HB 22-1064

Legislative Council Staff

Nonpartisan Services for Colorado's Legislature

Revised Fiscal Note

(replaces fiscal note dated March 2, 2022)

Drafting Number:	LLS 22-0571	**Date:**	March 31, 2022
Prime Sponsors:	Rep. Mullica; Bacon Sen. Priola; Fields	**Bill Status:**	House Finance
		Fiscal Analysts:	Anna Gerstle | 303-866-4375 Anna.Gerstle@state.co.us Elizabeth Ramey | 303-866-3522 Elizabeth.Ramey@state.co.us

Bill Topic: **PROHIBIT FLAVORED TOBACCO REGULATION SYNTHETIC NICOTINE**

Summary of Fiscal Impact:

☒ State Revenue
☒ State Expenditure
☒ State Transfer
☒ TABOR Refund
☒ Local Government
☐ Statutory Public Entity

The bill prohibits retailers from selling, advertising, displaying, or marketing flavored cigarettes, tobacco products, and nicotine products, except by eligible retailers that obtain a permit. It also creates a grant program for communities disproportionately impacted by such products. The bill increases net state revenue and expenditures, reduces transfers, and impacts local government revenue and expenditures.

Appropriation Summary: For FY 2022-23, the bill requires an appropriation of $10.0 million to multiple state agencies.

Fiscal Note Status: The revised fiscal note reflects the introduced bill, as amended by House Health and Insurance Committee.

Table 1
State Fiscal Impacts Under HB 22-1064

		Budget Year FY 2022-23	Out Year FY 2023-24	Out Year FY 2024-25
Revenue	Cash Funds	-	$2,100,000	$2,100,000
	Total Revenue	**-**	**$2,100,000**	**$2,100,000**
Expenditures[2]	General Fund	$10,000,000	$10,000,000	$10,000,000
	Cash Funds	-	$1,178,184	$2,053,791
	Centrally Appropriated	$106,379	$304,456	$482,038
	Total Expenditures	**$10,106,379**	**$11,482,640**	**$12,535,829**
	Total FTE	**5.9 FTE**	**18.3 FTE**	**28.4 FTE**
Transfers		-	-	-
Other Budget Impacts	TABOR Refund	-	$2,100,000	Not estimated.
	General Fund Reserve	$1,500,000	$1,500,000	$1,500,000

HB 22-1064

Summary of Legislation

Ban on flavored products. Beginning January 1, 2024, this bill prohibits retailers from selling, advertising, or delivering flavored cigarettes, tobacco, or nicotine products, or synthetic nicotine products. Flavored products impart a taste or smell other than that of tobacco, including menthol, mint, wintergreen, fruit, herb, candy, and spice, among other flavors. There are three exceptions to the ban:

- flavored products sold by eligible retailers who obtain a permit to sell flavored products;
- premium cigars sold at cigar lounges for on-premises consumption; and
- flavored pipe tobacco.

The bill establishes parameters for determining if a product is considered flavored, and aligns the penalties for selling flavored products with the penalties for selling cigarettes, tobacco, and nicotine products to a minor.

Flavored products permit. Eligible retailers may sell flavored cigarettes, tobacco products, or nicotine products if they first obtain a permit from the Liquor Enforcement Division in the Department of Revenue (DOR). To be eligible, a retailer must:

- have a state retailer license;
- be an age-restricted premises as of January 1, 2024, meaning that the retailer checks customers' identification at the door to ensure they are at least 21 years old; and
- pay an initial permit fee of $3,000, or an amount determined by the DOR through rule; and
- renew the permit annually;
- not be a liquor store; and
- obtain a permit for each location.

The permit is not transferrable and may be issued to hookah lounges and cigar-tobacco bars. The maximum number of permits issued is based on the number of age-restricted premises with a valid license as of January 1, 2024.

Compliance checks. The DOR must perform, or coordinate with a local authority to perform, at least six compliance checks per year at each retailer that holds a permit. The check must include verification that the retailer uses an ID scanner that complies with the bill's requirements.

Product tracking system. The DOR must establish a system through which retailers are required to affix a unique identifying number to the packaging of an individual electronic smoking device or individual cartridge that is used with such devices. The system must allow for products to be tracked in order to determine the retail location at which the product was obtained. Retailers must provide the DOR with monthly reports indicating the flavored products sold, when and to whom the products were sold.

Local licensing authorities must have access to the system for the purposes of enforcing the unlawful sale to minors. School personnel or a parent may report a unique identifying number of a product found in possession of a minor to state or local licensing authorities to determine which retail location sold the product, who furnished the product to a minor, and any penalties that may be necessary.

Definitions. The bill adds synthetic nicotine to the definition of tobacco products that may not be sold to minors.

Grant program. The bill requires the Division of Prevention Services in the Colorado Department of Public Health and Environment (CDPHE) to convene a working group to create and administer a grant program for communities disproportionately impacted by the prevalence of tobacco and nicotine use. The working group must be convened by August 1, 2022, develop the grant program by January 15, 2023, and award grants by April 15, 2023, and each year thereafter.

In FY 2022-23, the General Assembly must appropriate $10.0 million from the General Fund for the program. Any money not expended or encumbered at the end of FY 2022-23 remains available in the subsequent years without further appropriation.

Background

Licensing. The DOR regulates cigarette, tobacco, and nicotine retailers, which are required by House Bill 20-1001 to obtain a license to operate. There are currently about 6,000 licensed retailers. The DOR is required to complete at least two compliance checks per year at each licensed location.

Taxes. Colorado has three taxes on cigarettes, tobacco products, and nicotine products – a statutory tax, and taxes adopted through Amendment 35 and Proposition EE. Table 2 shows the tax amounts, estimated revenue collections for FY 2023-24 under current law, and how that revenue is distributed.

Table 2
Cigarette, Tobacco Product, and Nicotine Product Taxes

	Statutory Tax	Amendment 35 Tax	Proposition EE Tax
Cigarettes	$0.01 per cigarette ($0.20 per pack)	$0.032 per cigarette ($0.64 per pack)	$0.055 per cigarette ($1.10 per pack)
Tobacco Products	20% excise tax	20% excise tax	10% excise tax
Nicotine Products	-	-	35% excise tax
Subject to TABOR	Yes	No	No
Estimated Revenue[1]	$54.2 million	$126.2 million	$182.7 million
FY 2023-24 Distributions[2]	General Fund • local governments (27%), based on cigarette sales in each jurisdiction	Tobacco Tax Cash Fund • Health Care Expansion Fund (46%) • Primary Care Fund (19%) • Tobacco Education Programs Fund (16%) • Prevention, Early Detection, and Treatment Fund (15%) • General Fund (3%), distributed for: – health services – local governments – CHP+ – other programs.	2020 Tax Holding Fund • Several cash funds and the General Fund *(amounts specified in statute)* • The remainder is deposited in the Preschool Programs Cash Fund (starting in FY 2023-24).

[1] FY 2023-24 estimated revenue, based on the March 2022 Legislative Council Staff Forecast
[2] In FY 2023-24 the General Fund and Tobacco Tax Cash Fund receive specific distributions. In subsequent years, the General Fund, Tobacco Tax Cash Fund, and Tobacco Education Fund receive specific distributions.

Minimum price. Proposition EE also set a minimum price for cigarettes. Of the additional sales tax revenue resulting from the minimum price, 27 percent is deposited in the General Fund and 73 percent is deposited in the Preschool Programs Fund.

Assumptions

Permits. The fiscal note assumes that 700 retailers will apply for the flavored products permit. This is based on the current number of age-restricted premises, the total number of tobacco and vape shops in the state, and the assumption that a portion of retailers whose premises are not age-restricted will convert to an age-restricted model by January 1, 2024.

Compliance checks. The fiscal note also assumes that four additional compliance checks will be required (the six required by the bill minus the two required under current law), for a total of 2,800 additional compliance checks. Of these checks, 90 percent are assumed to be completed by the DOR and 10 percent are assumed to be conducted by local licensing authorities.

Source investigations. It is assumed that about 190,000 cigarette, tobacco, and nicotine products are confiscated per year from middle and high schools in the state (30 per month per middle and high school in the state). The fiscal note assumes that 5 percent will be reported to the DOR, for an estimated 9,660 source investigations per year.

Comparable Crime Analysis

Legislative Council Staff is required to include certain information in the fiscal note for any bill that creates a new crime, changes the classification of an existing crime, or creates a new factual basis for an existing crime. This section outlines data on crimes comparable to the offense in this bill and discusses assumptions on future rates of criminal conviction for this offense.

Prior conviction data and assumptions. This bill creates a new factual basis for the existing offense of selling nicotine products to minors under 21 years old for synthetic nicotine products. To estimate the prevalence of this new offense, the fiscal note looks at the existing offense of selling a nicotine product to minor under 21 years old. From January 1, 2017 through December 31, 2021, zero offenders have been sentenced and convicted for this offense; therefore, the fiscal note assumes that there will continue to be minimal criminal case filings or convictions for this offense under the bill. Because the bill is not expected to have a tangible impact on criminal justice-related revenue or expenditures at the state or local levels, these potential impacts are not discussed further in this fiscal note. Beginning March 1, 2022, this crime is classified as a civil offense.

State Revenue

Beginning in FY 2023-24, the bill increases state revenue from permit fees by $2.1 million annually, and decreases state revenue by an indeterminate amount. Impacted state revenue is deposited in the General Fund and various cash funds.

Tax revenue. The bill decreases state revenue from cigarette, tobacco, and nicotine excise taxes by an indeterminate amount beginning in FY 2023-24 and future years, to the extent that consumers reduce or eliminate consumption of these products due to changes under the bill. However, this fiscal note assumes that current consumers are likely to purchase flavored products at eligible retailers, or to switch to unflavored products that are more widely available. Thus, the bill is not expected to significantly impact the amount of cigarette, tobacco, or nicotine tax collections in the initial years. Over the longer term, tax revenue from tobacco and nicotine products may decrease more in future years if fewer consumers start using and purchasing these products. This longer term reduction in revenue has not been estimated. The analysis will be updated if more data becomes available.

This potential revenue decrease will affect statutory tax revenue credited to the General Fund, which is subject to TABOR, and Amendment 35 and Proposition EE tax revenue credited to the Tobacco Tax Cash Fund and the 2020 Tax Holding Fund, respectively, which are not subject to TABOR.

Fee impact on retailers. Colorado law requires legislative service agency review of measures which create or increase any fee collected by a state agency. These fee amounts are reflect the $3,000 permit fee established in the bill; however, actual fees will be set administratively by DOR based on cash fund balance, estimated program costs, and the estimated number of licenses. The table below identifies the fee impact, which will be deposited in the Liquor Enforcement Division Cash Fund.

Table 3
Fee Impact on Cigarette, Tobacco, and Nicotine Retailers

Fiscal Year	Type of Fee	Proposed Fee Increase	Number Affected	Total Fee Impact
FY 2023-24	Flavored Products Permit Fee	$3,000	700	$2,100,000
FY 2024-25	Flavored Products Permit Fee	$3,000	700	$2,100,000

Fine revenue. The bill increases fine revenue from violations of the prohibition on the sale of flavored tobacco, cigarette, and nicotine products by a minimal amount. The fiscal note assumes that most retailers will comply with the bill's provisions, or obtain a permit to sell flavored products. Revenue will increase in subsequent years if retailers commit multiple violations within a 24 month period. Fine revenue is deposited in the Tobacco Education Programs Fund.

Tobacco Master Settlement Agreement. Colorado receives annual payments from tobacco manufacturers under the Tobacco Master Settlement Agreement (MSA). Payments to the state depend in part on national cigarette consumption. The bill is expected to decrease national cigarette consumption by a minimal amount. Therefore, any decrease in Tobacco MSA payments due to the bill is assumed to be minimal.

State Transfers

Under current law, cigarette and tobacco excise tax revenue credited to the Tobacco Tax Cash Fund are distributed to two cash funds in the Department of Health Care Policy and Financing (HCPF), two cash funds in CDPHE, and the General Fund. In addition, the portion of cigarette, tobacco, and nicotine excise tax revenue remaining in the 2020 Tax Holding Fund after statutorily required transfers is transferred to the Preschool Programs Cash Fund beginning in FY 2023-24. To the extent that the state collects less cigarette, tobacco, and nicotine tax revenue, the bill will reduce these transfers.

State Expenditures

The bill results in a net increase in state expenditures of $10.1 million in FY 2022-23, $11.5 million in FY 2023-24, and $12.5 million beginning in FY 2024-25. Expenditures are from the General Fund for the CDPHE, and from the Liquor Enforcement Division Cash Fund for the DOR. Specific impacts are listed in Table 4 and discussed below.

Table 4
Expenditures Under HB22-1064

Cost Components	FY 2022-23	FY 2023-24	FY 2024-25
Department of Revenue			
Personal Services	-	$821,485	$1,570,708
Operating Expenses	-	$15,525	$29,700
Capital Outlay Costs	-	$74,400	$62,000
Computer Program Costs	-	$53,000	$96,000
Legal Services	-	$83,785	$24,643
Vehicles & Mileage	-	$55,286	$115,534
Equipment	-	$52,200	$110,200
Minor Contractors	-	$22,503	$45,006
Centrally Appropriated Costs[1]	-	$188,894	$366,476
FTE – Personal Services	-	11.5 FTE	22.0 FTE
FTE – Legal Services	-	0.5 FTE	0.1 FTE
DOR Subtotal	**-**	**$1,367,078**	**$2,420,267**
Public Health & and Environment			
Personal Services	$398,441	$434,663	$434,663
Operating Expenses	$8,505	$8,505	$8,505
Capital Outlay Costs	$37,200	-	-
Working Group Costs	$12,990	$12,990	$12,990
Travel	-	$3,186	$3,186
Grants	$9,542,864	$9,539,606	$9,539,606
Centrally Appropriated Costs[1]	$106,379	$115,562	$115,562
FTE – Personal Services	5.9 FTE	6.3 FTE	6.3 FTE
CDPHE Subtotal	**$10,106,379**	**$10,115,562**	**$10,115,562**
Total	**$10,106,379**	**$11,482,640**	**$12,535,829**
Total FTE	**5.9 FTE**	**18.3 FTE**	**28.4 FTE**

[1] *Centrally appropriated costs are not included in the bill's appropriation.* 2

Department of Revenue. The bill will increase costs in the DOR by $1.4 million in FY 2023-24 and by $2.4 million in FY 2024-25 and future years, as described below and summarized in Table 4 above.

- *Administrative and enforcement staff.* The DOR will require 11.5 FTE in FY 2023-24 and 22.0 FTE in FY 2024-25 to implement the new flavored products permit, conduct additional compliance checks at permitted retailers, implement the tracking system, and conduct source investigations of products that school officials or parents report as being in the possession of a minor. The majority of the new staff, about 16.9 FTE in FY 2024-25, are for criminal investigators to conduct compliance checks and source investigations. Administrative and legal assistants will handle permit applicants and violations. Costs account for a January, 2024 effective date, and standard capital outlay and operating costs, as well as standard equipment and vehicle costs for the criminal investigator positions.

- *Legal services.* The DOR will require additional legal services hours, estimated at 850 hours in FY 2023-24 and 150 hours in FY 2024-25, for rulemaking and additional administrative actions resulting from the additional compliance checks. Legal services are provided by the Department of Law at a rate of $98.57 per hour.

- *Compliance check costs.* For each compliance check, the department must use a minor contractor to attempt to purchase products. This requires two to three hours depending on whether the check is passed or failed, for each of the 2,520 new compliance checks, at a rate of $18 per hour.

- *Computer programming.* The DOR must purchase a system to track certain flavored products sold by permitted retailers. Based on a similar system available for tracking the sale of marijuana products, costs are estimated at $8,000 per month, or $96,000 for a full year. This cost is prorated for a January start date in FY 2023-24. Additionally, DOR requires $5,000 in FY 2023-24 only to add the new permit to the current licensing system.

Department of Public Health and Environment. The bill provides $10.0 million for a grant program to provide resources to communities disproportionately impacted by the marketing, sale, and prevalence of tobacco and nicotine product use. Of that amount, $457,136 is required for administrative expenses, estimated at 5.9 FTE in FY 2022-23 and 6.3 FTE in subsequent years. Administrative expenses are based on the current staffing levels for similar grant programs, and also include working group costs. The remaining $9.5 million will be distributed as grants. If 25 grants are awarded, each grant will average $382,000. Actual grant amounts will be determined by CDPHE.

Programs funded with cigarette, tobacco, and nicotine tax revenue. Any reduction in the transfers discussed above, or other programs funded by cigarette, tobacco, and nicotine tax revenue, will result in a corresponding decrease in expenditures for these programs. This analysis assumes that any adjustments in funding for these programs will be handled through the annual budget process based on the actual revenue reduction.

Distributions to local governments. The bill decreases state cigarette rebate distributions to local governments by an indeterminate amount. Under current law, 27 percent of statutory cigarette tax revenue credited to the General Fund is distributed to local governments. Because the bill decreases cigarette tax revenue, it also decreases this distribution. The distribution occurs pursuant to statute and no change in appropriations is required.

Judicial Department. The bill increases the trial court workload in the Judicial Department by a minimal amount. Additional cases will occur if retailers challenge an agency decision to assess a fine or a prohibition on sale, or if there are additional criminal cases filed for the sale or provision of synthetic nicotine products to minors. No change in appropriations is required.

Centrally appropriated costs. Pursuant to a Joint Budget Committee policy, certain costs associated with this bill are addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. These costs, which include employee insurance and supplemental employee retirement payments, are shown in Table 4.

Other Budget Impacts

TABOR refunds. The bill is expected to increase the amount of state revenue required to be refunded to taxpayers by the amounts shown in the State Revenue section above, although some of the increase may be offset by a decrease in tax revenue from tobacco, cigarette, and nicotine products. This estimate assumes the March 2022 LCS revenue forecast. A forecast of state revenue subject to TABOR is not available beyond FY 2023-24. Because TABOR refunds are paid from the General Fund, increased cash fund revenue will reduce the amount of General Fund available to spend or save.

General Fund reserve. Under current law, an amount equal to 15 percent of General Fund appropriations must be set aside in the General Fund statutory reserve beginning in FY 2022-23. Based on this fiscal note, the bill is expected to increase the amount of General Fund held in reserve by the amounts in Table 1 starting in FY 2022-23, which will decrease the amount of General Fund available for other purposes.

Local Government

To the extent the bill decreases state revenue from statutory cigarette tax revenue, it will decrease state General Fund distributions to local governments. Distributions are allocated based on consumption in the local jurisdiction. Thus, the revenue impact to specific local governments will vary based on changes in consumption patterns. The bill will also decrease revenue for municipal governments that impose excise taxes on cigarettes and tobacco products by an indeterminate amount. Individual local governments may also experience revenue decreases or increases as local economies respond to the ban on flavored tobacco products.

Local licensing authorities may also have an increase in costs to complete additional compliance checks at retailers permitted to sell flavored products. The fiscal note assumes that 280 (10 percent) of the newly required compliance checks will be completed by local licensing authorities.

Effective Date

The bill takes effect upon signature of the Governor, or upon becoming law without his signature.

State Appropriations

In FY 2022-23, the bill requires a General Fund appropriation of $10,000,000 to the Colorado Department of Public Health and Environment, and 5.9 FTE.

State and Local Government Contacts

Counties	Education
Health Care Policy & Financing	Higher Education
Human Services	Information Technology
Judicial	Law
Municipalities	Personnel
Public Health & Environment	Public Safety
Revenue	