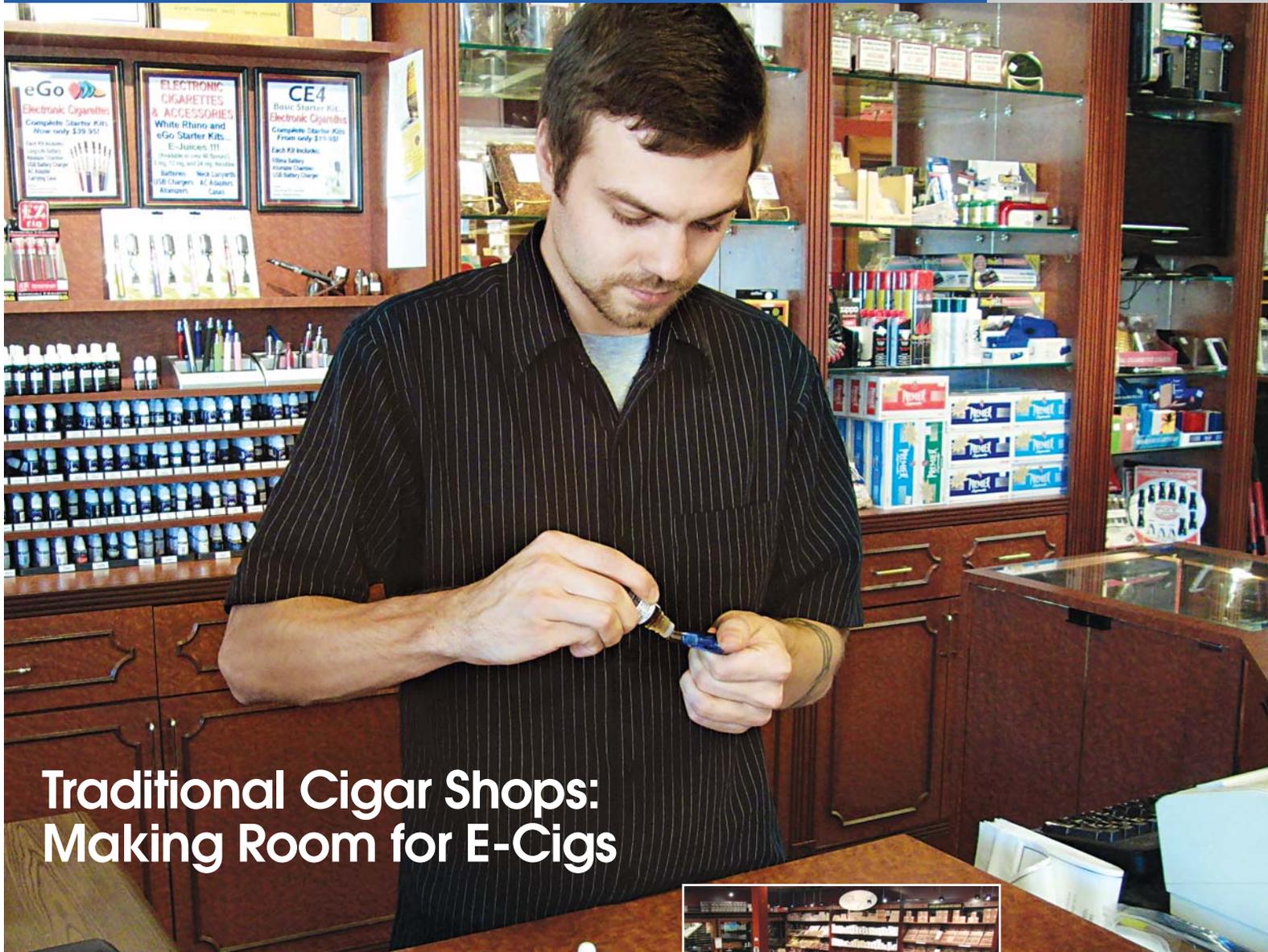


SMOKESHOP

THE INDUSTRY AUTHORITY ON TOBACCO RETAILING

Official Publication of the International Premium Cigar & Pipe Retailers Association (IPCPR)

February 2014



Traditional Cigar Shops: Making Room for E-Cigs



**Island
Smoke
Shop**
Key Largo,
Florida

- **Drew Estate:** \$4 million Leaf Facility Paves Way for More Cigars
- **Tobacco Plus Convenience Expo 2014** Was Huge: Vaping is Why
- **Alternative Tobacco Products** in State Regulator's Crosshairs



E-Cigs at the Forefront

Nationwide, state legislatures look toward taxation and regulation of tobacco alternatives, with e-cigs drawing the most attention.

>BY BRYAN M. HAYNES AND ANNE HAMPTON ANDREWS

Although electronic cigarettes were invented more than a decade ago, they only appeared in the U.S. market starting in 2007. Consequently, regulation of electronic cigarettes is a new phenomenon, and appears to be rapidly expanding. Laws governing electronic cigarettes have already been adopted in some states while others are currently considering legislation in this field.

In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act, which granted the Food and Drug Administration the authority to regulate cigarettes, roll-your-own tobacco and smokeless tobacco. The Tobacco Control Act also allows the FDA to issue regulations asserting the same authority over other tobacco products. In December

2012, the White House released its Unified Agenda and Regulatory Plan, which indicated that the FDA intended to issue a rule subjecting additional tobacco products, thought to include electronic cigarettes, to FDA's authority.

While electronic cigarettes are not currently regulated by the federal government, some states have enacted laws regulating them. Additionally, other states have introduced legislation that, if adopted, would further regulate these products. Generally, existing and pending state regulation of electronic cigarettes is focused on three areas: youth access; public use restrictions; and taxation.

YOUTH ACCESS

Numerous states have enacted laws restricting the sale of electronic cigarettes

to minors. Arkansas, Hawaii and Wyoming are among the states that passed legislation during their respective 2013 legislative sessions prohibiting minors from using electronic cigarettes.

In Arkansas, an alternative nicotine product is defined to include an electronic cigarette. Arkansas prohibits the sale of alternative nicotine products to individuals under the age of eighteen. In Hawaii, an electronic cigarette is an electronic smoking device. It is against the law in Hawaii to sell electronic smoking devices to minors under the age of eighteen. In Wyoming, electronic cigarettes are included within the definition of tobacco products for purposes of youth access. Wyoming prohibits the sale of tobacco products to persons under the age of eighteen. While these are just three recent examples of states exercising the authority to restrict youth access to electronic cigarettes, each of these states has utilized a different definitional framework to accomplish its goal.

Consistent with the trend to ban the sale of electronic cigarettes to minors, some states have bills pending that would restrict youth access to electronic cigarettes. Utah Senate Bill 440 makes it unlawful to provide an electronic cigarette to individuals under a certain age. Interestingly, the current legal age for purchasing tobacco products in Utah is nineteen, and Senate Bill 440 not only expands the definition of tobacco products to include electronic cigarettes, but also makes it unlawful to sell tobacco products to anyone under the age of twenty-one. In most (if not all) other states with restrictions on youth access, the age requirement is eighteen.

PUBLIC USE RESTRICTIONS

Some states, although not as many that have laws pertaining to youth access, have enacted laws restricting the use of electronic cigarettes in public places. Two of these states include New Jersey and Minnesota. New Jersey prohibits the use of electronic smoking devices, which includes electronic cigarettes, in indoor public places. In Minnesota, the use of electronic cigarettes falls within the definition of smoking. Minnesota law pro-

hibits smoking in public places, places of employment, public transportation and public meetings.

Some localities have passed laws to include electronic cigarettes among the products that are prohibited in public places. For example, New York City and Chicago have recently passed ordinances to treat electronic cigarettes as traditional cigarettes with respect to smoking in public places. The New York City Council passed its legislation in December 2013, and Chicago passed its ordinance a few weeks later, in mid-January 2014.

There are also states (and localities) that are considering legislation governing the use of electronic cigarettes in public places. Pending before the New York legislature is a bill that, if enacted, would ban the use of electronic cigarettes in indoor public places. Senate Bill 6255 includes electronic cigarettes within the definition of smoking, and smok-

that electronic cigarettes are not prohibited in such locations. For example, Wisconsin will consider a bill during the 2014 legislative session that would explicitly exclude electronic cigarettes from an indoor smoking ban. Currently, Wisconsin law prohibits smoking in most public indoor locations. Senate Bill 440 proposes an exemption for electronic cigarettes, which would allow such devices in restaurants, bars and other public places.

TAXING E-CIGARETTES

Minnesota is the only state that currently taxes electronic cigarettes. The legislature amended the definition of “tobacco products” in the section of the code pertaining to excise and use taxes to include electronic cigarettes within that definition. In Minnesota, the tax rate for tobacco products, including electronic cigarettes, is generally 95 percent of the wholesale price.

consumable material in the vapor product. In both states, the bills prohibit the tax rate on electronic cigarettes from exceeding 10 percent of the tax imposed on a package of cigarettes by that state.

While taxation of electronic cigarettes exists in one state and is being considered by several others, it is not expanding at the pace of laws governing youth access and public use restrictions. In addition, the New York legislature has introduced Senate Bill 6255 to explicitly exempt electronic cigarettes from taxation.

VAPING BANS LACK RESEARCH

While restricting the sale of electronic cigarettes to minors appears to have public policy benefits, such public policy benefits are not readily apparent from a restriction on the use of these products in public places by adults. The purported health benefit for prohibiting smoking cigarettes or other tobacco products in public places is based upon the perceived health-related impact of second-hand smoke. Prior to states adopting smoking bans, there was extensive research into the health effects of smoking and second-hand smoke. The use of electronic cigarettes does not generate smoke from combusted tobacco—let alone second-hand smoke.

Additionally, there is no body of research to support a demonstrated harm from using or being in the proximity of someone using electronic cigarettes. Frequently, taxation policy is used not only to generate revenue but to promote certain public policy positions. While the high level of taxation frequently imposed by states on cigarette sales may serve a public policy of discouraging smoking, there is no demonstrated adverse health impact caused by electronic cigarettes. Consequently, there is not a health-related public policy basis to support taxation of electronic cigarettes. Legislators would be wise to consider the public health aspects of electronic cigarettes in voting on such measures. 

Troutman Sanders Tobacco Team, Troutman Sanders LLP, 1001 Haxall Point, Richmond, Va. 23219, Tel: (804) 697-2206, Fax: (804) 697-1339, Web: www.troutmansanders.com, Email: bryan.haynes@troutmansanders.com.

> While taxation of electronic cigarettes exists in one state and is being considered by several others, it is not expanding at the pace of laws governing youth access and public use restrictions.

ing is currently prohibited in certain indoor areas. Even if this bill fails, such restrictions will still apply in New York City. Interestingly, Senate Bill 6255 would also exempt electronic cigarettes from the state tobacco tax.

Additionally, other localities have recently proposed legislation that, if enacted, would restrict the use of electronic cigarettes in public places. For example, a bill to ban the use of electronic cigarettes in public places was introduced by the Los Angeles City Council in early January 2014. At the time of the writing of this article, no action had been taken on the bill. Before further consideration of the bill, the City Council has requested that the Los Angeles County Department of Public Health provide a recommendation.

While many states and localities have or are considering laws governing the use of electronic cigarettes in public places, other states have taken efforts to ensure

Following Minnesota’s lead, Oklahoma and South Carolina have introduced bills that are pending and, if enacted, would impose a tax on electronic cigarettes. Both Oklahoma Senate Bill 802 and South Carolina House Bill 4074 were introduced in 2013. No final action was taken on either of these bills. However, because both Oklahoma and South Carolina are “carry over” states, the bills will be considered during the state’s respective 2014 legislative session.

Oklahoma Senate Bill 802 includes the term “vapor product,” and an electronic cigarette is specifically included in the definition of a “vapor product.” Senate Bill 802 imposes a tax on electronic cigarettes, because it provides that all vapor products shall be taxed at a rate of five cents per vapor product unit. Similarly, South Carolina House Bill 4074 includes electronic cigarettes within the definition of “vapor product,” and imposes a tax of five cents per milliliter of