

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

House Bill 5037

FISCAL
NOTE

By Delegates W. Clark, Howell, Heckert, Ward, Tully,

Mazzocchi, E. Pritt, Ferrell, and Ellington

[Introduced January 23, 2024; Referred
to the Committee on Government Organization then
Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article
 2 designated §16-9H-1, §16-9H-2, §16-9H-3, §16-9H-4, §16-9H-5, §16-9H-6, and §16-9H-7,
 3 all relating to the creation of an e-cigarette and e-cigarette liquid directory; regulating the
 4 distribution and sale of e-cigarettes and e-cigarette liquid; requiring manufacturers to
 5 obtain market authorization from the United States Food and Drug Administration prior to
 6 the sale of e-cigarettes or e-cigarette liquids; providing manufacturers notice and the
 7 opportunity to be heard before removal from the directory; prohibiting the sale of e-
 8 cigarettes or e-cigarette liquid not listed on the directory; requiring unannounced
 9 compliance checks for retailers and wholesalers of electronic cigarettes; prescribing fines
 10 and penalties; requiring foreign manufacturers to designate an agent for service of
 11 process; designating the Secretary of State as an agent for service of process for resident
 12 manufacturers; and providing enforcement and rulemaking authority to the Tax
 13 Commissioner and the Alcohol Beverage Control Administration Commissioner.

Be it enacted by the Legislature of West Virginia:

ARTICLE 9H. E-cigarette Usage Restrictions.

§16-9H-1. E-cigarette and E-cigarette Liquid Directory

1 (a) By July 1, 2024, and annually thereafter, every manufacturer of e-cigarettes or e-
 2 cigarette liquids that are sold in the state shall submit a certification to the State Tax Commissioner
 3 and the Alcohol Beverage Control Commissioner that separately lists each e-cigarette or e-
 4 cigarette liquid that is sold in this state.

5 (b) Every manufacturer of e-cigarettes or e-cigarette liquid that are sold in this state,
 6 whether directly or through a distributor, wholesaler, retailer, or similar intermediary or
 7 intermediaries, shall certify, under penalty of perjury on a form and in the manner prescribed by the
 8 commissioners, that the manufacturer agrees to comply with this article and that:

9 (1) The manufacturer has received a marketing authorization or similar order for the e-
10 cigarette or e-cigarette liquid from the United States Food and Drug Administration pursuant to 21
11 U.S.C. Section 387j; or

12 (2) The e-cigarette or e-cigarette liquid was marketed in the United States as of August 8,
13 2016, the manufacturer submitted a premarket tobacco product application for the e-cigarette or e-
14 cigarette liquid to the United States Food and Drug Administration pursuant to 21 U.S.C. Section
15 387j on or before September 9, 2020, and the application either remains under review by the
16 United States Food and Drug Administration or a final decision on the application has not
17 otherwise taken effect.

18 (c) Each annual certification form required by subsections (a) and (b) of this section shall
19 be accompanied by:

20 (1) A copy of the marketing authorization or other order for the e-cigarette or e-cigarette
21 liquid issued by the United States Food and Drug Administration pursuant to 21 U.S.C. Section
22 387j, or evidence that the premarket tobacco product application for the e-cigarette or e-cigarette
23 liquid was submitted to the United States Food and Drug Administration and a final authorization
24 or order has not yet taken effect; and

25 (2) A payment of \$100.00 for each e-cigarette or e-cigarette liquid the first time a
26 manufacturer submits a certification form for that e-cigarette or e-cigarette liquid and a
27 payment of \$100.00 annually thereafter for each e-cigarettes and e-cigarette liquid.

28 (d) A manufacturer required to submit a certification form pursuant to subsections (a)
29 and (b) of this section shall notify the State Tax Commissioner and the Alcohol Beverage
30 Control Commissioner within 30 days of any material change to the certification form, including
31 the issuance or denial of a marketing authorization or other order by the United States Food
32 and Drug Administration pursuant to 21 U.S.C. Section 387j, or any other order or action by the
33 United States Food and Drug Administration or a court of competent jurisdiction that affects

34 the ability of the e-cigarette or e-cigarette liquid to be introduced or delivered into interstate
35 commerce for commercial distribution in the United States.

36 (e) Beginning September 1, 2024, the State Tax Commissioner and the Alcohol
37 Beverage Control Commissioner shall maintain and make publicly available on either
38 commissioner's website a directory that lists all e-cigarette and e-cigarette liquid
39 manufacturers and e-cigarettes and e-cigarette liquid for which certification forms have been
40 submitted and shall update the directory at least monthly to ensure accuracy.

41 (f) The State Tax Commissioner and the Alcohol Beverage Control Commissioner shall
42 provide manufacturers notice and an opportunity to cure deficiencies before removing
43 manufacturers, e-cigarettes, or e-cigarette liquid from the directory.

44 (1) The State Tax Commissioner and the Alcohol Beverage Control Commissioner may
45 not remove the manufacturer or its products from the directory until at least 15 days after the
46 manufacturer has been given notice of an intended action. Notice shall be sufficient and be
47 considered immediately received by a manufacturer if the notice is sent either electronically or
48 by facsimile to an electronic mail address or facsimile number, as the case may be, provided
49 by the manufacturer in its most recent certification filed under subsections (a) and (b) of this
50 section of this section.

51 (2) The e-cigarette or e-cigarette liquid manufacturer shall have 15 business days from
52 the date of service of the notice of the commissioners' intended action to establish that the e-
53 cigarette or e-cigarette liquid manufacturer or its products should be included in the directory.

54 (g) If a product is removed from the directory, each retailer, distributor, and wholesaler
55 shall have 21 days from the day such product is removed from the directory to remove the
56 product from its inventory and return the product to the manufacturer for disposal. After 21
57 days following removal from the directory, the e-cigarettes or e-cigarette liquid of a
58 manufacturer identified in the notice of removal are contraband and are subject to seizure,
59 forfeiture, and destruction, and may not be purchased or sold in the state. The cost of such

60 seizure, forfeiture, and destruction shall be borne by the person from whom the products are
61 confiscated.

§16-9H-2. Prohibition of Sales.

1 Beginning September 1, 2024, or on the date that the State Tax Commissioner and the
2 Alcohol Beverage Control Commissioner first make the directory available for public
3 inspection on their website, whichever is later, a person may not sell or offer for sale an e-
4 cigarette or e-cigarette liquid in this state that is not included in the directory established by
5 §16-9H-1 of this code, and an e-cigarette or e-cigarette liquid manufacturer may not sell, either
6 directly or through a distributor or wholesaler, retailer, or similar intermediary or intermediaries,
7 an e-cigarette or e-cigarette liquid in this state that is not included in the directory required by
8 §16-9H-1(e) of this code.

§16-9H-3. Fees & penalties.

1 (a) The following fees and penalties shall apply to violations of this article:

2 (1) A distributor, wholesaler, or retailer, or any other person, who sells or offers for sale
3 an e-cigarette or e-cigarette liquid in this state that is not included in the directory shall be
4 subject to a civil penalty of \$100.00 a day for each product offered for sale in violation of this
5 section until the offending product is removed from the market or until the offending product is
6 properly listed on the directory.

7 (2) An e-cigarette or e-cigarette liquid manufacturer whose e-cigarettes or e-cigarette
8 liquid are not listed in the directory and are sold in this state, whether directly or through a
9 distributor, wholesaler, retailer, or similar intermediary or intermediaries, is subject to a civil
10 penalty of \$100.00 a day for each product offered for sale in violation of this section until the
11 offending product is removed from the market or until the offending product is properly listed on
12 the directory.

13 (3) In addition, any manufacturer that falsely represents any of the information required
14 by §16-9H-1(a) and §16-9H-1(b) of this code is guilty of a misdemeanor for each false
15 representation.

16 (b) All fees and penalties collected by the State Tax Commissioner and the Alcohol
17 Beverage Control Commissioner pursuant§ to this section shall be used for administration and
18 enforcement of this section.

§16-9H-4. Enforcement; rule-making.

19 (a) This article shall be enforced by the State Tax Commissioner and the Alcohol
20 Beverage Control Commissioner.

21 (b) To enforce the provisions of this article, the State Tax Commissioner and the
22 Alcohol Beverage Control Commissioner may examine the books, papers, invoices, and other
23 records of any person in possession, control, or occupancy of any premises where e-
24 cigarettes or e-cigarette liquid are placed, stored, sold, or offered for sale, as well as the stock
25 of e-cigarettes or e-cigarette liquid on the premises. Every person in the possession, control,
26 or occupancy of any premises where e-cigarettes or e-cigarette liquid are placed, sold, or
27 offered for sale shall give the State Tax Commissioner and the Alcohol Beverage Control
28 Commissioner the means, facilities, and opportunity for the examinations authorized by this
29 section.

30 (c) Each retailer and wholesaler that sells or distributes e-cigarettes or e-cigarette
31 liquid in this state may be subject to unannounced compliance checks annually for purposes of
32 enforcing this section. At least 33 percent of retailers and wholesalers operating in West
33 Virginia each year shall be subject to compliance checks each year. Unannounced follow-up
34 compliance checks of all noncompliant retailers and wholesalers shall be conducted within 30
35 days after any violation of this article. The State Tax Commissioner and the Alcohol Beverage
36 Control Commissioner shall publish the results of all compliance checks at least annually and
37 shall make the results available to the public on request.

38 (d) The State Tax Commissioner and the Alcohol Beverage Control Commissioner
39 may, pursuant to § 29A-3-1 et seq. of this code, promulgate such separate or joint legislative
40 rules, including emergency rules, as are necessary to effect the purposes of this article.

§16-9H-5. Service of Process.

1 (a) Any nonresident manufacturer of e-cigarettes or e-cigarette liquid that has not
2 registered to do business in the state as a foreign corporation or business entity shall, as a
3 condition precedent to being included in the directory created in this section, appoint and
4 continually engage without interruption the services of an agent in West Virginia to act as agent
5 for the service of process on whom all process, and any action or proceeding against it
6 concerning or arising out of the enforcement of this section, may be served in any manner
7 authorized by law. The service constitutes legal and valid service of process on the
8 manufacturer. The manufacturer shall provide the name, address, telephone number, and
9 proof of the appointment and availability of such agent to the State Tax Commissioner and the
10 Alcohol Beverage Control Commissioner.

11 (b) The manufacturer shall provide notice to the State Tax Commissioner and the
12 Alcohol Beverage Control Commissioner 30 calendar days prior to termination of the authority
13 of an agent and shall further provide proof to the satisfaction of the commissioners of the
14 appointment of a new agent no less than five calendar days prior to the termination of an
15 existing agent appointment. If an agent terminates an agency appointment, the manufacturer
16 shall notify the commissioners of the termination within five calendar days and shall include
17 proof to the satisfaction of the commissioners of the appointment of a new agent.

18 (c) Any manufacturer whose e-cigarettes or e-cigarette liquid are sold in this state who
19 has not appointed and engaged the services of an agent as required by this section shall be
20 deemed to have appointed the Secretary of State as its agent for service of process. The
21 appointment of the Secretary of State as agent shall not satisfy the condition precedent
22 required in subsection (a) of this section to be included or retained in the directory.

§16-9H-6.

Appeals.

1 A determination by the State Tax Commissioner and the Alcohol Beverage Control
2 Commissioner to not include or to remove from the directory a manufacturer or an e-cigarette
3 or e-cigarette liquid shall be subject to review by the filing of a civil action for prospective
4 declaratory or injunctive relief.

§16-9H-7. Reporting.

5 (q) Beginning December 31, 2024, and annually thereafter, the State Tax Commissioner
6 and the Alcohol Beverage Control Commissioner shall file an annual report with the joint
7 committee on government and finance regarding the status of the directory, manufacturers and
8 products included in the directory, revenue and expenditures related to administration of this
9 article, and enforcement activities undertaken pursuant to this article.

NOTE: The purpose of this bill is to establish the E-cigarette and E-cigarette Liquid Directory. The bill requires all manufacturers to obtain marketing authorization from the United States Food and Drug Administration before engaging in consumer sales in West Virginia. Manufacturers must also apply to the State Tax Commissioner and State Alcohol Beverage Control Commissioner and obtain approval from such agencies to be listed on the directory before engaging in consumer sales. Finally, the Alcohol Beverage Control Commissioner and the Tax Commissioner shall have joint regulatory enforcement authority over the directory.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.