HB 22-1064

Legislative Council Staff

Nonpartisan Services for Colorado's Legislature

Revised Fiscal Note

(replaces fiscal note dated)

Drafting Number:	LLS 22-0571	**Date:**	May 6, 2022
Prime Sponsors:	Rep. Mullica; Bacon Sen. Priola; Fields	**Bill Status:**	Senate Introduction
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Bill Topic: **PROHIBIT FLAVORED TOBACCO REGUL 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. The bill decreases state revenue and expenditures, transfers and local government revenue.

Appropriation Summary: No appropriation is required for FY 2022-23.

Fiscal Note Status: The fiscal note reflects the reengrossed bill.

Table 1. State Fiscal Impacts Under HB 22-1064

		FY 2022-23	FY 2023-24	FY 2024-25
Revenue	General Fund	-	($2.0 million)	($4.0 million)
	Cash Funds[1]	-	($13.6 million)	($27.0 million)
	Total Revenue	**-**	**($15.7 million)**	**($31.0 million)**
Expenditures[2]	General Fund	-	$1.6 million	$3.2 million
	Cash Funds	-	($3.8 million)	($7.4 million)
	Centrally Appropriated	-	$2,961	$4,921
	Total Expenditures	**-**	**($2.2 million)**	**($4.2 million)**
	Total FTE	**-**	**0.2 FTE**	**0.3 FTE**
Transfers[1]	Various Cash Funds	-	($13.6 million)	($26.9 million)
	General Fund	-	($118,157)	($228,574)
	Reduced Transfers	**-**	**($13.7 million)**	**($27.1 million)**
Other Budget Impacts	TABOR Refund	-	($2.0 million)	Not estimated.
	General Fund Reserve	-	$0.3 million	$0.5 million

1 Reduced revenue to the Tobacco Tax Cash Fund and 2020 Tax Holding Fund decreases transfers to the General Fund and several cash funds, including health-related funds and the Preschool Programs Fund.

2 Includes a decrease in expenditures due to reduced cigarette, tobacco, and nicotine tax revenue, and an increase in expenditures to replace a portion of the decrease in cash fund revenue and enforce the ban on flavored products.

Summary of Legislation

Ban on flavored products. Beginning January 1, 2024, this bill prohibits retailers from selling or advertising flavored cigarettes, tobacco, or nicotine products, including flavored rolling paper. 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 four exceptions to the ban:

- premium cigars;
- flavored pipe tobacco;
- shisha tobacco products including hookahs; and
- flavored products sold by a cigar-tobacco bar located within a licensed gaming establishment, which may sell no more than one carton of menthol cigarettes per person per day.

The bill establishes parameters for determining if a product is considered flavored.

Fines. The bill aligns the penalties for selling flavored products with the penalties for selling cigarettes, tobacco, and nicotine products to a minor. Those penalties are as follows, for violations within a 24 month period:

- First violation – fine of $250 to $275;
- Second violation – fine of $500 to $750 and a 7 day prohibition on selling cigarettes, tobacco products, and nicotine products;
- Third violation – fine of $750 to $1,000 and a 30 day prohibition on selling products; and
- Fourth violation – fine of $1,000 to $15,000, and a prohibition of up to 3 years.

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

Tobacco education, prevention, and cessation grant program. The bill directs the existing tobacco education, prevention, and cessation grant program administered by the Division of Prevention Services in the Colorado Department of Public Health and Environment (CDPHE) to provide resources to communities disproportionately impacted by the marketing, sale, and use of tobacco and nicotine products.

Background

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 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 Programs 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.

Licensing. The Department of Revenue (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.

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.

Assumptions

Market share of flavored products. Based on available data on consumption patterns of cigarettes, other tobacco products, and nicotine products, as well as research on flavor bans in other jurisdictions, the revenue estimates in this fiscal note are based on the following assumptions:

- menthol cigarettes account for 22 percent of cigarette sales in Colorado;
- flavored tobacco products account for 27 percent of sales of other tobacco products in Colorado; and
- flavored nicotine products account for 73 percent of nicotine product sales in Colorado.

Changes in consumption. Banning flavored tobacco and nicotine products will reduce overall consumption of these products. While a portion of flavored product consumers are expected to migrate to unflavored products and to flavored products and retailers exempt from the ban, others are expected to stop consuming tobacco/nicotine products completely if flavored products are unavailable or will purchase flavored products from sources in other jurisdictions. The resulting impacts on Colorado sales of these products are assumed to be:

- up to a 7 percent decline in cigarette sales;
- up to an 8 percent decline in sales of other tobacco products; and
- up to a 22 percent decline in sales of nicotine products.

To the extent that more consumers migrate to unflavored products and to flavored products and retailers exempt from the ban and fewer consumers quit or purchase flavored products elsewhere, revenue will decrease by less than the estimated amounts. On the other hand, if more consumers quit or purchase products in other jurisdictions than assumed above, revenue will decrease by more than estimated in this fiscal note.

State Revenue

The bill is expected to decrease state revenue by up to $15.7 million in FY 2023-24 and up to $31.0 million in FY 2024-25. This revenue change is primarily the result of decreased cigarette and tobacco tax revenue, offset to a small degree by increased fine and fee revenue.

Tax revenue. The bill is not expected to impact state tax revenue in FY 2022-23, and to decrease state revenue by up to $15.7 million in FY 2023-24 and by up to $31.0 million in FY 2024-25 and future years by reducing cigarette, tobacco, and nicotine product consumption. This reduced consumption will decrease revenue from excise taxes levied on these products, as well as sales tax collected from the minimum price of cigarettes. The revenue decrease will affect statutory tax revenue credited to the General Fund, along with Amendment 35 and Proposition EE tax revenue credited to the Tobacco Tax Cash Fund and the 2020 Tax Holding Fund, respectively. Table 3 lists the tax impact of the bill. General Fund revenue from cigarette and tobacco products tax is subject to TABOR, while cash fund revenue is voter-approved, TABOR-exempt revenue.

Table 3
State Tax Revenue Impacts of HB 22-1064

	FY 2022-23	FY 2023-24	FY 2024-25
General Fund			
Cigarette Tax	-	($880,213)	($1,680,114)
Tobacco Products Tax	-	($1,092,816)	($2,286,547)
General Fund Total	**-**	**($1,973,030)**	**($3,966,661)**
Tobacco Tax Cash Fund			
Cigarette Tax	-	($2,827,995)	($5,397,955)
Tobacco Products Tax	-	($1,110,585)	($2,221,171)
Tobacco Tax Cash Fund Total	**-**	**($3,938,581)**	**($7,619,126)**
2020 Tax Holding Fund			
Cigarette Tax	-	($4,644,922)	($8,866,027)
Tobacco Products Tax	-	($555,293)	($1,161,864)
Nicotine Products Tax	-	($4,543,663)	($9,434,208)
2020 Tax Holding Fund Total	**-**	**($9,743,878)**	**($19,462,098)**
Total Tax Revenue Impact[1]	**-**	**($15,655,488)**	**($31,047,885)**

[1] *Totals may not sum due to rounding.*

Fine revenue. The bill increases fine revenue from violations of the prohibition on the sale of flavored tobacco, cigarette, and nicotine products by at least $22,500 in the first half year and $45,000 in subsequent full years. The fiscal note assumes that most retailers will comply with the bill's provisions. Under current law, about 3 percent of compliance checks of tobacco and nicotine product license holders result in a violation. Assuming the same percentage of retailers pay the minimum fine of $250 for a first time violation, revenue will increase by $45,000. Revenue will increase in subsequent years if retailers commit subsequent violations within a 24 month period. Fine revenue is deposited in the Tobacco Education Programs Fund.

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 estimates only, 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 of this bill, which will cover DOR implementation costs and be deposited in the Liquor Enforcement Division Cash Fund.

Table 4
Fee Impact on Cigarette, Tobacco, and Nicotine Retailers

Fiscal Year	Type of Fee	Proposed Fee Increase	Number Affected	Total Fee Impact
FY 2023-24	License Application/Renewal Fee	$4	3,000	$12,000
FY 2024-25	License Application/Renewal Fee	$4	6,000	$24,000

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.

Department of Public Safety. The bill will minimally decrease revenue to the Fire Safe Cigarettes program in the Department of Public Safety, as one brand family that receives a certificate exclusively sells menthol cigarettes and likely will not apply for certification.

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 State Education Fund in FY 2022-23, and to the Preschool Programs Cash Fund beginning in FY 2023-24. Because the bill reduces revenue to the Tobacco Tax Cash Fund and the 2020 Tax Holding Fund, it is expected to correspondingly reduce these transfers, shown in the table below.

Table 5
State Transfer Reductions under HB22-1064

	FY 2022-23	FY 2023-24	FY 2024-25
Transfers from the Tobacco Tax Cash Fund			
Health Care Expansion Fund (HCPF)	-	($1,811,747)	($3,504,798)
Primary Care Fund (HCPF)	-	($748,330)	($1,447,634)
Tobacco Education Programs Fund (CPDHE)	-	($630,173)	($1,219,060)
Prevention, Detection, and Treatment Fund (CDPHE)	-	($630,173)	($1,219,060)
General Fund	-	($118,157)	($228,574)
Subtotal	**-**	**($3,938,581)**	**($7,619,126)**
Transfers from 2020 Tax Holding Fund			
State Education Fund (CDE)	-	-	-
Preschool Programs Fund	-	($9,743,878)	($19,462,098)
Subtotal	**-**	**($9,743,878)**	**($19,462,098)**
Total Transfer Reduction	**-**	**($13,682,458)**	**($27,081,224)**

State Expenditures

The bill has no impact on state expenditures in FY 2022-23. Expenditure impacts begin in FY 2023-24, with an estimated net decrease in state expenditures of $2.2 million and a net decrease of $4.2 million in FY 2024-25. The change is the result of a decrease in tax revenue starting in January 2024, discussed above, increased expenditure from the General Fund to replace a portion of reduced cash fund revenue transferred to HCPF, and increased expenditures in DOR to implement the bill. It also minimally increases workload for the Judicial Department, Department of Law, CDPHE, and Department of Public Safety. Specific impacts are listed in Table 6 and discussed below.

Table 6
Summary of Expenditures Under HB22-1064

	FY 2022-23	FY 2023-24	FY 2024-25
Reduced Cash Fund Expenditures			
HCPF – Health Care Expansion Fund	-	($1,811,747)	($3,504,798)
HCPF – Primary Care Fund	-	($748,330)	($1,447,634)
CDPHE – various programs	-	($1,260,346)	($2,438,120)
Reduced General Fund Expenditures			
General Fund – local government distributions	-	($238,612)	($455,452)
Increased General Fund Expenditures			
HCPF – replace revenue for health services	-	$1,882,642	$3,641,942
Increased Cash Fund Expenditures			
DOR – Enforcement Costs (Table 8)	-	$10,683	$21,362
Centrally Appropriated Costs[1]	-	$2,961	$4,921
Total Cost	**-**	**($2,162,750)**	**($4,177,779)**
Total FTE	**-**	**0.2 FTE**	**0.3 FTE**

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

Department of Health Care Policy & Financing. As listed in Table 5, HCPF receives transfers from the Tobacco Tax Cash Fund that fund a portion of several programs, including Medicaid, CHP+, and services funded through the Primary Care Fund. The bill will reduce funding available for those programs by at least $2.6 million in FY 2023-24. Of that amount, $1.9 million is from the Health Care Expansion Fund or for Old Age Pension and CHP+ services, which will require additional funding from the General Fund to replace lost revenue. It is assumed that this funding will be adjusted 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 $238,612 in FY 2023-24 and $455,452 in FY 2024-25 and subsequent years. 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.

Preschool Programs Cash Fund. As described in the State Transfers section above, a portion of Proposition EE tax revenue is transferred to the Preschool Programs Cash Fund beginning in FY 2023-24. A reduction in these transfers will reduce funding available for education-related programs. It is assumed that any change to appropriations will occur through the budget process.

Department of Public Health and Environment. The bill will increase workload for CDPHE to add additional grant criteria and purposes to the existing tobacco education, prevention, and cessation grant program. The additional criteria may shift how grants are awarded, but does not change the funding available for the program. No change in appropriations is required.

- **Various programs.** As discussed in the State Transfers section above, CDPHE receives transfers from the Tobacco Tax Cash Fund that fund all or a portion of several programs. The bill will reduce funding available for the following programs by $1.3 million in FY 2023-24 and by $2.4 million per year in FY 2024-25 and subsequent years, varying by program: the State Tobacco Education and Prevention Partnership, the Cancer Cardiovascular and Pulmonary Disease Grants Program, the Office of Health Equity Grants Program, the Immunization Program, and the Women's Wellness Connection Breast and Cervical Cancer Screening Program.

Department of Revenue. The bill increases expenditures for the DOR to handle violations of the ban on flavored products. The DOR currently conducts two compliance checks at each licensed retailer in the state. The fiscal note assumes that the department will pursue violations found in the course of current compliance checks. The department will require 0.3 FTE to handle violations, estimated to occur at 3 percent of compliance checks. Costs are paid from the Liquor Enforcement Division Cash Fund.

Table 7
DOR Expenditures

	FY 2022-23	FY 2023-24	FY 2024-25
Department of Revenue			
Personal Services	-	$10,683	$21,362
Centrally Appropriated Costs[1]	-	$2,961	$4,921
Total Cost	**-**	**$13,644**	**$26,283**
Total FTE	**-**	**0.2 FTE**	**0.3 FTE**

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

Department of Law. CDPHE and the DOR will require additional legal services hours to conduct rulemaking and handle administrative actions related to violations (DOR) and to establish the grant program (CDPHE). No change in appropriations for either agency 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.

Department of Public Safety. The bill will minimally increase workload for the Fire Life and Safety Division, which administers the Fire Safe Cigarettes program, to remove menthol products from and reissue twenty-six brand certifications. 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 6.

Other Budget Impacts

TABOR refunds. The bill is expected to decrease the amount of state revenue required to be refunded to taxpayers by $2.0 million in FY 2023-24. 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, decreased General Fund revenue will lower the TABOR refund obligation, but result in no net change to the amount of General Fund otherwise 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 amount shown in Table 1, which will decrease the amount of General Fund available for other purposes.

Local Government

The bill decreases distributions to local governments from the General Fund via the statutory cigarette tax rebate by an estimated $238,612 in FY 2023-24 and $455,452 in FY 2024-25. 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. Individual local governments may also experience revenue decreases or increases as local economies respond to the ban on flavored tobacco products.

Effective Date

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

State and Local Government Contacts

Counties
Health Care Policy & Financing
Human Services
Judicial
Municipalities
Public Health & Environment
Revenue

Education
Higher Education
Information Technology
Law
Personnel
Public Safety