Bartlett Brief

THE JOSIAH BARTLETT *Center for* PUBLIC POLICY

Why expanding the tobacco tax to non-tobacco products is bad policy

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SUMMARY: Both the Democratic Legislature and Republican Gov. Chris Sununu included in their budgets an expansion of the state tobacco tax to electronic cigarettes. Bipartisan support for this policy is cause for concern because of its tax and health implications.

New Hampshire has no broad-based sales tax on goods, but it does have “sin” taxes on alcohol and tobacco. Legislators and the governor this year have proposed expanding the sin tax on tobacco to devices known as electronic cigarettes.

This expansion is pitched not as a tax increase, but as a technical correction to an existing tax. But the measure is more complicated than that. For starters, the tobacco tax exists to discourage the “sin” of tobacco smoking. But e-cigarettes *contain no tobacco*.

Current law (RSA 78:1) defines tobacco products as those that contain *both* tobacco and nicotine. E-cigarettes can discharge nicotine, a tobacco byproduct, but no e-cigarette burns tobacco. To get around that, the revision changes the “and” to “or.” The tobacco tax is thus changed to a *tobacco or nicotine* tax.

Nicotine is derived primarily from tobacco, but it does occur naturally in some other plants. It is habit-forming, like caffeine, but is not a carcinogen. It does not have the same health impacts as tobacco, and it is not always derived from tobacco. E-cigarette manufacturers are increasingly making their products with synthetic nicotine.

This new version of the tobacco tax, therefore, applies this sin tax to products that contain no tobacco and increasingly contain nothing derived from tobacco either.

An exemption that discourages kicking the habit

Lawmakers recognized that this expansion would tax consumer goods that help smokers quit the habit. The proposed law supposedly avoids this negative effect by excluding from taxation "any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product and is being marketed and sold exclusively for such approved use."

How many e-cigarettes does this exempt? None. No e-cigarette currently on the U.S. market fits into that tightly worded exclusion.

Worse, the exclusion ignores studies that have shown electronic cigarettes in general to be effective at helping people quit smoking — more effective, even, than FDA-approved methods.

- A study published in the New England Journal of Medicine in February found that "e-cigarettes were more effective for smoking cessation than nicotine-replacement therapy, when both products were accompanied by behavioral support." In that study, e-cigarettes were almost twice as effective than alternatives. The abstinence rate after one year was 18% for people who switched to e-cigarettes and 9.9% for people who chose a different nicotine-replacement product.

- A study published in 2016 in the British Medical Journal found that "(a)mong those making a quit attempt, use of e-cigarettes as a cessation aid surpassed that of FDA-approved pharmacotherapy." Long-term e-cigarette users had a 42.4% cessation rate vs. 14.2% for short-term e-cigarette users and 15.6% for those who didn't use e-cigarettes. The report's understated conclusion was that "long-term use of e-cigarettes was associated with a higher rate of quitting smoking."

- A 2015 study by Public Health England, a government agency similar to our FDA, found that "e-cigarettes are around 95% less harmful than smoking" and "there is no evidence so far that e-cigarettes are acting as a route into smoking for children or non-smokers."

Lawmakers acknowledge the value of excluding from taxation products that help people quit smoking. Yet they define those exempted products not by their actual effectiveness, but by their endurance of a lengthy and costly federal regulatory process. (The average FDA approval time for medical devices is seven years and costs millions of dollars, a 2016 review found.)

With studies showing that e-cigarettes can be more effective than FDA-approved smoking cessation products, this proposed law would encourage smokers to use less-effective smoking-cessation products while discouraging them from using more effective ones.

E-cigarettes are not actually cigarettes

This tobacco tax expansion also is based on misclassifying e-cigarettes as cigarettes.

Under existing state law, an e-cigarette is not a cigarette. To be a cigarette, it must contain tobacco. E-cigarettes are tobacco-free alternatives to cigarettes. Manufacturers market these devices as "cigarettes" because the term is familiar and because the devices can deliver the nicotine fix smokers crave. But they are *not tobacco products*.

Changing the definition of “tobacco product” to cover products that contain no tobacco is bad policy and bad precedent. In this case it also would discourage people from transitioning from real cigarettes to much healthier, tobacco-free e-cigarettes.

Impact on the New Hampshire Advantage

Finally, there is a potentially large impact on small businesses, particularly convenience stores in border towns.

On July 1, Vermont’s 92% tax on e-cigarettes took effect. Maine’s governor this month signed a law taxing e-cigarettes at 43% of the wholesale price. Massachusetts is considering a 75% vaping excise tax.

As our neighbors attempt to squeeze revenue out of products proven to help smokers quit, New Hampshire would be wise to remain an island of sanity and sound policy. New Hampshire’s lack of a tax on these products would encourage cross-border sales and further entrench the New Hampshire Advantage. Following our neighbors in adopting a poorly reasoned tax that comes with negative health effects would be a mistake.