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## Bill Analysis

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### SUMMARY

#### E-smoking product manufacturer certification

- Requires, within 60 days of the bill's effective date and annually thereafter, every manufacturer of electronic smoking ("e-smoking") products sold in Ohio to submit certain certifications to the Department of Public Safety (DPS) investigative unit ("Investigative Unit"), certifying compliance with the bill's provisions, certain federal laws and regulations, and a list of specific details of the products sold.
- Defines "e-smoking product" as any noncombustible product, other than a cigarette or tobacco product, that contains or is designed to use vapor products and employs some mechanical or chemical process to produce vapor from the vapor product, including, for example, an electronic cigarette, and a disposable e-smoking product.
- Declares that the information submitted in the annual certification is confidential commercial or financial information for purposes of Ohio's Public Records laws and prohibits DPS from disclosing such information except as required or authorized by law.
- Allows a manufacturer to partially redact confidential commercial and financial information in its annual certification documents.

#### Material changes

- Requires manufacturers to notify DPS within 30 days after any material change to the information required for its annual certification, including the issuance or denial of a marketing authorization or other order by the U.S. Food and Drug Administration (FDA) or any other FDA order or action that affects the introduction or delivery of the e-smoking product into interstate commerce.

- Does not require a manufacturer to resubmit certain certification or documentation relating to its application based solely on changes to the name, brand style, or packaging of an e-smoking product.

### **E-smoking product directory**

- Requires the Investigative Unit, beginning 90 days after the bill's effective date, to maintain and make publicly available a directory that lists information concerning e-smoking product manufacturers and their products on the unit's website ("ESP-directory"), which must be updated monthly.

### **Denial of ESP-directory listing**

- Prohibits the Investigative Unit from adding a manufacturer or e-smoking product to the ESP-directory if the Investigative Unit determines that the manufacturer failed to comply with the bill's requirements.
- Provides that any person that presents false information in a certification for inclusion on the ESP-directory is guilty of a fourth degree misdemeanor for each such false representation.

### **Notice of violation and cure period**

- Requires the Investigative Unit to provide notice to a manufacturer to give it an opportunity to cure deficiencies before removing the manufacturer or e-smoking product from the ESP-directory, if the manufacturer or product is already listed.
- Provides for the notice to be sent by email or fax to the email address or fax number provided by the manufacturer in the manufacturer's most recent certification.
- Mandates the notice includes a description of the violation, instructions for how to cure it, and an explanation that failure to cure the violation could result in removal of the manufacturer or product from the ESP-directory.
- Requires, within 30 days after the notice is sent, for the removal of the manufacturer or product from the directory if the violations are not cured.

### **E-smoking products not included on ESP-directory**

- Declares that any e-smoking product not listed in the ESP-directory is contraband, as follows:
  - In the case of an e-smoking product removed from the ESP-directory due to noncompliance with the certification requirements, 30 days after the Investigative Unit publishes an updated ESP-directory that includes the removal;
  - For all other e-smoking products, January 1, 2027, or on the date that the Investigative Unit first publishes the ESP-directory on its website, whichever is later.
- Prohibits any person or manufacturer from selling, directly or indirectly, an e-smoking product in Ohio that is not included in the ESP-directory.

## **Contraband product sales**

- Requires a retail dealer, distributor, or wholesale dealer, prior to a contraband designation, to either sell the product or remove it from inventory; after designation, the product is subject to seizure, forfeiture, and destruction by the Investigative Unit with any costs for such acts to be paid by the person from whom the products were confiscated.
- Allows the Investigative Unit to store and dispose of the seized products as appropriate, in accordance with federal, state, and local laws.
- Prohibits the seizure of e-smoking products from a consumer who makes a bona fide purchase of such product.

## **Civil penalties**

- Allows the Investigative Unit to impose a civil penalty, set by DPS, on a manufacturer, business, or person who sells or offers for retail sale in Ohio, an e-smoking product that is not included in the ESP-directory; each day a noncompliant product is sold constitutes a separate violation subject to additional civil penalties.

## **E-Smoking Products Enforcement Fund**

- Requires any fees or penalties collected under the bill's provisions to be deposited to the Electronic Smoking Products Enforcement Fund, created in the state treasury; money in the fund must be used by the Investigative Unit to administer and enforce the bill's provisions, including allocating funds to the Department of Taxation (TAX) to fund inspection and enforcement actions.

## **Investigations and record examinations**

- Requires the Investigative Unit to conduct inspections of businesses licensed to distribute or sell at retail tobacco products, alternative nicotine products ("alt-nicotine products"), e-smoking products, and vapor products to determine compliance with the bill's provisions and current law regarding the cigarette tax.
- Allows the Investigative Unit to examine the business records of a person that deals in e-smoking products either through sale or storage.
- Requires compliance with the Unit's investigation by every person in possession, control, or occupancy of any premises where such products are placed, sold, or offered for sale.
- Requires the Investigative Unit to conduct annual unannounced compliance checks for each distributor, wholesale dealer, and retail dealer that sells or distributes e-smoking products in Ohio, including unannounced follow-up compliance checks after the Unit determines there is a violation.
- Requires the Investigative Unit to publish the results of all compliance checks and follow-up compliance checks at least annually and to make the results available to the public on request.

## **Nonresident or foreign manufacturers**

- Defines a “nonresident or foreign manufacturer” (NFM) as a person that manufactures or sells e-smoking products that is not an Ohio resident; incorporated, formed, or organized under Ohio law; or licensed, registered, or certified to transact business in Ohio.
- Requires an NFM, as a condition precedent to NFM’s and its product’s inclusion and retention in the ESP-directory, to comply with a variety of requirements regarding the appointment of an agent in Ohio to receive all service of process pertaining to enforcing the bill’s provisions and obtaining a surety bond.
  - Deems the Secretary of State (SOS) as the NFM’s agent, if the NFM fails to appoint an agent as directed by the bill, and provides for the NFM to be proceeded against in any action or proceeding arising under the bill’s provisions by service of process on the SOS;
  - Provides that the appointment of the SOS as the NFM’s agent does not satisfy the bill’s requirements for the NFM to appoint an agent for inclusion in the ESP-directory;
  - Requires each NFM to obtain a bond of \$25,000 in favor of DPS, conditioned upon the NFM’s performance of all the bill’s requirements and obligations; allows DPS to request an additional bond if it executes on the initial bond;
  - Provides a process for a surety on a bond to be released and discharged from liability to DPS 60 days after a written request to the Investigative Unit.

## **Removal or noninclusion subject to review**

- Provides that a determination by the Investigative Unit to not include or to remove a manufacturer or e-smoking product from the ESP-directory is subject to review via a civil action for declaratory or injunctive relief.

## **Reporting requirement**

- Requires the Investigative Unit, beginning six months after the bill’s effective date and every six months thereafter, to provide a report to the General Assembly regarding the status of the ESP-directory and other information regarding the administration and enforcement of the bill’s provisions.

## **Unfair or deceptive acts or practices**

- Declares any violation of the bill’s ESP-directory or annual certification provisions an “unfair or deceptive act or practice” under Ohio’s Consumer Sales Practices Act.

## **Marketing prohibitions**

- Prohibits a person from negligently selling an e-smoking product that is accompanied by, uses, or has advertising, labeling, packaging, trade dress, trademarks, branding, or product design that depicts, imitates, includes symbols or images of, has features of, material typically marketed towards minors.

- Provides that a violation of the marketing prohibition is a third degree misdemeanor and carries a fine limited to \$500.

## **TAX retail dealer license**

- Prohibits a person from selling, at retail, tobacco products, alt-nicotine products, e-smoking products, or vapor products in Ohio without having a license issued by TAX.
- Requires each person selling, at retail, tobacco products, alt-nicotine products, e-smoking products, or vapor products in Ohio without a license to apply for one within ten days of being notified of noncompliance.
- Defines an “alt-nicotine product” (for purposes of the TAX license provisions) as any noncombustible product containing nicotine that is intended for human consumption, excluding cigarettes, tobacco products, e-smoking products, vapor products, or certain items regulated under federal law.
- Requires each applicant, annually, on or before the first day of February, to deliver to TAX a statement containing certain information regarding the applicant’s business and any other information TAX considers necessary and include in the statement affirmation of compliance with all applicable federal and state laws.
- Requires a \$125 application fee for each physical place where the applicant proposes to carry out business where a license is required, except the bill provides for the fee to be pro-rated for applications filed after February 1, with \$25 as the pro-ration floor.
- Requires TAX, after determining the applicant has paid all fees, charges, and taxes, and submitted all required information, to issue a license to the applicant for a duration of one year, allowing the applicant to sell tobacco products, alt-nicotine products, e-smoking products, or vapor products that are legal to sell pursuant to federal law, provided they satisfy the other state law requirements.
- Allows TAX to impose a penalty of up to \$1,000 on any person found to be engaged in illegally selling tobacco products, alt-nicotine products, e-smoking products, or vapor products without a valid license.
- Requires TAX to coordinate any inspection activities and share any information with DPS.
- Mandates that all license, license replacement, and transfer fees collected pursuant to the bill’s provisions, and for the distributor license under current law, and all penalties assessed to distributors under current law, to be deposited into the Nicotine Products Licensing Enforcement Fund, created by the bill.

## **Cigarette tax records**

- Requires each tobacco or vapor product distributor subject to the state and county Cigarette Tax to mark on the invoices the brand and product name of each product sold in addition to other requirements in current law.

- Applies similar recordkeeping requirements to retail dealers of tobacco products and vapor products not otherwise subject to that law and to each person that sells alt-nicotine products or e-smoking products at retail.
- Allows DPS to inspect the premises of any person in the business of distributing or selling at retail tobacco products, alt-nicotine products, e-smoking products, or vapor products, regardless of whether that person holds a license.

## Smoking in schools

- Allows public schools and other educational institutions to declare school property or facilities as a nonsmoking place and to prohibit pupils from using or possessing any substance containing nicotine in any area under the school's control.

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## DETAILED ANALYSIS

### Summary

The bill makes various changes throughout Ohio Tobacco laws as well as creates new requirements for sellers, distributors, and manufactures of tobacco products, alternative nicotine products (“alt-nicotine products”), electronic smoking products (“e-smoking products”), and vapor products. First, the bill requires e-smoking product manufacturers to certify various information about their business and products with the Department of Public Safety (DPS). Administration and enforcement actions are undertaken by DPS’s investigative unit (“Investigative Unit”), whose authority is expanded by the bill. The bill then requires the creation of an e-smoking product directory (“ESP-directory”), which is to be made publicly available, and must show consumers the manufacturers and e-smoking products that are in compliance with the law. Next, the bill directs retail dealers of such products to apply to the Department of Taxation (TAX) for a license to continue operating their businesses. The bill provides for various enforcement mechanisms, including civil penalties. Lastly, the bill allows schools and other public educational institutions to ban smoking in any facility under their control.

### DPS administrative and enforcement authority

The bill requires DPS, through its Investigative Unit, to administer and enforce the e-smoking product manufacturer certification, ESP-directory, and investigations and record examination provisions of the bill.<sup>1</sup>

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<sup>1</sup> R.C. 5502.01(O).

## **E-smoking product manufacturer certification**

The bill requires, within 60 days of the bill's effective date, and annually thereafter, every manufacturer of e-smoking products sold at retail in Ohio or to a "person" (includes individuals, firms, partnerships, associations, joint-stock companies, corporations, combinations of individuals of any form, and the state and any of its political subdivisions) in Ohio, whether directly or through a distributor, wholesale dealer, retail dealer, or similar intermediary or intermediaries, to submit the following, along with a filing fee set by DPS, to the Investigative Unit, in the form and manner prescribed by DPS (which may also adopt other rules necessary to administer the bill's provisions):

1. Certification that the manufacturer agrees to comply with Chapter 5502 of the Revised Code (DPS's laws);
2. Certification under penalty of perjury, that at least one of the following applies:
  - a. The manufacturer has received a marketing authorization or similar order for the e-smoking product from the U.S. Food and Drug Administration (FDA) pursuant to federal law;
  - b. The manufacturer submitted a "timely filed premarket tobacco product application" (an application made pursuant to federal law for an e-smoking product or vapor product marketed in the U.S. as of August 8, 2016, that was submitted to the FDA on or before September 9, 2020, and accepted for filing), and it either remains under review or a final decision on the application is not otherwise in effect;
  - c. The FDA has issued a rule, guidance, or other formal statement that temporarily exempts the e-smoking product from federal marketing authorization requirements.
3. A copy of the FDA-issued marketing authorization, evidence that the timely filed premarket tobacco product application was submitted and either remains pending or is not otherwise in effect, or a document issued by the FDA demonstrating that the e-smoking product is temporarily exempt from federal marketing authorization requirements. The bill declares this information is confidential commercial or financial information for purposes of Ohio's Public Records laws. The Investigative Unit is not permitted to disclose such information except as required or authorized by law. The bill allows a manufacturer to partially redact this information upon request and Unit approval;
4. A certification form that separately lists the brand name, product name, and flavor for each e-smoking product that the manufacturer, directly or indirectly, sells at retail in Ohio or to a person in Ohio.

The bill defines "e-smoking product" as any noncombustible product, other than a cigarette or tobacco product, that contains or is designed to use vapor products and 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 the vapor product, including:

- A “vapor product” (any liquid solution or other substance that contains nicotine and is depleted as it is used in an e-smoking product, whether sold with or separately from such product, excluding any solution or substance regulated as a drug, device, or combination product under federal law) whether sold with or separately from the e-smoking product;
- An electronic cigarette;
- A “disposable e-smoking product” (an e-smoking product that is filled with a solution or other substance containing nicotine before the product is sold, is sealed by the manufacturer and not intended to be opened by the consumer, and is intended to be disposed of after the solution or other substance containing nicotine has been depleted);
- An “open-system e-smoking product” (an e-smoking product that utilizes a nicotine solution in a container that is intended to be refillable or that otherwise makes the nicotine solution accessible to the consumer through customary or reasonably foreseeable handling or use);
- An electronic cigar, cigarillo, pipe, hookah;
- A vape pen;
- A vaporizer;
- Any similar product or device, except for any product regulated as a drug, device, or combination product under the Federal Food, Drug, and Cosmetic Act.

The bill further defines “nicotine” as any form of the chemical nicotine, including any salt or complex, regardless of whether the chemical is naturally or synthetically derived, and nicotinic alkaloids and nicotine analogues, such as metatine. A “nicotine analogue,” under the bill, means a substance that: (1) has a chemical structure substantially similar to nicotine’s chemical structure, (2) has, or is represented to have, an effect on the central nervous system similar to the chemical nicotine, or (3) is manufactured, formulated, sold, distributed, or marketed with the intent to avoid DPS’s provisions of law and the bill.<sup>2</sup>

### **Material changes**

The bill requires manufacturers subject to certification to notify the Investigative Unit within 30 days after any material change to the manufacturer’s certification information, including either: (1) issuance or denial of a marketing authorization or other order by the FDA, or (2) any other FDA order or action that affects the e-smoking product’s ability to be introduced or delivered into interstate commerce for commercial distribution in the U.S.

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<sup>2</sup> R.C. 5502.80(B), (D), (F), (G), (H), (I), (M), and (N), and 5502.81(A) to (C), (P), and (Q); R.C. 149.43 to 149.45, 21 United States Code (U.S.C.) 387j, Chapter V of the “Federal Food, Drug, and Cosmetic Act,” 21 U.S.C. 301, *et seq*, not in the bill.

The bill does not require resubmission of certification or documentation relating to a manufacturer's market authorization or exemption based solely on changes to the name, brand style, or packaging of an e-smoking product.<sup>3</sup>

### **E-smoking product directory**

The bill directs the Investigative Unit, beginning 90 days after the bill's effective date, to maintain and make publicly available on its public website a directory that lists all e-smoking product manufacturers, brand names, product names, and flavors for which certification forms have been submitted and approved by the Investigative Unit ("ESP-directory"). The bill further requires the Unit to update the ESP-directory at least once a month.

### **Denial of ESP-directory listing**

The bill denies inclusion onto the ESP-directory to any e-smoking product manufacturer or product if the Investigative Unit determines any of the following apply:

- The manufacturer failed to provide a complete and accurate certification relating to the manufacturer's market authorization or exemption as required by the bill;
- The manufacturer failed to include the filing fee with such certification;
- The manufacturer sold products in Ohio required to be certified during a period when either the manufacturer or the product had not been certified and listed on the ESP-directory;
- The manufacturer's certification contains false information, material misrepresentations, or omissions. The bill also provides that whoever knowingly presents false information for certification is guilty of a fourth degree misdemeanor for each such false representation.

### **Notice of violation and cure period**

The bill requires the Investigative Unit to provide a manufacturer notice of the violation and an opportunity to cure deficiencies before removing the manufacturer or e-smoking product from the ESP-directory. Removal from the ESP-directory can occur no sooner than 30 days after the Unit sent the notice, which can be sent by email or fax to the email address or fax number provided by the manufacturer in its most recent certification. The bill directs the Unit to include in the notice a description of the violation, instructions for how to cure it, and an explanation that failure to cure the violation within 30 days could result in removal from the ESP-directory, which is what the bill requires the Unit to do if the violation is not cured within 30 days.<sup>4</sup>

### **E-smoking products not included on ESP-directory**

The bill provides that any e-smoking product that is not listed in the ESP-directory as "contraband" (any property that is illegal for a person to acquire or possess under a statute,

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<sup>3</sup> R.C. 5502.81(D).

<sup>4</sup> R.C. 5502.81(E) to (G) and 5502.99(E).

ordinance, or rule, or that a trier of fact lawfully determines to be illegal to possess by reason of the property's involvement in an offense), as of the following dates:

- In the case of an e-smoking product that is removed from the ESP-directory due to not curing a violation, 30 days after the Investigative Unit publishes an updated ESP-directory that includes the product's removal;
- For all other e-smoking products, January 1, 2027, or on the date that the Unit first publishes the ESP-directory on its public website, whichever is later.

The bill prohibits any person from selling or offering for retail sale in Ohio or to a person in Ohio an e-smoking product not included in the ESP-directory. Additionally, a manufacturer cannot sell, either directly or through a distributor or wholesale dealer, retail dealer, or similar intermediary or intermediaries, an e-smoking product in Ohio not included in the ESP-directory.

The bill defines the following terms:

“Distributor” means: (1) a person that sells vapor products to a retail dealer, (2) a retail dealer that receives vapor products with respect to which the Cigarette Tax has not or will not be paid by another person that is a distributor, (3) a secondary manufacturer, (4) an Ohio wholesale dealer that receives vapor products from a manufacturer, or receives vapor products on which the Cigarette Tax has not been paid, and (5) a wholesale dealer located outside Ohio that sells vapor products to a wholesale dealer in Ohio.

“Retail dealer” means any person in Ohio engaged in the business of selling vapor products to ultimate consumers in Ohio, regardless of quantity, amount, or number of sales.

“Sale” includes an exchange, barter, gift, offer for sale, or distribution, and includes transactions in interstate or foreign commerce.

“Secondary manufacturer” means any person in Ohio engaged in the business of repackaging, reconstituting, diluting, or reprocessing a vapor product for resale to consumers.

“Wholesale dealer” means only persons that either bring in or cause to be brought into Ohio unstamped cigarettes purchased directly from the manufacturer, producer, or importer of cigarettes for sale in Ohio or are engaged in the business of selling cigarettes, tobacco products, or vapor products to others for resale, but excludes: (1) a person that brings in or causes to be brought into Ohio cigarettes with respect to which no evidence of Cigarette Tax payment is required thereon, and (2) a cigarette manufacturer, export warehouse proprietor, or importer with a valid permit under federal law, if that person sells cigarettes in Ohio only to wholesale dealers holding valid and current cigarette licenses under current law or to an export warehouse proprietor or another manufacturer.<sup>5</sup>

### **Contraband product sales**

The bill directs a retail dealer, distributor, or wholesale dealer, before the e-smoking product receives the contraband designation, to either sell the product or remove it from the

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<sup>5</sup> R.C. 5502.80(A), (C), (J), (K), (L), and (O) and 5502.81(H) and (I); 26 U.S.C. 5713, not in the bill.

entity's inventory. After the contraband designation, the bill provides the product is subject to seizure, forfeiture, and destruction by the Investigative Unit. The bill requires the person who possessed the contraband to pay for the cost of the seizure, forfeiture, and destruction. The bill allows the Unit to store and dispose of the seized products as appropriate, in accordance with federal, state, and local laws pertaining to storage and disposal of such products, including by contracting with a licensed hazardous waste disposal facility. However, the bill prohibits any seizure of e-smoking products from a consumer who makes a bona fide purchase of such product.<sup>6</sup>

### **Civil penalties**

The bill empowers the Investigative Unit to impose a civil penalty, set by DPS rule, on a distributor, wholesale dealer, retail dealer, or any other person who sells or offers for retail sale in Ohio an e-smoking product that is not included in the ESP-directory, with each day constituting a separate violation and subject to additional civil penalties. The bill also provides for the imposition of a civil penalty (set in the same manner with the same effect as above) on e-smoking product manufacturers whose products are not listed in the ESP-directory and are sold retail sale in Ohio or to a person in Ohio, directly or indirectly.

### **E-smoking Products Enforcement Fund**

The bill requires all fees and penalties collected pursuant to the bill's DPS e-smoking product manufacturer provisions to be deposited to the E-smoking Products Enforcement Fund, which the bill creates in the state treasury, and provides that all investment earnings of the fund be credited to the fund. The bill directs the Investigative Unit to use the fund's money to administer and enforce the bill's provisions and may allocate money to TAX for the purposes of funding inspections and enforcement actions.<sup>7</sup>

### **Investigations and record examinations**

The bill provides that the Investigative Unit must conduct inspections of the premises of persons licensed to do business distributing or selling at retail tobacco products, alt-nicotine products, e-smoking products, and vapor products to determine compliance with the bill and existing law, and the rules adopted thereunder, relating to distributor license and retail license holders.

To enforce the bill's provisions, the bill allows the Investigative Unit to examine the books, papers, invoices, and other records of any person in possession, control, or occupancy of any premises where e-smoking products are placed, stored, sold, or offered for sale, as well as the e-smoking products in stock on the premises. The bill requires that every person in possession, control, or occupancy of any premises where such products are placed, sold, or offered for sale must give the Unit the means, facilities, and opportunity for the examinations.

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<sup>6</sup> R.C. 5502.81(J).

<sup>7</sup> R.C. 5502.81(K).

The bill further requires the Investigative Unit to conduct annual unannounced compliance checks for each distributor, wholesale dealer, and retail dealer that sells or distributes e-smoking products in Ohio, including unannounced follow-up compliance checks of any entity after the Unit determines that the entity violated the bill's provisions. The Investigative Unit must publish the results of all compliance checks and follow-up compliance checks at least annually and must make the results available to the public on request.<sup>8</sup>

### **Inspection process**

The bill provides a process for the Investigative Unit to conduct the compliance inspections, which extends to inspections for compliance with Ohio's Cigarette Tax law. That process is as follows:

#### **Timing**

The bill requires compliance inspections to be conducted only during the license holder's business hours and only by authorized Investigative Unit enforcement agents or by any peace officer (which the bill grants the same authority vested in Unit agents under current law<sup>9</sup>). The bill provides that inspections done outside of normal business hours may be conducted only to determine compliance with laws or TAX rules that regulate the hours of sale of tobacco products, alt-nicotine products, e-smoking products, and vapor products.

#### **Confiscation of property**

The bill requires only the confiscation of contraband, including e-smoking products designated as contraband, and tobacco products, alt-nicotine products, e-smoking products, and vapor products being offered for sale without the required license, or property that is otherwise necessary for evidentiary purposes.

The bill further requires the Investigative Unit agent or peace officer to provide a complete inventory of all property confiscated from the premises to the license holder, or their agent or employee, at the conclusion of the inspection. At that time, the inventory must be signed by the confiscating Unit agent or peace officer and must give the license holder, their agent, or employee the opportunity to sign it.

Lastly, the bill requires any court of competent jurisdiction, if it finds that confiscated property is not necessary for evidentiary purposes, is not contraband, or was not offered for sale in violation of licensing requirements, to order the immediate return of the confiscated property, if such property is not otherwise subject to forfeiture, to the license holder. The bill, however, clarifies that the return of such property is not grounds for dismissal of the case. The bill also

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<sup>8</sup> R.C. 5502.81(A)(1), (L), and (M).

<sup>9</sup> R.C. 2935.034.

allows the commission to order the return of confiscated property if no criminal prosecution is pending or anticipated.<sup>10</sup>

### **Reasonable manner**

The bill mandates all inspections be conducted in a reasonable manner. The bill directs any court of competent jurisdiction that finds any inspection that was not conducted in a reasonable manner in accordance with the bill's provisions, as applicable, or any DPS or TAX rules, to consider that grounds for suppression of evidence or dismissal of the case.<sup>11</sup>

### **Nonresident or foreign manufacturers**

The bill places separate conditions on a nonresident or foreign manufacturer (NFM) for inclusion and retention of the NFM and its e-smoking products in the ESP-directory. Under the bill, an NFM is a person that manufactures or sells e-smoking products that is not an Ohio resident; incorporated, formed or organized under Ohio law; or licensed, registered, or certified to transact business in Ohio.

### **In-state agent for process**

The bill requires an NFM to:

- Appoint and continually engage without interruption the services of an agent in Ohio to act as agent for service, in any manner authorized by law, of all process pertaining to any court action or proceeding in Ohio against the manufacturer concerning or arising out of enforcing the bill's provisions;
- Agree that service on the manufacturer's agent constitutes legal and valid service of the process on the manufacturer;
- Provide the Investigative Unit with proof, to DPS's satisfaction, of the appointment and notice of the name, address, telephone number, and availability of the manufacturer's agent;
- Provide notice to the Investigative Unit 30 days prior to terminating the agent and provide proof, to DPS's satisfaction, of the appointment of a new agent not less than five days prior to the termination;
- Provide notice to the Investigative Unit within five days after the agent terminates the appointment and include proof, to DPS's satisfaction, of the appointment of a new agent.

The bill provides, for an NFM who has not appointed and continually engaged an agent, that the Secretary of State (SOS) is deemed to have been appointed as the NFM's agent and may be proceeded against in any action or proceeding arising out of the bill's provisions by service of

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<sup>10</sup> R.C. 5502.13 and 5502.82(A)(2)(a) and (b) and (B). It is not clear who the "commission" is in this context. This may be intended to refer to the TAX Commissioner. If so, a corrective amendment would be necessary to correct this.

<sup>11</sup> R.C. 5502.82(A)(2)(c).

process on the SOS. The bill, however, does not waive the in-state agent requirement with the appointment of the SOS as an NFM's agent.<sup>12</sup>

### **Surety bond**

The bill also requires an NFM to obtain, and always maintain in effect, a surety bond issued by a surety company or insurance company authorized to do business in Ohio. The bond must be \$25,000 in favor of DPS and must be conditioned upon the NFM's performance of all requirements and obligations imposed by the bill. The bill subjects a surety on the NFM's bond to liability up to the amount of the bond, and DPS may execute on such surety bond to pay fines and penalties imposed on the NFM and for the costs of seizure and destruction of products sold in violation of the bill's provisions. The bill provides, if DPS executes on the surety bond, that DPS can require the NFM to provide an additional bond as a condition precedent for retaining the NFM and the NFM's e-smoking products in the ESP-directory.

The bill further requires a surety on a bond furnished by an NFM to be released and discharged from liability to DPS 60 days after a written request to the Investigative Unit. The bill clarifies that the release or discharge can be construed to relieve, release, or discharge the surety from liability already accrued or which accrues before the expiration of the 60-day period. The Investigative Unit must, upon receiving any such request, notify the NFM.

The bill provides that unless the NFM, on or before the expiration of the 60-day period, files a new bond with the Investigative Unit, with the surety approved by and acceptable to the Investigative Unit, the Unit must remove the NFM and its e-smoking products from the ESP-directory.<sup>13</sup>

### **Removal or noninclusion subject to review**

The bill states that an Investigative Unit determination to not include or to remove a manufacturer or an e-smoking product from the ESP-directory is subject to review by filing a civil action for prospective declaratory or injunctive relief.<sup>14</sup>

### **Reporting requirement**

The bill requires the Investigative Unit, starting six months after the bill's effective date, and every six months thereafter, to provide a report to the General Assembly regarding the ESP-directory's status, manufacturers and products included in the ESP-directory, revenue and expenditures related to the administration of the ESP-directory and manufacturer certification provisions in the bill, and any enforcement activities undertaken.<sup>15</sup>

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<sup>12</sup> R.C. 5502.81(N)(1) to (3); Title XVII of the Revised Code, not in the bill.

<sup>13</sup> R.C. 5502.81(N)(4).

<sup>14</sup> R.C. 5502.81(O).

<sup>15</sup> R.C. 5502.81(Q).

## Unfair or deceptive act

The bill declares any violation of the bill's provisions regarding the ESP-directory or manufacturer certification process is an "unfair or deceptive act or practice" in violation of Ohio's Consumer Sales Practices Act, allowing the Attorney General (AG) to pursue various legal remedies along with private rights of action for those injured by those violations.<sup>16</sup>

## Marketing prohibitions

The bill prohibits a person from negligently selling e-smoking products that are accompanied by, uses, or has advertising, labeling, packaging, trade dress, trademarks, branding, or design of the product that:

- Depicts a cartoon or cartoon-like character that mimics a character primarily aimed at entertaining minors;
- Includes an image of a celebrity or a character in a comic book, movie, television show, or video game, or a mythical creature;
- Imitates or mimics trademarks or trade dress of products that are or have been primarily marketed to minors;
- Includes a symbol that is primarily used to market products to minors;
- Imitates, mimics, or replicates the design of a product that is not a vapor product, including:
  - School supplies commonly used by minors such as an eraser, highlighter, pen, pencil, or backpack;
  - A smart phone/watch/case, headphones, or ear buds;
  - A cosmetic product, including lipstick;
  - A toy.
- Has entertainment features, such as the ability to play games, music or other audio, display photos or video, or any similar electronic entertainment features.

The bill declares a person who violates this prohibition is guilty of a third degree misdemeanor and must only be fined \$500.<sup>17</sup>

## TAX retail dealer license

The bill prohibits a person from engaging in the business of selling at retail, tobacco products, alt-nicotine products, e-smoking products, or vapor products within Ohio without having a license issued by TAX. A license holder may offer for sale and sell such products so long as they are legal to market in the U.S. pursuant to federal law and regulations, and provided the

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<sup>16</sup> R.C. 5502.81(R); R.C. 1345.02, not in the bill.

<sup>17</sup> R.C. 5502.83.

products satisfy other applicable requirements imposed under the bill and the continuing Cigarette Tax law.

For purpose of the bill's TAX license provisions, "alt-nicotine product" means any noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means, but excludes a cigarette, tobacco product, e-smoking product, vapor product, or any product regulated as a drug, device, or combination product under the Federal Food, Drug, and Cosmetic Act.<sup>18</sup>

## **Application**

The bill requires each license applicant, annually, on or before the first day of February, to deliver, on a form furnished by TAX, a statement showing the applicant's name, each physical place the applicant conducts business, and any other information TAX considers necessary for the administration of the bill and the continuing Cigarette Tax law. The applicant must also affirm the applicant will comply with all federal and state laws applicable to the sale of tobacco products, alt-nicotine products, e-smoking products, or vapor products.

## **Fee**

The bill requires an applicant, at the time of submitting the application, to pay a \$125 application fee for each physical place where the person proposes to conduct business. The bill provides that each place of business shall be deemed such space, under lease or license to, or under the control of, or under the supervision of the applicant, as is contained in one or more contiguous, adjacent, or adjoining buildings constituting a place of business operated by, or under the control of, one person, or under one roof and connected by doors, halls, stairways, or elevators, which space may contain any number of points at which tobacco products, alt-nicotine products, e-smoking products, or vapor products are offered for sale, provided that each additional point at which such products are offered for sale shall be listed in the application.

## **License issuance**

The bill requires, upon receipt of the application and license fee, TAX to verify that the applicant has filed all returns, submitted all information, and paid all outstanding taxes, charges, or fees as required for any taxes, charges, or fees administered by TAX, to the extent TAX is aware of such things at the time of the application. Upon approval, the bill requires TAX to issue a license to the applicant for each place of retail sale designated in the application, authorizing the applicant to engage in business for one year commencing on the first day of February.

The bill reduces, for licenses issued after the first day of February, the application fee proportionately by the remainder of the 12-month period for which the license is issued, not to be lower than \$25. The bill also provides there is a replacement fee of \$25 if the original license is lost, destroyed, or defaced.<sup>19</sup>

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<sup>18</sup> R.C. 5743.01(X), 5743.611(A), and 5743.74.

<sup>19</sup> R.C. 5743.611(B).

## License transfer

The bill allows a license holder to transfer the license to a place of business on the conditions that: (1) the licensee's ownership and business structure remains unchanged, (2) the licensee applies to TAX for the transfer on a form issued by TAX, and (3) the licensee pays a \$25 transfer fee to TAX.

On the dissolution of a partnership by death, the bill provides that the surviving partner can operate under the license issued to the partnership until the license's expiration. The bill allows the heirs or legal representatives of the deceased person, and receivers and trustees in bankruptcy appointed by competent authority, to operate under the license held by the deceased former license holder if the partner or successor notifies TAX of the dissolution or succession within 30 days of the dissolution or succession.<sup>20</sup>

## Violations

The bill allows the Tax Commissioner to impose a penalty of up to \$1,000 on any person found to be engaging in the business of selling at retail tobacco products, alt-nicotine products, e-smoking products, or vapor products without holding a license. The bill requires a person, within ten days after being notified of noncompliance, to comply with the licensing requirements. Failure to comply subjects a person to further penalties imposed under current law.<sup>21</sup>

## Licensing rules

The bill authorizes TAX to adopt rules necessary to administer the above requirements established for retail dealer licenses.<sup>22</sup>

## Nicotine Products Licensing Enforcement Fund

The bill creates the Nicotine Products Licensing Enforcement Fund in the state treasury to be used by TAX for administering and enforcing the bill and the Cigarette Tax law. The bill requires all license, license replacement, and transfer fees collected pursuant to distributor licensing requirements in current law and the new retailer license requirements the bill creates to be deposited into the fund. Additionally, all penalties assessed to distributors under current law and to retailers under the bill must be credited to the fund. TAX may adopt any rules necessary to administer the fund, the law governing distribution of tobacco and vapor product licenses, and fees and penalties.<sup>23</sup>

Under current law, tobacco and vapor product distributors are required to be licensed by TAX to engage in business in Ohio. Those license application fees are deposited into the Cigarette

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<sup>20</sup> R.C. 5743.611(C).

<sup>21</sup> R.C. 5743.611(D).

<sup>22</sup> R.C. 5743.611(E).

<sup>23</sup> R.C. 5743.61(C), (F), and (G).

Tax Enforcement Fund. The bill repeals that deposit requirement in favor of deposit into the Nicotine Products Licensing Enforcement Fund.<sup>24</sup>

## **Cigarette Tax recordkeeping**

The bill makes changes to current law requirements for distributors of tobacco products and vapor products as well as creating new requirements for retail dealers of tobacco products and vapor products not subject to current law recordkeeping requirements.

### **Distributor requirements**

The bill requires each distributor of tobacco or vapor products subject to the Cigarette Tax under current law to mark on the invoices of tobacco or vapor products sold the brand and product name of each product sold. Current law requires the distributor to mark on the invoices only that the tax has been paid and the distributor's account number, as assigned by the Tax Commissioner.<sup>25</sup>

### **Retail dealers**

The bill requires each retail dealer, and each person that sells alt-nicotine products or e-smoking products at retail, to maintain complete and accurate records of all purchases and sales. They must also procure and retain all invoices, bills of lading, and other documents relating to the purchases and sales of those products.

The bill further requires the person to keep open records and documents during business hours for inspection by TAX and to preserve them for a period of three years from the date the return was due or was filed, whichever is later. TAX, in writing, may consent to their destruction within that three-year period or order that they be kept for a longer period of time.

Lastly, the bill prohibits a person from making a false entry upon any invoice or record upon which an entry is required, and from presenting any false entry for inspection with the intent to evade the Cigarette Tax.<sup>26</sup>

### **Inspections**

As stated above (see "**Investigation and record examinations**" above), the bill allows DPS to inspect the premises of a person engaged in the business of distributing or selling at retail tobacco products, alt-nicotine products, e-smoking products, or vapor products, regardless of whether the person holds a TAX license. The bill requires TAX and DPS to coordinate enforcement (using the Investigative Unit) and any inspection activities and to share information about the results. TAX and DPS, in consultation with each other, may adopt rules regarding the inspections.<sup>27</sup>

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<sup>24</sup> R.C. 5743.61(B)(2).

<sup>25</sup> R.C. 5743.54(B)(1).

<sup>26</sup> R.C. 5743.541.

<sup>27</sup> R.C. 5502.01(O) and 5743.75.

## Smoking in schools

### Pupils

The bill amends provisions of current law regarding the prohibition of pupils using tobacco in schools, as follows.

Current law provides that no pupil can smoke or use tobacco or possess any substance containing tobacco in any area under the control of a school district or an educational service center, or at any school-sponsored activity. The bill adds that a pupil cannot possess any substance containing nicotine.

Current law defines “smoke” to mean to burn any substance containing tobacco, including a lighted cigarette, cigar, or pipe, or to burn a clove cigarette. The bill adds the use of an e-smoking device or vapor product, as those terms are defined in current law.

Current law defines “use tobacco” to mean to chew or maintain any substance containing tobacco, including smokeless tobacco, in the mouth to derive the effects of tobacco. The bill includes using or consuming any product, whether smoked, heated, chewed, absorbed, dissolved, inhaled, or ingested by any other means, that is made or derived from tobacco or that contains any form of nicotine.<sup>28</sup>

### General prohibition

Notwithstanding any other provision in Chapter 3794 of the Revised Code, which prohibits smoking in public places, places of employment, and places declared as nonsmoking, and as an exemption from the prohibition against local regulation of tobacco and alt-nicotine products, the bill allows a city, local, exempted village, or joint vocational school; a STEM school; an educational service center; or a community school to declare school property or school facilities as a nonsmoking place. With respect to the exemption regarding local regulation, the above entities are also not prohibited from enacting policies to implement the prohibition against students possessing any substance containing nicotine.<sup>29</sup>

## HISTORY

Action	Date
Introduced	05-06-26

ANHB0849IN-136/ar

<sup>28</sup> R.C. 3313.751(A)(2), (3), and (B).

<sup>29</sup> R.C. 9.681(F) and 3794.05(B).