

SENATE BILL REPORT

ESSB 5986

As Passed Senate, April 23, 2019

Title: An act relating to establishing a tax on vapor and heated tobacco products to fund cancer research and support local public health.

Brief Description: Establishing a tax on vapor and heated tobacco products to fund cancer research and support local public health.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Braun, Keiser, Kuderer and Van De Wege).

Brief History:

Committee Activity: Ways & Means: 3/25/19, 4/03/19 [DPS, w/oRec, DNP].

Floor Activity:

Passed Senate: 4/23/19, 35-13.

Brief Summary of Engrossed First Substitute Bill

- Establishes a tax on vapor products in an amount equal to \$0.10 per milliliter of solution.
- Establishes a tax on heated tobacco products at a rate of \$0.60 per ounce of tobacco.
- Creates the Foundational Public Health Account.
- Authorizes the Governor to enter into vapor products taxation compacts with federally recognized Indian tribes, and establishes requirements for such compacts.

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Substitute Senate Bill No. 5986 be substituted therefor, and the substitute bill do pass.

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

Minority Report: That it be referred without recommendation.

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

Signed by Senator Rivers.

Minority Report: Do not pass.

Signed by Senators Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Hasegawa and Schoesler.

Staff: Alia Kennedy (786-7405)

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

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

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

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

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

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

Modified Risk Tobacco Product Orders. The Food and Drug Administration (FDA) is an agency within the United States Department of Health and Human Services that is

responsible, in part, for regulating the manufacturing, marketing, and distribution of tobacco products to protect the public health and to reduce tobacco use by minors.

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

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

Summary of Engrossed First Substitute Bill: Tax on Vapor Products. The sale, use, consumption, handling, possession, or distribution of vapor products is subject to tax in an amount equal to \$0.10 per milliliter of solution. The tax on vapor products must be based on the volume of the solution as listed by the manufacturer.

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

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

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

The term does not include:

- any product approved by the FDA for sale as a tobacco cessation product, medical device, or for other therapeutic purposes;
- any product that will become an ingredient or component in a vapor product manufactured by a distributor; or
- any product that meets the definition of marijuana, useable marijuana, marijuana concentrates, marijuana-infused products, cigarette, or tobacco products.

Heated Tobacco Products. The sale, use, consumption, handling, possession, or distribution of heated tobacco products is subject to tax in an amount equal to \$0.60 per ounce of tobacco, plus a proportionate tax at the like rate on any fractional parts of an ounce. The tax

on heated tobacco products is imposed based on the net weight of tobacco as listed by the manufacturer.

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

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

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

Foundational Public Health Services Account. The Foundational Public Health Services Account is created in the State Treasury. Expenditures from the account must be used to promote governmental public health.

For purposes of funding foundational public health services, governmental public health systems must work together to:

- arrive at a mutually acceptable allocation and distribution of funds from the account; and
- determine the best accountability measures to ensure efficient and effective use of funds, emphasizing use of shared services where appropriate.

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

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

The expiration date on the Andy Hill Cancer Research Endowment is repealed.

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

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

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

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: The bill takes effect on October 1, 2019.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The primary purpose of this bill is to provide stable funding for the Andy Hill Cancer Research Endowment Fund. Vapor and heated tobacco products are not necessarily the same as other tobacco or nicotine products and should not be taxed the same, but the products should be taxed above the general sales and use taxes. The goal is to create a tax that is based on perceived or potential harm of the products. The Cancer Research Endowment was established by the Legislature in 2015 to advance and support cancer research and, as a result, researchers in the state are working to increase cancer survivorship, advance immunotherapy to target lung cancer, and reduce cancer risks associated with environmental exposures to carcinogens. This bill will provide dedicated funding to cancer research and development and accelerate critical research in cancer prevention and potential lifesaving discoveries. The Legislature has been particularly focused on policies that reduce harm, such as raising the age for purchasing tobacco products, and this should include taxation approaches that decrease tobacco product use and invest in public health. The statistics are alarming when it comes to youth usage of vapor products, which also increases the risk of youth trying combustible cigarettes. This bill helps counties and local health jurisdictions in protecting and improving the health of our families and communities. Imposing a tax on vapor products is an essential step in reducing the burden of tobacco and nicotine related diseases in Washington. Price points matter to young consumers. This bill is a great start to funding the state's struggling public health system.

CON: The tax rate proposed in this bill is unlikely to result in a meaningful increase in price and therefore will have a minimal effect on reducing teen usage of these products. A tax on the percentage of price would allow for increases in revenue as the price of the product goes up. Setting the tax rate at 65 percent would have the most impact on teen usage rates. A portion of the tax should be used to support state cigarette prevention programs. Vapor products help people quit smoking cigarettes. Taxing this product at a higher rate sends the message that this product is harmful to human health. There are a number of studies that indicate vapor products are less harmful than traditional cigarettes. Imposing a tax on vapor products will harm vapor businesses. Smokers smoke for the nicotine but die from the smoke. Heat-not-burn products used in Japan have reduced smoking by 30 percent. There are over 200 vapor stores in Washington and many of those are owned by former smokers who are passionate about using vapor products as a way to quit smoking. The most effective way to stop smoking cigarettes is the long-term use of vapor products. A long-term study

from Public Health England reaffirms that vaping is significantly safer than cigarettes. If the intent is to increase revenue for cancer research then funding should come from the amounts collected on tobacco products. The bottom line here is harm reduction and this includes reducing the amount of parents who influence their children to start smoking. The tax under this bill will push people away from a lifesaving alternative. This bill will have the opposite effect on cancer than what is intended because it will force people to move away from vaping and start smoking cigarettes. It is easy for vapor customers to go to the tribal stores, Oregon, or buy online in order to continue purchasing those products without paying tax. Cigarettes are already cheaper than vapor products and every 10 percent increase in price equals a ten percent reduction in consumers. This bill is a barrier to people who are trying to make healthier life choices. Those who use vaping to quit smoking usually start at a high nicotine potency and then naturally begin to decrease those amounts overtime until they are no longer addicted to nicotine. Not all vapor products have additives, such as benzoic acid, that increase absorption of nicotine. Using vapor products as a cessation tool has been proven to be twice as effective as standard nicotine replacement therapies. Young people are not getting these products from vapor stores and will still be able to access these products despite the tax.

OTHER: E-cigarette use is skyrocketing among Washington's youth. The majority of people who vape are between the ages of eighteen to twenty four. Nicotine is addictive and can harm the developing brain. Vapor products not only contain nicotine but also other harmful chemicals that enter the body when inhaled deeply into the lungs. Taxing tobacco products is a proven effective way to reduce tobacco use. Youth and young adults are two to three times more responsive than adults are to changes in tobacco price.

Persons Testifying: PRO: Senator John Braun, Prime Sponsor; Edna Fund, Lewis County Commissioner; Danette York, Lewis County Health and Human Services Director; Amy Brackenbury, Public Health Roundtable; Thomas Bates, Fred Hutchinson Cancer Research Center; Molly Hill, citizen.

CON: Mary McHale, ACS Cancer Action Network, American Lung Association, American Heart Association, Campaign for Tobacco-Free Kids; Ashley Britain, citizen; Joshua Baba, citizen; Shaun D'Sylva, citizen; Julie Anderson, eCig n' Vape; Gregory Conley, American Vaping Association; Kimberly Thompson, Pink Lung Brigade; Jeff Willis, citizen; Anthony Covert, Cloud 509; Allan Kettle, citizen; Aaron Crisp, Crisp Vapes LLC; Stephen Eggleston, citizen; Mistie Head, citizen; Steven Berry, citizen; Jason Weber, CEO Vape Crusaders, Smokeless Solutions; Mark Johnson, Washington Retail; James Hoy, Northwest Fog; Matthew Page, citizen; Margo Ross, Cloud 509 Moses Lake.

OTHER: Lacy Fehrenbach, Washington State Department of Health.

Persons Signed In To Testify But Not Testifying: No one.