efforts of R.J. Reynolds' petition to the U.S. Food and Drug Administration (FDA) to ban E-cigarette systems that use e-juices, which can be added by the smoker. R.J. Reynolds claims that E-cigarette systems where the smoker can add e-juice are dangerous because those types of e-juices don't have the health regulations a major tobacco company would have. R.J. Reynolds also argues that pre-loaded cartridges in E-cigarettes allow

⁷ Senate Bill 140, Senator Mark Leno (2015)

⁸ Senate Bill 24, Senator Jerry Hill (2015)

⁹ 15 United States Code, Sections 1330-1336

¹⁰ Champan, Ron, MD, MPH, California Department of Public Health, State Health Officers Report on E-cigarettes, A Community Health Threat, (pg. 8).

¹¹ Forbes, *E-cigarettes Are Smoking Hot-Four Ways To Invest In Them* "December, 5, 2013

companies to control what flavor of e-juices they offer; thereby limiting marketing towards minors¹².

Legislative Remedies:

There are a variety of different options Legislators have to tax E-cigarettes. The first option is to define E-cigarettes as tobacco. However, this option would require a four-fifths vote by both houses of the state Legislature. The four-fifths vote requirement is mandated by the Tobacco Tax and Health Protection Act of 1988 (Proposition 99)¹³.

The second option would be to create a special category absent of tobacco for E-cigarettes and ancillary E-cigarette products and apply a new tax for E-cigarettes. This option would require a two-thirds vote in both houses of the state Legislature¹⁴. The third option would involve the state Legislature placing an initiative to amend the state Constitution to tax E-cigarettes. As in option 2, this would take a two-thirds vote by both houses of the state Legislature. However, the Governor does not sign initiatives proposed by the state Legislature¹⁵. Options 1 and 2 require a signature by the Governor.

The fourth option would be for the state Legislature to issue fees for permits to sell E-cigarettes. This option would only require a majority vote of each house of the state Legislature. This option would generate lower amounts of revenue than taxing E-cigarettes.

Conclusion:

The collective findings of peer-reviewed studies clearly demonstrate that E-cigarette usage is harmful to its users. E-cigarettes are not particularly more effective than other smoking cessation methods like nicotine gum or patches with a low quit rate around 7 percent. Marketing for E-cigarettes closely resembles the marketing of Big Tobacco companies before federal regulation. Big tobacco companies predominately control the E-cigarette market. In addition, marketing of E-cigarettes is very appealing to minors.

Policy makers must weigh the consequences of the continued, unregulated sale and marketing of E-cigarettes. California has made tremendous strides in reducing the number of active smokers. In 1984, approximately one quarter of all Californians were smokers; today, that number has been dramatically reduced to less than 12 percent of the population. The continued prevalence of E-cigarettes represents a pathway to reversing decades of progress in smoking cessation efforts.

¹² Winston-Salem Journal, *Reynolds American wants FDA to ban vapor e-cigs*, September 7, 2014

¹³ Section 12, Article XIII (B), California Constitution

¹⁴ Section 2, Article XIII(A), California Constitution

¹⁵ Section 1, Article XVIII, California Constitution

In addition, E-cigarette sales are not presently taxed in the same way that alcohol, tobacco or other similar products are taxed. Retailers of E-cigarettes need only remit the sales tax on the products, which is counterproductive for two primary reasons. First, it means that state policy is inconsistent with the intent of anti-smoking legislation like Proposition 10 (the Children and Families First Act) which was passed by the voters in 1998 and increased tobacco taxes by \$0.50 per pack of cigarettes to fund smoking cessation and children's health programs. Had E-cigarettes been on the market in 1998, they would have almost certainly fallen under the purview of Proposition 10. Second, failing to tax E-cigarettes means that the state is not capturing revenues which would otherwise offset the costs associated with the presence of E-cigarettes in California (e.g. increased costs to law enforcement for theft; future healthcare treatment costs).

This presents the Legislature and the Governor with the unique opportunity to generate revenues, build on California's success in curbing smoking, and establish a national standard for the regulation of sales, marketing and distribution of a product with demonstrated long-term health consequences. Notwithstanding the questions of regulation on the sales and marketing of E-cigarettes and their attendant products and accessories, implementing a tax could generate tens of millions of dollars per annum, increasing the available funding for crucial programs. Further economic studies need to be conducted to accurately estimate potential tax revenue from E-cigarettes.

California should continue the progress that has been made on tobacco cessation efforts, and implement a regulatory scheme and tax structure to control the sale of E-cigarettes. Particular emphasis with respect to the issues of accessibility to minors and capturing revenues that are not presently being captured, is a crucial state challenge; one that policy makers must address.

