

# House Bill 3178

Sponsored by COMMITTEE ON REVENUE

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Imposes tax on wholesale sale of inhalant-form nicotine based on percentage of wholesale price. Provides that person may not make wholesale sale of inhalant-form nicotine unless premises at which inhalant-form nicotine is received, stored or delivered is licensed. Establishes licensing program within Department of Revenue. Provides that licensing provisions become operative January 1, 2018.

Applies to inhalant-form nicotine sold after January 1, 2018.

Takes effect on 91st day following adjournment sine die.

## A BILL FOR AN ACT

1  
2 Relating to inhalant-form nicotine; prescribing an effective date; and providing for revenue raising  
3 that requires approval by a three-fifths majority.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. As used in sections 1 to 16 of this 2017 Act:**

6 (1) **“Consumer” means any person who purchases inhalant-form nicotine in this state for**  
7 **the person’s use or consumption or for any purpose other than reselling the inhalant-form**  
8 **nicotine to another person.**

9 (2) **“Inhalant-form nicotine” means nicotine that:**

10 (a) **Is in a form that allows the nicotine to be delivered into a person’s respiratory sys-**  
11 **tem;**

12 (b) **Is inhaled for the purpose of delivering the nicotine into a person’s respiratory sys-**  
13 **tem; and**

14 (c)(A) **Is not approved by, or emitted by a device approved by, the United States Food and**  
15 **Drug Administration for a therapeutic purpose; or**

16 (B) **If approved by, or emitted by a device approved by, the United States Food and Drug**  
17 **Administration for a therapeutic purpose, is not marketed and sold solely for that purpose.**

18 (3)(a) **“Nicotine retailer” means any person that is engaged in the business of selling or**  
19 **otherwise dispensing inhalant-form nicotine to consumers.**

20 (b) **“Nicotine retailer” includes the operators of or recipients of revenue from all places**  
21 **such as smoke shops, cigar stores and vending machines, where inhalant-form nicotine is**  
22 **made or stored for ultimate sale to consumers.**

23 (4) **“Nicotine wholesaler” means a person that purchases inhalant-form nicotine in this**  
24 **state for resale to a person other than a consumer.**

25 (5) **“Sale” means any transfer, exchange or barter, in any manner or by any means, for**  
26 **a consideration, or a gift by a person engaged in the business of selling inhalant-form**  
27 **nicotine, for advertising, as a means of evading the provisions of sections 1 to 13 of this 2017**  
28 **Act, or for any other purpose.**

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 (6) "Taxpayer" includes a nicotine wholesaler or other person required to collect a tax  
2 imposed under sections 1 to 13 of this 2017 Act.

3 (7) "Untaxed inhalant-form nicotine" means inhalant-form nicotine for which the tax re-  
4 quired under sections 1 to 13 of this 2017 Act has not been paid.

5 (8) "Wholesale price" means the price paid for untaxed inhalant-form nicotine at the  
6 point of first sale in this state.

7 **SECTION 2.** (1) A tax is hereby imposed upon the wholesale sale of inhalant-form nicotine  
8 in this state. The tax shall be collected:

9 (a) By a nicotine wholesaler at the time at which the wholesale sale occurs.

10 (b) Upon the sale of inhalant-form nicotine to a consumer, if the sale is the first sale of  
11 the inhalant-form nicotine in this state.

12 (2) The tax imposed under this section shall be imposed at the rate of:

13 (a) Ninety-five percent of wholesale price of inhalant-form nicotine that is sold separately  
14 from an inhalant delivery system or sold in a disposable cartridge used in an inhalant deliv-  
15 ery system.

16 (b) Ninety-five percent of the wholesale price of an inhalant delivery system that is sold  
17 containing inhalant-form nicotine and does not require any additional components for use.

18 (3) A tax under this section is not imposed on an inhalant delivery system that when sold  
19 does not contain inhalant-form nicotine.

20 (4) If the tax imposed under this section does not equal an amount calculable to a whole  
21 cent, the tax shall be equal to the next higher whole cent.

22 (5) Except as otherwise provided by the Department of Revenue by rule, the amount of  
23 the tax shall be separately stated on an invoice, receipt or other similar document that the  
24 nicotine wholesaler provides to the purchaser at the time at which the wholesale sale occurs.

25 (6) A person may not knowingly sell, purchase, install, transfer or possess electronic  
26 devices or software programs for the purposes of:

27 (a) Hiding or removing records of wholesale sales of inhalant-form nicotine; or

28 (b) Falsifying records of wholesale sales of inhalant-form nicotine.

29 **SECTION 3.** (1) Except as otherwise provided in sections 1 to 13 of this 2017 Act, the tax  
30 imposed under section 2 of this 2017 Act shall be collected and remitted by each nicotine  
31 wholesaler that engages in the wholesale sale of inhalant-form nicotine. The tax is a tax upon  
32 the nicotine wholesaler that is required to collect the tax, and the nicotine wholesaler is a  
33 taxpayer.

34 (2) The nicotine wholesaler shall file a return with the Department of Revenue on or  
35 before the last day of January, April, July and October of each year for the previous calendar  
36 quarter.

37 (3) The nicotine wholesaler shall pay the tax to the department in the form and manner  
38 prescribed by the department, but not later than with each quarterly return, without regard  
39 to an extension granted under subsection (5) of this section.

40 (4) Nicotine wholesalers shall file the returns required under this section regardless of  
41 whether any tax is owed.

42 (5) For good cause, the department may extend the time for filing a return under this  
43 section. The extension may be granted at any time if a written request is filed with the de-  
44 partment during or prior to the period for which the extension may be granted. The depart-  
45 ment may not grant an extension of more than 30 days.

1 (6) Interest shall be added at the rate established under ORS 305.220 for each month, or  
 2 fraction of a month, from the time the return was originally required to be filed to the time  
 3 of payment.

4 (7) If a nicotine wholesaler fails to file a return or pay the tax as required by this section,  
 5 the department shall impose a penalty in the manner provided in ORS 314.400.

6 (8) Except as provided in subsections (9) and (10) of this section, the period prescribed  
 7 for the department to allow or make a refund of any overpayment of tax paid under sections  
 8 1 to 13 of this 2017 Act is as provided in ORS 314.415.

9 (9)(a) The department shall first apply any overpayment of tax by a nicotine wholesaler  
 10 to any tax imposed under sections 1 to 13 of this 2017 Act that is owed by the nicotine  
 11 wholesaler.

12 (b) If after any offset against any delinquent amount the overpayment of tax remains  
 13 greater than \$1,000, the remaining refund shall be applied as a credit against the next sub-  
 14 sequent calendar quarter as an estimated payment.

15 (10) The department may not make a refund of, or credit, any overpayment of tax under  
 16 sections 1 to 13 of this 2017 Act that was credited to the account of a nicotine wholesaler  
 17 under subsection (9)(b) of this section if the return for that tax period is not filed within  
 18 three years after the due date of that return.

19 **SECTION 4.** (1) Every person who collects any amount under section 3 of this 2017 Act  
 20 shall hold the same in trust for the State of Oregon and for the payment thereof to the De-  
 21 partment of Revenue in the manner and at the time provided in section 3 of this 2017 Act.

22 (2) At any time a nicotine wholesaler fails to remit any amount collected, the department  
 23 may enforce collection by the issuance of a distraint warrant for the collection of the delin-  
 24 quent amount and all penalties, interest and collection charges accrued thereon. The warrant  
 25 shall be issued, recorded and proceeded upon in the same manner and shall have the same  
 26 force and effect as is prescribed with respect to warrants for the collection of delinquent  
 27 income taxes.

28 (3)(a) In the case of a nicotine wholesaler that is assessed pursuant to the provisions of  
 29 ORS 305.265 (12) and 314.407 (1), the department may issue a notice of liability to any officer,  
 30 employee or member of the nicotine wholesaler within three years from the time of assess-  
 31 ment. Within 30 days from the date the notice of liability is mailed to the officer, employee  
 32 or member, the officer, employee or member shall pay the assessment, plus penalties and  
 33 interest, or advise the department in writing of objections to the liability and, if desired, re-  
 34 quest a conference. A conference shall be governed by the provisions of ORS 305.265 per-  
 35 taining to a conference requested from a notice of deficiency.

36 (b) After a conference or, if no conference is requested, a determination of the issues  
 37 considering the written objections, the department shall mail the officer, employee or mem-  
 38 ber a conference letter affirming, canceling or adjusting the notice of liability. Within 90 days  
 39 from the date the conference letter is mailed to the officer, employee or member, the officer,  
 40 employee or member shall pay the assessment, plus penalties and interest, or appeal to the  
 41 Oregon Tax Court in the manner provided for an appeal from a notice of assessment.

42 (c) If the department does not receive payment or written objection to the notice of li-  
 43 ability within 30 days after the notice of liability was mailed, the notice of liability becomes  
 44 final. In that event, the officer, employee or member may appeal the notice of liability to the  
 45 tax court within 90 days after it became final in the manner provided for an appeal from a

1 notice of assessment.

2 (4)(a) In the case of a failure to file a return on the due date, governed by the provisions  
3 of ORS 305.265 (10) and 314.400, the department, in addition to any action described in the  
4 provisions of ORS 305.265 (10) and 314.400, may send notices of determination and assessment  
5 to any officer, employee or member any time within three years after the assessment. The  
6 time of assessment against the officer, employee or member is 30 days after the date the  
7 notice of determination and assessment is mailed. Within 30 days from the date the notice  
8 of determination and assessment is mailed to the officer, employee or member, the officer,  
9 employee or member shall pay the assessment, plus penalties and interest, or advise the  
10 department in writing of objections to the assessment and, if desired, request a conference.  
11 A conference shall be governed by the provisions of ORS 305.265 pertaining to a conference  
12 requested from a notice of deficiency.

13 (b) After a conference or, if no conference is requested, a determination of the issues  
14 considering the written objections, the department shall mail the officer, employee or mem-  
15 ber a conference letter affirming, canceling or adjusting the notice of determination and as-  
16 sessment. Within 90 days from the date the conference letter is mailed to the officer,  
17 employee or member, the officer, employee or member shall pay the assessment, plus pen-  
18 alties and interest, or appeal in the manner provided for an appeal from a notice of assess-  
19 ment.

20 (c) If the department does not receive payment or written objection to the notice of de-  
21 termination and assessment within 30 days after the notice of determination and assessment  
22 was mailed, the notice of determination and assessment becomes final. In that event, the  
23 officer, employee or member may appeal the notice of determination and assessment to the  
24 tax court within 90 days after it became final in the manner provided for an appeal from a  
25 notice of assessment.

26 (5)(a) More than one officer or employee of a corporation may be held jointly and se-  
27 verally liable for payment of taxes.

28 (b) Notwithstanding the confidentiality provisions of section 11 of this 2017 Act, if more  
29 than one officer or employee of a corporation may be held jointly and severally liable for  
30 payment of taxes, the department may require any or all of the officers, members or em-  
31 ployees who may be held liable to appear before the department for a joint determination of  
32 liability. The department shall notify each officer, member or employee of the time and place  
33 set for the determination of liability.

34 (c) Each person notified of a joint determination under this subsection shall appear and  
35 present such information as is necessary to establish that person's liability or nonliability  
36 for payment of taxes to the department. If a person who was notified fails to appear, the  
37 department shall make its determination on the basis of all the information and evidence  
38 presented. The department's determination is binding on all persons notified and required to  
39 appear under this subsection.

40 (d)(A) If an appeal is taken to the tax court pursuant to section 11 of this 2017 Act by  
41 any person determined to be liable for unpaid taxes under this subsection, each person re-  
42 quired to appear before the department under this subsection shall be impleaded by the  
43 plaintiff. The department may implead any officer, employee or member who may be held  
44 jointly and severally liable for the payment of taxes. Each person impleaded under this par-  
45 agraph shall be made a party to the action before the tax court and shall make available to

1 the tax court the information that was presented before the department, as well as other  
2 information that may be presented to the tax court.

3 (B) The tax court may determine that one or more persons impleaded under this para-  
4 graph are liable for unpaid taxes without regard to any earlier determination by the depart-  
5 ment that an impleaded person was not liable for unpaid taxes.

6 (C) If a person required to appear before the tax court under this subsection fails or re-  
7 fuses to appear or bring such information in part or in whole, or is outside the jurisdiction  
8 of the tax court, the tax court shall make its determination on the basis of all the evidence  
9 introduced. Notwithstanding section 11 of this 2017 Act, the evidence constitutes a public  
10 record and shall be available to the parties and the tax court. The determination of the tax  
11 court is binding on all persons made parties to the action under this subsection.

12 (e) This section may not be construed to preclude a determination by the department or  
13 the tax court that more than one officer, employee or member is jointly and severally liable  
14 for unpaid taxes.

15 **SECTION 5.** (1) A nicotine wholesaler shall keep receipts, invoices and other pertinent  
16 records related to wholesale sales of inhalant-form nicotine in the form required by the De-  
17 partment of Revenue. Each record shall be preserved for five years from the time to which  
18 the record relates, or for as long as the nicotine wholesaler retains the inhalant-form  
19 nicotine to which the record relates, whichever is later. During the retention period and at  
20 any time prior to the destruction of records, the department may give written notice to the  
21 nicotine wholesaler not to destroy records described in the notice without written permission  
22 of the department. Notwithstanding any other provision of law, the department shall pre-  
23 serve reports and returns filed with the department for at least five years.

24 (2) The department or its authorized representative, upon oral or written demand, may  
25 make examinations of the books, papers, records and equipment of persons making wholesale  
26 sales of inhalant-form nicotine and any other investigations the department deems necessary  
27 to carry out the provisions of sections 1 to 13 of this 2017 Act.

28 **SECTION 6.** (1) The Department of Revenue has authority, by order or subpoena to be  
29 served with the same force and effect and in the same manner as a subpoena is served in a  
30 civil action in the circuit court, or the Oregon Tax Court, to require the production at any  
31 time and place the department designates of any books, papers, accounts or other informa-  
32 tion necessary to carry out sections 1 to 13 of this 2017 Act. The department may require  
33 the attendance of any person having knowledge in the premises, and may take testimony and  
34 require proof material for the information, with power to administer oaths to the person.

35 (2) If a person fails to comply with a subpoena or order of the department or to produce  
36 or permit the examination or inspection of any books, papers, records and equipment perti-  
37 nent to an investigation or inquiry under sections 1 to 13 of this 2017 Act, or to testify to  
38 any matter regarding which the person is lawfully interrogated, the department may apply  
39 to the Oregon Tax Court or to the circuit court of the county in which the person resides  
40 or where the person is for an order to the person to attend and testify, or otherwise to  
41 comply with the demand or request of the department. The department shall apply to the  
42 court by ex parte motion, upon which the court shall make an order requiring the person  
43 against whom the motion is directed to comply with the request or demand of the depart-  
44 ment within 10 days after the service of the order, or within the additional time granted by  
45 the court, or to justify the failure within that time. The order shall be served upon the per-

1 son to whom it is directed in the manner required by this state for service of process, which  
 2 service is required to confer jurisdiction upon the court. Failure to obey any order issued  
 3 by the court under this section is contempt of court. The remedy provided by this section is  
 4 in addition to other remedies, civil or criminal, existing under the tax laws or other laws of  
 5 this state.

6 **SECTION 7.** Notwithstanding the confidentiality provisions of section 11 of this 2017 Act,  
 7 the Department of Revenue may disclose information received under sections 1 to 13 of this  
 8 2017 Act to the Oregon Health Authority to carry out the provisions of ORS 431A.175,  
 9 431A.183 and 433.835 to 433.875.

10 **SECTION 8.** Except as otherwise provided in sections 1 to 13 of this 2017 Act, a person  
 11 aggrieved by an act or determination of the Department of Revenue or its authorized agent  
 12 under sections 1 to 13 of this 2017 Act may appeal, within 90 days after the act or determi-  
 13 nation, to the Oregon Tax Court in the manner provided in ORS 305.404 to 305.560. These  
 14 appeal rights are the exclusive remedy available to determine the person's liability for the  
 15 tax imposed under sections 1 to 13 of this 2017 Act.

16 **SECTION 9.** (1)(a) When an amount represented by a nicotine wholesaler to a nicotine  
 17 retailer as constituting the tax imposed under sections 1 to 13 of this 2017 Act is computed  
 18 upon an amount that is not taxable or is in excess of the taxable amount and is actually paid  
 19 by the nicotine retailer to the nicotine wholesaler, the excess tax paid shall be returned by  
 20 the nicotine wholesaler to the nicotine retailer upon written notification by the Department  
 21 of Revenue or the nicotine retailer.

22 (b) The written notification must contain information necessary to determine the validity  
 23 of the nicotine retailer's claim.

24 (2) If the nicotine wholesaler does not return the excess tax within 60 days after mailing  
 25 of the written notification required under subsection (1) of this section, the nicotine retailer  
 26 may appeal to the department for a refund of the amount of the excess tax, in the manner  
 27 and within the time allowed under rules adopted by the department.

28 (3) If excess tax is returned to the nicotine retailer by the department, the department  
 29 may issue a notice of deficiency for the excess tax to the nicotine wholesaler in the manner  
 30 provided under ORS 305.265.

31 **SECTION 10.** The Department of Revenue shall administer and enforce sections 1 to 13  
 32 of this 2017 Act. The department is authorized to establish rules and procedures for the im-  
 33 plementation and enforcement of sections 1 to 13 of this 2017 Act that are consistent with  
 34 sections 1 to 13 of this 2017 Act.

35 **SECTION 11.** Except as otherwise provided in sections 1 to 13 of this 2017 Act or where  
 36 the context requires otherwise, the provisions of ORS chapters 305 and 314 as to the audit  
 37 and examination of returns, periods of limitation, determination of and notices of deficien-  
 38 cies, assessments, collections, liens, delinquencies, claims for refund and refunds, confer-  
 39 ences, appeals to the Oregon Tax Court, stays of collection pending appeal, confidentiality  
 40 of returns and the penalties relative thereto, and the procedures relating thereto, apply to  
 41 the determinations of taxes, penalties and interest under sections 1 to 13 of this 2017 Act.

42 **SECTION 12.** If the Department of Revenue believes that the collection of any tax im-  
 43 posed under sections 1 to 13 of this 2017 Act or any amount of the tax required to be paid  
 44 to the state or of any determination will be jeopardized by delay, the department shall make  
 45 a determination of the tax or amount of tax required to be collected, noting that fact upon

1 the determination. The amount determined is immediately due and payable, and the depart-  
 2 ment shall assess the taxes, notify the person and proceed to collect the tax in the same  
 3 manner and using the same procedures as for the collection of income taxes under ORS  
 4 314.440.

5 **SECTION 13.** (1) All moneys received by the Department of Revenue under sections 1 to  
 6 13 of this 2017 Act shall be deposited in the State Treasury and credited to a suspense ac-  
 7 count established under ORS 293.445. The department may pay expenses for the adminis-  
 8 tration and enforcement of sections 1 to 13 of this 2017 Act out of moneys received from the  
 9 tax imposed under section 2 of this 2017 Act. Amounts necessary to pay administrative and  
 10 enforcement expenses are continuously appropriated to the department from the suspense  
 11 account.

12 (2) After the payment of administrative and enforcement expenses and refunds or credits  
 13 arising from erroneous overpayments, the department shall credit the balance of the moneys  
 14 received by the department under this section to the General Fund.

15 **SECTION 14.** (1) The wholesale sale of inhalant-form nicotine in this state is subject to  
 16 regulation by the Department of Revenue.

17 (2) A nicotine wholesaler must have a wholesale license issued by the department for the  
 18 premises at which inhalant-form nicotine is received, stored or delivered. To hold a wholesale  
 19 license under this section, a nicotine wholesaler:

- 20 (a) Must apply for a license in the manner described in section 15 of this 2017 Act;
- 21 (b) Must provide proof that the applicant is 21 years of age or older;
- 22 (c) May not be located in an area that is zoned exclusively for residential use; and
- 23 (d) Must meet the requirements of any rule adopted by the department under subsection  
 24 (3) of this section.

25 (3) The department shall adopt rules that:

- 26 (a) Require a nicotine wholesaler to annually renew a license issued under this section;
- 27 (b) Establish application, licensure and renewal of licensure fees for nicotine wholesalers;
- 28 (c) Require inhalant-form nicotine received, stored or delivered by a nicotine wholesaler  
 29 to be tested; and
- 30 (d) Require a nicotine wholesaler to meet any public health and safety standards and in-  
 31 dustry best practices established by the department by rule.

32 (4) Fees adopted under subsection (3)(b) of this section:

- 33 (a) May not exceed the cost of administering this section and section 15 of this 2017 Act;  
 34 and
- 35 (b) Shall be deposited in the Tobacco Use Reduction Account established under ORS  
 36 431A.153.

37 **SECTION 15.** (1) An applicant for a license or renewal of a license under this section and  
 38 section 14 of this 2017 Act shall apply to the Department of Revenue in the form required  
 39 by the department, showing the name and address of the applicant, location of the premises  
 40 that is to be operated under the license and other pertinent information required by the de-  
 41 partment. The department may not grant or renew a license until the applicant has complied  
 42 with the provisions of this section and section 14 of this 2017 Act and the rules of the de-  
 43 partment.

44 (2) The department may reject any application that is not submitted in the form required  
 45 by rule. The department shall give applicants an opportunity to be heard if an application is

1 rejected. A hearing under this subsection is not subject to the requirements for contested  
 2 case proceedings under ORS chapter 183.

3 (3) Except as provided in subsection (2) of this section, a revocation of, or a refusal to  
 4 issue or renew, a license under this section and section 14 of this 2017 Act is subject to the  
 5 requirements for contested case proceedings under ORS chapter 183.

6 **SECTION 16.** (1) A sales invoice for the wholesale sale of inhalant-form nicotine in this  
 7 state shall contain the following:

8 (a) The name and address of the seller, the name and address of the purchaser, the date  
 9 of the sale of inhalant-form nicotine, the quantity and product description of inhalant-form  
 10 nicotine, the price paid for inhalant-form nicotine and any discount applied in determining  
 11 the price paid for inhalant-form nicotine;

12 (b) The applicable license identification number for the nicotine wholesaler;

13 (c) A certified statement by the nicotine wholesaler that all taxes due under sections 1  
 14 to 13 of this 2017 Act have been or will be paid; and

15 (d) Any other information the Department of Revenue may prescribe by rule.

16 (2) A nicotine wholesaler must provide a copy of the sales invoice to the purchaser of the  
 17 inhalant-form nicotine and the purchaser shall retain a copy of the invoice for five years  
 18 following the date of purchase.

19 (3) Each purchaser that then sells the inhalant-form nicotine to a subsequent purchaser  
 20 shall provide the subsequent purchaser with a sales invoice that meets the requirements of  
 21 this section.

22 (4)(a) A purchaser in possession of inhalant-form nicotine that is unable to present a  
 23 sales invoice that meets the requirements of this section is presumed to be in possession of  
 24 inhalant-form nicotine for which the tax imposed under sections 1 to 13 of this 2017 Act has  
 25 not been paid.

26 (b) In the case of a purchaser in possession of untaxed inhalant-form nicotine, the tax  
 27 is due immediately, along with a penalty equal to 100 percent of the tax due. Amounts due  
 28 under this paragraph may be collected as provided in section 12 of this 2017 Act.

29 (c) If the purchaser in possession of untaxed inhalant-form nicotine is a nicotine retailer,  
 30 the Department of Revenue may impose a civil penalty for the possession of untaxed  
 31 inhalant-form nicotine. A civil penalty imposed under this paragraph may not exceed \$1,000  
 32 per violation. A civil penalty imposed under this paragraph may be appealed to the  
 33 magistrate division of the tax court in the time and manner prescribed in ORS 305.404 to  
 34 305.560.

35 **SECTION 17.** Sections 1 to 16 of this 2017 Act apply to inhalant-form nicotine sold on or  
 36 after January 1, 2018.

37 **SECTION 18.** (1) Sections 14 and 15 of this 2017 Act become operative on January 1, 2018.

38 (2) The Department of Revenue may take any action before the operative date specified  
 39 in subsection (1) of this section that is necessary to enable the department to exercise, on  
 40 and after the operative date specified in subsection (1) of this section, all the duties, func-  
 41 tions and powers conferred on the department by sections 14 and 15 of this 2017 Act.

42 **SECTION 19.** This 2017 Act takes effect on the 91st day after the date on which the 2017  
 43 regular session of the Seventy-ninth Legislative Assembly adjourns sine die.