



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

DATE: April 26, 2021

TO: Honorable Deb Patterson, Chair of the Senate Committee on Health Care

FROM: Kate Denison, Deputy Legislative Director, Oregon Department of Justice

SUBJECT: HB 2261 – Controlling the Youth Vaping Crisis

This testimony is presented in support of HB 2261.

BACKGROUND

Teen use of electronic cigarettes (e-cigarettes) has increased at an alarming rate in the past decade, prompting the US Surgeon General to describe it as an epidemic. According to the CDC, approximately 31.2% of high school students and 12.5% of middle school students reported using tobacco products in 2019. In Oregon, e-cigarette use among 11th graders grew from 13% to 23% in the two-year period from 2017 to 2019, an 80% increase. E-cigarettes have surpassed cigarettes, little cigars, and smokeless tobacco as the product of choice among youth.

E-cigarettes are the most commonly used tobacco product among young people, and – despite recent declines in the rate of cigarette smoking – the current vaping epidemic is threatening years of public health progress. In 2019, more than one in every four high school students (27.5%) reported that they used electronic cigarettes in the past 30 days. That is a 26% increase from reported use among high schoolers in 2011.

E-cigarettes are easy to hide and especially dangerous due to their high levels of nicotine—a typical cartridge contains as much nicotine as a pack of cigarettes. Nicotine is toxic for adolescents with developing brains, as they are more susceptible to both the addictiveness and harm effects of nicotine. Nicotine actually changes the adolescents’ brain cell activity in the parts of the brain responsible for attention, learning and memory. Even breathing e-cigarette aerosol that someone else has exhaled poses potential health risks.

Internet sales historically have allowed minors relatively easy access to tobacco. No matter how much so-called “proof” is required to make a purchase online, remote sellers just cannot adequately verify the age or identity of remote purchasers. Neither can they verify that their products are being delivered to people who are old enough to legally use them.

In 2017, the legislature enacted ORS 180.441, which prohibits delivery sales of cigarettes and smokeless tobacco to Oregon consumers, and requires that sales of these products be made in person, as part of a face-to-face exchange. The face-to-face requirement is an important tool in combatting

sales of cigarettes and smokeless tobacco to youth because retailers are able to verify that the purchaser is at least 21 years of age before selling these products.

The Oregon Department of Justice has enforcement authority over ORS 180.441. This includes authority to issue civil investigative demands and to seek an injunction or civil penalties. Department staff investigates violations and takes enforcement action where warranted.

CONCEPT

HB 2261 would expand ORS 180.441 to include inhalant delivery systems, or e-cigarettes. It would prohibit shipment of these products to Oregon consumers and would require that consumer purchases of these products be made in person as part of a face-to-face exchange. The bill would utilize the Attorney General's existing enforcement mechanisms to investigate and prosecute violations.

HB 2261 would complement federal statutes that regulate the interstate shipment of certain tobacco products. The Prevent All Cigarette Trafficking, or "PACT," Act regulates the shipment of cigarettes, smokeless tobacco, and now, electronic nicotine delivery systems. In other words, it sets requirements for how a remote seller ships these products to consumers (labeling, age verification, etc.), but it still allows remote sales of those products. HB 2261 goes further than the PACT Act and completely bans the remote sale of e-cigarettes. The ability of a state to enact a complete ban, such as our bill, was specifically contemplated in the PACT Act.

With the passage of HB 2261, the online sales ban would apply to cigarettes, smokeless tobacco, and inhalant delivery systems. Online sales of other tobacco products—e.g., pipe tobacco and cigars—are regulated by ORS 323.700 to 323.730. HB 2261 contains a number of updates to these statutes related to reporting, labeling and the minimum purchase age. Changes in the regulatory landscape have occurred in the years since these statutes were enacted, and updates are needed.

The bill also cleans up obsolete language in ORS 323.706 and 323.718 that has been preempted by federal law. These statutes impose requirements on mailers and shippers of tobacco to verify the age and identity of consumers at the point of delivery. Although Oregon's statute has been on the books unchallenged for many years, the statutes are closely modeled after a Maine law that has been preempted. The United States Supreme Court, in *Rowe v. New Hampshire Motor Transport Ass'n*, 552 US 364 (2008), ruled that Congress preempted state-law regulation of the service of any motor carrier (through the Federal Aviation Administration Authorization Act ((FAAAA)). *Rowe* makes it clear that a state cannot impose burdens on motor carriers to offer services such as age verification. Any obligations regarding age verification need to be on the actual seller, not on the shipper/carrier.

Banning online sales of inhalant delivery systems is an important step in reducing youth access to these harmful products. The Department of Justice is ready to assume the responsibilities contemplated by this legislation. We urge your support.

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