

BILL ANALYSIS

H.B. 4481
By: Smith
Public Health
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Currently, many nicotine products in the Texas market are in violation of federal law. Lack of enforcement is creating a situation in which bad actors are not penalized for selling illegal products, and responsible retailers do not have the information needed to know what's legal and what's not. There is no current way, even for state agencies, to know which products are in compliance with FDA regulations and which are being sold in violation of federal law. H.B. 4481 seeks to address this issue by requiring manufacturers of e-cigarettes and alternative nicotine products to submit a certification to the comptroller of public accounts confirming that the manufacturer agrees to comply with the state's tobacco product laws and that the manufacturer's e-cigarettes and alternative nicotine products are in compliance with marketing authorizations requirements imposed by federal law. The bill would require manufacturers to provide certain documentation that confirms the accuracy of their certification and notice to the state if the status of any product changes and requires the comptroller to maintain a directory of all e-cigarette and alternative nicotine product manufacturers that have submitted the certification.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

H.B. 4481 amends the Health and Safety Code to apply statutory provisions regulating the sale of cigarettes, e-cigarettes, and tobacco products to the sale of alternative nicotine products. The bill defines "alternative nicotine product" as any noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, ingested, inhaled, or consumed by any other means, and does not include any cigarette, e-cigarette, tobacco product, or any product regulated as a drug or device by the FDA. The bill applies statutory provisions regarding the distribution of cigarettes, e-cigarettes, and tobacco products to alternative nicotine products in the same manner as those provisions apply to those other products, as follows:

- includes a transfer of possession from a retailer to a consumer in connection with a purchase, sale, or exchange for value of alternative nicotine products in the definition of "retail sale" and includes a person who engages in the practice of selling alternative nicotine products to consumers and the owner or a coin-operated alternative nicotine product vending machine in the definition of "retailer";

- creates a class C misdemeanor offense for a person who with criminal negligence sells, gives, or causes to be sold or given an alternative nicotine product to someone who is younger than 21 years of age or to another person who intends to deliver it to someone younger than 21 years of age and establishes the criminal responsibility of a retail employee for such an offense;
- provides for an exception to the application of and a defense to the prosecution of an offense involving the sale of an alternative nicotine product to someone who is younger than 21 years of age;
- prohibits a person from selling, giving, or causing to be sold or given an alternative nicotine product to someone who is younger than 30 years of age unless the consumer presents an apparently valid proof of identification;
- requires each person who sells alternative nicotine products at retail or by vending machine to post a sign with a statement as specified by the bill in a location that is conspicuous to all employees and customers and that is close to the place at which the products may be purchased;
- requires the comptroller of public accounts on request to provide the sign without charge to a distributor or wholesale dealer of alternative nicotine products;
- requires each retailer to notify within a certain time each individual employed by the retailer who is engaged in the retail sales of alternative nicotine products of state law with respect to the sale or distribution of the product to a person younger than 21 years of age and the sign posting requirements;
- prohibits a retailer or other person from offering alternative nicotine products for sale in a manner that permits a customer direct access to certain products or from installing or maintaining a vending machine containing alternative nicotine products;
- prohibits the distribution of alternative nicotine product by means of a free sample, a coupon that may be redeemed for a free product, and a coupon that a person younger than 21 years of age may redeem for a discounted product and prohibits a person, including an applicable permit holder, from accepting or redeeming, offering to accept or redeem, or hiring a person to accept or redeem such coupons; and
- authorizes the comptroller to make block grants to counties and municipalities to be used by local law enforcement for enforcement purposes that can reasonably be expected to reduce the extent to which alternative nicotine products are sold or distributed to persons who are younger than 21 years of age.

H.B. 4481 requires a manufacturer of e-cigarettes or alternative nicotine products that are sold in Texas, whether directly or through a wholesaler, retailer, or similar intermediary or intermediaries, to annually certify under penalty of perjury on a form prescribed by the comptroller, that the manufacturer agrees to comply with provisions relating to the distribution of cigarettes, e-cigarettes, or tobacco products and that the following is true:

- the manufacturer has received a marketing authorization or similar order for the e-cigarette or alternative nicotine product from the FDA; or
- the e-cigarette or alternative nicotine product was marketed in the United States as of August 8, 2016, the manufacturer submitted a premarket tobacco product application for the e-cigarette or alternative nicotine product to the FDA on or before September 9, 2020, and the application either remains under review by the FDA or a final decision on the application has not otherwise taken effect.

The bill requires a manufacturer to submit a separate certification form for each e-cigarette or alternative nicotine product that is sold in Texas and requires each annual certification form to be accompanied by a payment of \$1,000 and a copy of the marketing authorization or other order issued by the FDA for the e-cigarette or alternative nicotine product or evidence that the premarket tobacco product application for the e-cigarette or alternative nicotine product was submitted and a final authorization or order has not yet taken effect. The bill requires a manufacturer to notify the comptroller within 30 days of any material change to the certification form, including the issuance or denial of a marketing authorization or other order by the FDA or any other FDA order or action that affects the ability of the e-cigarette or alternative nicotine

product to be introduced or delivered into interstate commerce for commercial distribution in the United States.

H.B. 4481 requires the comptroller to maintain a directory that lists all e-cigarette and alternative nicotine product manufacturers and e-cigarettes and alternative nicotine products for which certification forms have been submitted and to update the directory as necessary to ensure accuracy. The bill prohibits a person from selling or offering for sale an e-cigarette or alternative nicotine product in Texas that is not included in the directory and prohibits a manufacturer from selling, either directly or through a wholesaler, retailer, or similar intermediary or intermediaries, an e-cigarette or alternative nicotine product in Texas that is not included in the directory. The bill requires each retailer to notify each individual employed by that retailer who is to be engaged in retail sales or alternative nicotine products that state law prohibits the sale or offer of sale of e-cigarettes or alternative nicotine products that are not included in the directory. The bill requires the comptroller, to facilitate the effective administration and enforcement of provisions relating to the distribution of cigarettes, e-cigarettes or tobacco products, to make the directory available to the public.

H.B. 4481 requires the comptroller to provide manufacturers notice and an opportunity to cure deficiencies before removing manufacturers or products from the directory and does the following with regard to such a notice:

- prohibits the comptroller from removing a manufacturer or its products from the directory until at least 15 days after the notice is sent either electronically or by facsimile to the electronic mail address or facsimile number provided by the manufacturer in its most recent certification;
- establishes that the manufacturer has 15 business days from the date of service of the notice to establish that the manufacturer or its products should be included in the directory; and
- establishes that a determination by the comptroller to not include or to remove from the directory a manufacturer or a manufacturer's product is subject to review by the filing of a civil action for prospective declaratory or injunctive relief.

The bill establishes that each retailer and wholesaler of a product that is removed from the directory has 21 days from the day the product is removed from the directory to remove the product from its inventory and return the product to the manufacturer for disposal. The bill subjects a retailer who sells or offers for sale an e-cigarette or alternative nicotine product that is not included in the directory in Texas to the disciplinary actions applicable to cigarette, e-cigarette, and tobacco product retailers.

H.B. 4481 subjects an e-cigarette or alternative nicotine product manufacturer whose e-cigarettes or alternative nicotine products are not listed in the directory and are sold in Texas, whether directly or through a wholesaler, retailer, or similar intermediary or intermediaries, to a civil penalty of \$1,000 and establishes that each e-cigarette or alternative nicotine product not listed in the directory constitutes a separate violation. The bill authorizes the comptroller or a person assisting the comptroller with enforcement with respect to the distribution of cigarettes, e-cigarettes, or tobacco products to seize and destroy e-cigarettes and alternative nicotine products that are not listed on the directory. The bill requires funds collected for a disciplinary action under the bill's provisions or under provisions relating to disciplinary action against cigarette, e-cigarette, or tobacco product retailers to be used to administer the bill's directory provisions or for block grants provided by the comptroller for use by local law enforcement agencies.

EFFECTIVE DATE

September 1, 2023.