

Testimony of Altria Client Services LLC on HB 2801

Kansas House Federal and State Affairs Committee

February 20, 2024

Chairman Carpenter, Vice Chair Kessler, and Committee Members,

Thank you for the opportunity to testify today. My name is David Sylvia, Senior Director at Altria, and I am here to discuss the issue of illicit e-vapor products and to ask for your support of HB 2801, which will address this problem in a meaningful way.

Altria's goal is to support a well-regulated tobacco and nicotine product market where all members of the trade are acting responsibly and in compliance with the law. It is only through this system that we can make sure youth use of tobacco products continues to go down, and that adult smokers have access to FDA-regulated reduced harm alternatives.

We are making progress: According to the National Youth Tobacco Survey (NYTS), past-30 day cigarette use among the combined middle and high school population was just 1.6% in 2023. Combined middle and high school use of e-vapor products was 7.7%.¹ We aim to continue this progress.

In the last two years we have seen a serious threat to the responsible, lawful marketplace with the emergence of illicit e-vapor products which follow none of the rules laid out by Congress and the FDA. CDC data suggest these illicit e-vapor products have grown to at least 52% of the marketplace.²

Background on Federal E-vapor Regulation

Critical Dates: August 8, 2016, and September 9, 2020

In 2016, FDA issued regulations that explicitly prohibited any manufacturer from introducing new e-vapor products into the market without FDA pre-market authorization. FDA told manufacturers they could keep existing products on the market while FDA reviewed applications for those products.³ But FDA was clear: no new e-vapor products may come onto the market without FDA authorization.

In 2020, FDA issued guidance banning any flavors other than tobacco and menthol for cartridge-based products but exempted single-use "disposable" e-vapor products from this flavor regulation.⁴

¹ FDA, National Youth Tobacco Survey (NYTS) 2023, <https://www.fda.gov/tobacco-products/youth-and-tobacco/results-annual-national-youth-tobacco-survey>.

² CDC, U.S. E-cigarette Sales Climbed during 2020-2022, <https://www.cdc.gov/media/releases/2023/p0622-ecigarettes-sales.html>.

³ FDA, Submit Tobacco Product Applications for Deemed Tobacco Products, <https://www.fda.gov/tobacco-products/manufacturing/submit-tobacco-product-applications-deemed-tobacco-products#:~:text=Deemed%20Tobacco%20Product%20Application%20Meeting.%E2%80%93%20by%20September%209%2C%202020>

⁴ FDA News Release, Jan. 2, 2020, <https://www.fda.gov/news-events/press-announcements/fda-finalizes-enforcement-policy-unauthorized-flavored-cartridge-based-e-cigarettes-appeal-children>

The Growth of Illicit E-vapor

Shortly thereafter, a group of foreign manufacturers – mostly based in China and licensed by the China Tobacco Monopoly – started flooding the market with new flavored disposable products, in flagrant violation of the law. Many of these manufacturers claimed their products were made with synthetic nicotine – and that they therefore could ignore federal law. But Congress passed legislation in 2022 that shut this argument down, and clearly directed synthetic products to come off the market by July 2022 unless they had FDA authorization as well.

The majority of these illicit products can be traced back to foreign manufacturers, who have shown a blatant disregard for U.S. laws and regulations. These companies have resorted to deceptive practices, such as frequent name changes and packaging alterations, to evade enforcement actions, including attempts to evade Customs and Border Protection package inspection. For instance, the China-based company, iMiracle Technology Co., has changed its name multiple times from “Elf Bar” to “EBDESIGN,” and “EBCREATE,” making it difficult both to track and hold the manufacturer accountable.⁵

As of 2022, disposable e-vapor products are now the majority of all e-vapor products today, including “Elf Bar” and its re-branded successors.⁶ According to the National Youth Tobacco Survey 2023 results, 3 of the top 5 brands used by youth are known illicit brands.⁷

And under current Kansas law, there is no way to know what’s legitimate authorized product and what is illicit. There is no central repository that tells legitimate retailers, wholesalers, regulatory agencies, or law enforcement which brands are legal, and which are not. And because of this gap in the law Kansas has limited tools and enforcement powers to enforce against illicit e-vapor products.

To address this pressing issue, HB 2801 would give Kansas the tools to enforce a legal market within its state by establishing a directory of e-vapor products. This system is similar to the Master Settlement Agreement cigarette directory that has been in place in Kansas and almost all other states for decades. This e-vapor directory would require all e-vapor manufacturers to file with the state and certify that their products comply with federal regulations. Only products on this directory list could be lawfully sold in the state.

Moving to the technical details of this proposal:

⁵ See, e.g. Matthew Perrone, “Elf Bar finds an easy way around US vape import ban: a name change,” Associated Press, Oct. 13, 2023, <https://apnews.com/article/ecigarettes-elf-bar-fda-disposable-vaping-5245aed253ca9cdf119483bd9cee1f1>.

⁶ CDC, U.S. E-cigarette Sales Climbed during 2020-2022, <https://www.cdc.gov/media/releases/2023/p0622-ecigarettes-sales.html>.

⁷ FDA, National Youth Tobacco Survey (NYTS) 2023, <https://www.fda.gov/tobacco-products/youth-and-tobacco/results-annual-national-youth-tobacco-survey>.

Key Features of Kansas Directory Policy Proposal (HB 2801)

Agency Powers

This bill sets the Kansas Department of Revenue, Alcoholic Beverage Control division, as the responsible agency for implementing and enforcing this policy.

Funding and Fines

This bill creates an initial \$250 per product fee for manufacturers to apply to get onto the directory. This fee amount is in line with other states that have implemented directories and is designed to pay for the intake and upkeep of the directory list itself. To be clear, Kansas wholesalers and retailers do not pay this fee, it is only manufacturers.

The fines in this bill are set at a level to deter the activity of selling illicit products. One concern we are well attuned to is that if fines are set too low, there is a risk that some entities will knowingly risk the fine, or maybe even continually pay it, because they can make enough money on sales of illicit products to cover the expense of the fine.

Importers, distributors, and wholesalers who supply products that are not on the directory will face a penalty of \$250 per day. A retailer who sells off-directory products would first receive a written violation and then increasing penalties ranging from \$100 - \$750 per day. For comparison, Kansas' penalty for selling cigarettes not listed on the state's MSA cigarette directory is a fine up to \$5,000 for stamping agents and \$1,000 for retailers. Also, important to note is that revenues generated from fines will be used for administration and enforcement of the directory. With these mechanisms, we feel the agency will have the necessary resources to set up and continue to enforce the law's provisions.

Implementation and Updating of the List

This bill requires that Kansas Department of Revenue make available the first list of compliant products on or after November 1, 2024, so that all trade participants can know what is legal to be sold in the state. That list will be updated as necessary to ensure accuracy.

In watching the implementation in other states, we have seen that straightforward approaches are working best: the agency in charge updates an excel spreadsheet each month and re-posts it to the public agency website. An email to registered tobacco licensees each month informing of the new list can also be helpful.

Conclusion

Four states have already passed similar legislation.⁸ A comprehensive directory in Kansas would provide a centralized resource that identifies and lists FDA-compliant products, making it easier for law enforcement agencies, wholesalers, and retailers to identify and remove illicit products from the market.

⁸ Louisiana, Oklahoma, Alabama, and Wisconsin.

At its core, this bill is about accountability in the marketplace. Restoring order and accountability in the marketplace is critical – for members of the industry, and even more importantly for the public. A well-regulated market of legal products will help reduce underage use. It will ensure adult consumers are using products that have the benefit of FDA oversight. And it will ensure adult smokers have access to FDA-regulated reduced harm alternatives.

In conclusion, I urge you to support HB 2801 aimed at addressing the proliferation of illicit e-vapor products. By establishing a directory in Kansas, we can take a significant step towards protecting our youth, promoting public health, and restoring integrity to the e-vapor market.

Thank you for your time and consideration. I am happy to answer any questions you may have.