

Confusion Continues to Cloud Proposed Nicotine Tax

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Bryan Haynes, a partner specializing in tobacco industry regulatory compliance and enforcement matters, was quoted in the *Vapor Voice* article, “Confusion Continues to Cloud Proposed Nicotine Tax.”

Bryan Haynes, a partner with the law firm Troutman Pepper who specializes in tobacco and vapor regulations, said that, at a minimum, the proposed nicotine tax is “a hastily written addition” that will “have a negative impact on tobacco harm reduction efforts and public health.” He said that it’s the first time the tobacco industry has seen an excise tax placed on an ingredient instead of a finished good. “This is an unprecedented type of tax that will ultimately drive former smokers back to combustible products,” said Haynes, adding that taxing an ingredient could also cause unforeseen issues for manufacturers, such as moving material between factories.

“If a company is producing nicotine or even synthetic nicotine, moving product from one factory to another could trigger the need for an Alcohol and Tobacco Tax and Trade Bureau (TTB) license, and when product is removed, so to speak, from their factory, they would be responsible for remitting the taxes,” explained Haynes. “There may be a way, for example, if the company removed the nicotine from their factory and transported it in-bond to another TTB factory that you could make that work. But it’s just not clear. There is the potential for a lot of unforeseen issues to arise the way the tax is currently being proposed.”

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Azim Chowdhury, a partner at the law firm Keller and Heckman who specializes in vapor, nicotine and tobacco product regulation, said that’s just not possible and Haynes agrees.

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The FDA could, however, cite the inclusion of synthetic products in the PACT Act and the latest nicotine tax proposal in its lobbying efforts to change the TCA’s definition of tobacco, said Haynes. “I could see the FDA telling Congress, ‘You just amended the Internal Revenue Code to make these products subject to federal excise taxes just like tobacco-derived nicotine, so it’s not a big stretch to amend the Tobacco Control Act’ in the same way,” he explains. “That’s how I would do it. It’s not really a legal argument, but it could be a decent lobbying argument.”

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Haynes said that if the nicotine tax bill ever makes it to Biden’s desk, “he’s going to sign it.”

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