HB 23-1015

Legislative Council Staff

Nonpartisan Services for Colorado's Legislature

Fiscal Note

Drafting Number:	LLS 23-0123	**Date:**	January 20, 2023
Prime Sponsors:	Rep. Bird Sen. Liston	**Bill Status:**	House Finance
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Bill Topic: **TAXATION TOBACCO PRODUCTS REMOTE RETAIL SELLERS**

Summary of Fiscal Impact:

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

The bill makes several adjustments and clarifications to the remittance of taxes on tobacco and nicotine products. It minimally decreases state revenue, and increases state expenditures, on an ongoing basis beginning in FY 2023-24.

Appropriation Summary: For FY 2023-34, the bill requires an appropriation of $82,900 to the Department of Revenue.

Fiscal Note Status: The fiscal note reflects the introduced bill, which was recommended by the Legislative Oversight Committee Concerning Tax Policy.

Table 1
State Fiscal Impacts Under HB 23-1015

		Budget Year FY 2023-24	Out Year FY 2024-25
Revenue		-	-
Expenditures	General Fund	$82,900	$7,328
	Centrally Appropriated	$8,225	-
	Total	**$91,125**	**$7,328**
	Total FTE	**0.5 FTE**	**-**
Transfers		-	-
Other Budget Impacts	General Fund Reserve	$12,435	$1,099

Summary of Legislation

The bill makes several adjustments to the remittance of taxes on tobacco and nicotine products.

First, the bill separates the tobacco tax treatment of out-of-state retailers, which was established in Proposition EE, into two distinct, but largely parallel, tax treatments. The first is for "delivery sales" which includes the sale of smokeless tobacco and roll-your-own tobacco products. The second is for "remote retail sales" which includes the sale of cigars, pipe, and other smoking tobacco. The two types of sales are taxed in largely the same way, with the exception that remote retail sellers are not required to remit the excise tax if their annual sales fall below the economic nexus threshold established in the U.S. Supreme Court's *South Dakota v. Wayfair* decision. If a remote seller performs fewer than 200 transactions and makes less than $100,000 in sales to purchasers in Colorado, the seller is not liable for tax, and the consumer is required to remit the tax instead.

Second, the bill clarifies how the "manufacturer's list price" (the price used to determine the amount of taxes owed) should be calculated in specific instances. For a manufacturer who is also a remote retail seller or a delivery seller of tobacco or nicotine, the bill sets the manufacturer's list price equal to the cost to manufacture the product. In cases where it is impracticable to determine the invoice price from the manufacturer, the average of the price paid for the product's stock in the previous calendar year may be used.

Background

Proposition EE, approved by voters in 2020, raised taxes on cigarettes and tobacco products, created a new tax for nicotine products, and created a minimum price for cigarette sales. The proposition also clarified that tobacco "delivery sellers," defined as sellers who reside outside of the state and sell directly to consumers in the state via the internet or other means, are subject to tobacco taxes at the time of the sale to the consumer.

State Revenue

The bill minimally decreases state revenue on an ongoing basis beginning in FY 2023-24.

The bill limits the payment of tax from remote retail sellers (but not from delivery sellers) to those making sales in excess of the sales tax economic nexus thresholds established following the *Wayfair* decision. If the remote retail seller's annual sales are below the economic nexus threshold, the consumer is required to remit the tax on the remote retail seller's behalf. Requiring consumers to remit the tax on the behalf of the remote retail seller, rather than taxing the seller directly, is expected to have lower compliance and more difficult enforcement, thus minimally decreasing state revenue.

Additionally, the combination of the tobacco products listed under the new definitions of remote retail sales and delivery sales is not an exhaustive list. Specifically, the former definition of delivery sale included a catch-all category for other types of tobacco suitable for chewing or smoking, which is not included under either of the two new definitions. If the omitted tobacco products are not taxed under the new bill, revenue will be reduced by a greater amount.

Revenue from the original statutory tax on tobacco products is deposited into the General Fund. Revenue from Amendment 35 is distributed to the Health Care Expansion Fund, Primary Care Expansion Fund, Prevention Detection Treatment Fund, Tobacco Education Programs Fund, and the General Fund. Revenue from Proposition EE is deposited in the General Fund, transferred to the 2020 Tax Holding Fund, and distributed to fund affordable housing, eviction legal defense, rural schools, tobacco education programs and, beginning in FY 2023-24, preschool programs.

State Expenditures

The bill increases state expenditures in the Department of Revenue by about $91,000 in FY 2023-24 and $7,300 in FY 2024-25, paid from the General Fund. The costs represent the administrative expenses in the DOR to implement the new taxation scheme for retail delivery sales. Expenditures are shown in Table 2 and detailed below.

Table 2
Expenditures Under HB 23-1015

	FY 2023-24	FY 2024-25
Department of Revenue		
Personal Services	$29,023	-
Operating Expenses	$675	-
Capital Outlay Costs	$6,670	-
Computer Programming and Testing	$46,532	$7,328
Centrally Appropriated Costs[1]	$8,225	-
Total Cost	**$91,125**	**$7,328**
Total FTE	**0.5 FTE**	**-**

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

Personal services. The DOR will require temporary staff for development and testing in support of GenTax programming that will be required to implement the new taxation scheme for retail delivery sales. Operating expenses include telephone, computers, and other supplies for these staff.

Computer programming and testing. The bill increases General fund expenditures for the DOR to update computer systems to accommodate new categories for remote retail sales and differentiation between delivery sales and remote retail sales. Programming costs are estimated at $22,500, representing 100 hours at $225 per hour. Costs for testing at the department are estimated at $16,640, representing 520 hours of user acceptance testing at a rate of $32 per hour. The Office of Research and Analysis will also have costs to make changes in related GenTax reports so that the department can access and document tax statistics related to the new taxation scheme, as well as to conduct ongoing reporting and analysis. These costs are estimated at around $7,300 per year.

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 2.

Other Budget Impacts

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. Based on this fiscal note, the bill is expected to increase the amount of General Fund held in reserve by the amounts shown in Table 1, decreasing the amount of General Fund available for other purposes.

State Appropriations

For FY 2023-24, the bill requires a General Fund appropriation of $82,900 the Department of Revenue, and 0.5 FTE.

Effective Date

The bill takes effect January 1, 2024, assuming no referendum petition is filed.

State and Local Government Contacts

Early Childhood	Health Care Policy and Financing	Personnel
Public Health and Environment	Revenue	