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To: Joint Legislative Committee on Administrative Rules & Regulations
From: R.E. "Tuck" Duncan
Counsel for Kansas Vapers Association
RE: **ELECTRONIC CIGARETTE REGULATIONS**
Date: January 3, 2017

The regulations before the committee are those proposed for the implementation of the electronic cigarette taxes as prescribed by K.S.A. 79-3399:

79-3399. Tax on electronic cigarettes imposed; rates; inventory tax. (a) On and after ~~July 1, 2016~~, January 1, 2017, a tax is hereby imposed upon the privilege of selling or dealing in electronic cigarettes in this state by any person engaged in business as a distributor thereof, at the rate of \$.20 per milliliter of consumable material for electronic cigarettes and a proportionate tax at the like rate on all fractional parts thereof. For electronic cigarettes in the possession of retail dealers for which tax has not been paid, tax shall be imposed under this subsection at the earliest time the retail dealer: (1) Brings or causes to be brought into this state from without the state electronic cigarettes for sale; (2) makes, manufactures or fabricates electronic cigarettes in this state for sale in this state; or (3) sells electronic cigarettes to consumers within this state.

(b) The secretary of revenue shall adopt rules and regulations to implement the provisions of this section.

The Kansas Legislature enacted imposing the tax effective July 1, 2016 during the 2015 session and subsequently in House Substitute for Senate Bill 149 approved by the Governor May 11, 2016 delayed its implementation 6 months. This law was enacted as part of a conference committee report and was never separately voted upon by either Chamber (contrary to the joint rules). Thus the law did not address many issues that the regulation propose to address. Unfortunately the regulation exceed matters set forth in the statute, such as the definition of "consumable material."

The Notice for the hearing now planned for February 20, 2017 was in the Register December 22, 2016. However, as of today's date the regulations are still not available to the public on the Kansas Dept. of Revenue website, which means there has not been the required 60 days notice.

The difficulty with the department's definition is that when a 5 ml container of nicotine liquid AND "other material" is taxed at 20 cents per ml that generates \$1.00 in tax. Whereas, the nicotine therein does not exceed 1/10th of that volume such that under a proper definition the tax to be collected would be ten (10) cents.

Thus the legislature should revisit this statute and enact the definitions. Otherwise, where an agency regulation exceeds the statutory authority of the agency and conflicts with an applicable statute, the regulation is invalid and void. See *Ruddick v. Boeing Co.*, 263 Kan. 494, 500, 949 P. 2d 1132(1997); *Cray v. Kennedy*, 230 Kan. 663, 676, 640 P.2d 1219 (1982).

The Economic Impact Statement attached to the December 13, 2016 submission is wholly inadequate¹. There is no indication as to the cost to the industry regarding the time and expense required to comply with the regulations.

The state's own manual on preparing regulations and related documents ² provides:

The economic impact statement must include the following items:

- (l) A brief description of the proposed regulation and its intended effect;

¹ Subsequent to the initial statement, minor amendments were made, but they do not cure the defects noted.

² SEE also: Policy and Procedure Manual, State of Kansas, Sept. 2016 at <https://admin.ks.gov/docs/default-source/Chief-Counsel/reg-manual-final-draft-sept-2016>

(2)(A) Whether or not the proposed regulation is mandated by federal law as a requirement for participating in or implementing a federally subsidized or assisted program; and (B) whether or not the proposed regulation exceeds the requirements of applicable federal law;

(3) a description of the cost, the persons who will bear the cost, and those who will be affected by the proposed regulation, including the following:

- (A) The agency proposing the regulation;
- (B) other governmental agencies or units;
- (C) “small employers” (see K.S.A. 77-415 and 77-416);
- (D) private citizens; and
- (E) consumers of the products or services that are the subject of the regulation or its enforcement; and

(4) a description of any less costly or less intrusive methods that were considered by the state agency for achieving the stated purpose of the regulation and the reason that those methods were rejected in favor of the proposed regulation. See K.S.A. 77-416.

The statement provided does not contain adequate information to meet these criteria, particularly as it relates to items (3) (C),(D) or (E).

Agencies are advised that:

“ The economic impact statement is often of great interest to parties affected by the regulation, as well as to the Joint Committee on Administrative Rules and Regulations. Moreover, the process of evaluating the economic impact of a proposed regulation may reveal significant policy issues that agencies need to consider before the regulations are in final form. Therefore, agencies should take care in developing economic impact statements so that they are as comprehensive and informative as possible, given data that is available to the agency.

Think broadly when trying to identify potential economic impacts of proposed regulations. Consider whether or not there are less obvious, indirect economic impacts or hidden costs. For example, the economic impact of an increase in the number of continuing education units required for renewal of a license would clearly involve registration costs for the additional training. However, the increase in required continuing education is likely to have a number of other less obvious costs, including travel costs and lost productivity due to time away from work.

While it is preferable to develop dollar estimates of the economic impact, agencies may not always have adequate data to do so. In those instances, be sure to describe the nature and anticipated extent of the economic impact.” (Page 9, Policy Manual)³

It is clear from a review of the statement that in this case the Department ignored this admonition. For example since the initial announcement of these proposed regulations three (3) vapers businesses in Kansas have moved to adjoining states and several others have closed. Those possible consequences are not mentioned in the statement.

We also understand that the Department needs to seek clarifying legislation regarding enforcement, so we hope the Agency and Industry can work together to resolve these issues.

Thank you for your attention to these matters.

³ SEE also: Policy and Procedure Manual, State of Kansas, Sept. 2016 at <https://admin.ks.gov/docs/default-source/Chief-Counsel/reg-manual-final-draft-sept-2016>