



March 26, 2018

Federal Funding Bill Does Not Include Changes to FDA Regulations

Last week, Congress passed an omnibus spending bill for Fiscal Year 2018. However, despite significant industry efforts in an attempt to change the FDA Deeming Regulation predicate/grandfather date from February 15, 2007 to August 8, 2016, and to exempt premium cigars from these FDA regulations, the funding bill did not include these provisions.

The funding bill originally contained a provision known as the “Cole-Bishop Amendment” that would have changed the date for cigars, pipe tobacco, e-cigarettes, vapor products and hookah products to remain on the market without the need to file a special substantial equivalency application (“SE”) or a pre-market tobacco application (“PMTA”) with the FDA. The Cole-Bishop Amendment would have changed this predicate date to August 8, 2016 and essentially grandfathered all cigars, pipe tobacco, e-cigarettes, vapor products and hookah products that were on the market as of August 8, 2016 and eliminated the need for manufacturers of these products to file SE or PMTA applications for their products with the FDA.

This means that manufacturers of cigars, pipe tobacco, and hookah tobacco will likely need to file SE or PMTA applications with the FDA by August 8, 2021 for each product SKU that was not on the market as of February 15, 2007 or which has been changed in some way by the manufacturer. The deadline for filing a SE or PMTA for electronic cigarette or vapor products is now August 8, 2022. This means that these products can remain on the market up until these deadline dates for a SE or PMTA application. To remain on the market after these deadline dates, manufacturers will need to have filed a SE or PMTA application for their products and have the application either pending with the FDA or approved by the agency.

The premium cigar industry, including the Cigar Association of America, the International Premium Cigar and Pipe Retailers Association, and Cigar Rights of America, worked diligently to have language included in the funding omnibus bill to define and exempt premium cigars from the FDA deeming regulations. The premium cigar industry continues to work toward finding a solution to the issue of FDA regulation of premium cigars.

State Legislative Bill Introductions

State tobacco-related legislative bills that have been recently introduced are listed below alphabetically by state:

New Jersey: Governor's budget proposes to increase tobacco taxes and impose a new tax on e-cigarettes, modeled after the tax increases proposed in Senate Bill 1184 (tobacco products from 30 % to 68%, imposes tax on electronic cigarettes and similar nicotine delivery products at 75%, increases the tax on snuff from \$.75 per ounce to \$2.25 per ounce, taxes cigars at \$2.70 per cigar, cigarillos at \$.54 each, little cigars at \$.135 each, pipe tobacco at \$4.15 per ounce).

Vermont: House Bill 922 imposes a new tax of 46% of wholesale on e-cigarettes and vapor products.

State Legislative Bill Actions

State tobacco-related legislative bills that have been acted on by a state legislative committee or state legislature are listed below alphabetically by state:

Alaska: Senate Bill 15, which prohibits minors from purchasing or possessing electronic smoking products and requires any person who sells electronic smoking products to obtain a business license, passed the Senate by a vote of 18-0 and moved to the House on March 8, 2018. SB15 was then referred to House Labor and Commerce Committee and the House Finance Committee.

Hawaii: Three bills passed the House Committee on Consumer Protection and Commerce on March 20, 2018: Senate Bill 2304, which, effective July 1, 2050 (and in part, July 1, 2051), prohibits the sale of tobacco products, including e-cigarettes, within 500 feet of public or private schools, public parks and playgrounds, grandfathering in licensees until December 1, 2019; Senate Bill 2654, which, effective July 1, 3000, prohibits shipments of tobacco products to anyone other than a licensee, applies the tobacco products tax to e-liquids, and increases the tax on all tobacco products by an unspecified amount; and Senate Bill 2843, which, effective July 1, 2050, increases the tax on large cigars from \$0.50 to the lesser of \$1.00 each or 50% of the wholesale price plus \$0.50 each. Three bills died for failure to meet a procedural deadline: House Bill 1636, which would have increased the annual license fee for tobacco retailers from \$2.50 to \$500.00, the tobacco tax on cigarettes and little cigars from \$3.20 per pack to \$4.50 per pack and the tax on other tobacco products (not including large cigars) from 70% to 80% of the wholesale price; House Bill 1907, which would have prohibited sales of tobacco products by the Internet or mail order; and House Bill 2492, which would have prohibited shipments of tobacco products to anyone other than a licensee and applies the tobacco products tax to e-liquids.

Iowa: House Bill 2339, which increases the taxes on cigarettes from \$1.36 to \$2.86 per pack and on other tobacco products from 50% of the wholesale price to 67% of the wholesale price, imposes the latter tax on vaping products, and removes the \$0.50 cap on taxes on cigars for failure to meet a procedural deadline.

Kansas: House Bill 2768, which increases the tax on cigarettes by \$1.50 per pack, was referred to the House Appropriations Committee. Senate Bill 376, which increases the tax on cigarettes by \$1.50 per pack and also increases the tax on OTP from 10% to 65% of the wholesale price, was considered in a hearing in the Senate Assessment and Taxation Committee on March 22, 2018.

Kentucky: House Bill 366, which included a \$.50 per pack cigarette tax increase, was amended to remove the tax in the Senate Appropriations and Revenue Committee, passed the Senate and was sent to the House for concurrence on March 20, 2018. The House refused to concur on March 21, 2018.

Massachusetts: Senate Bill 1218, which now includes age 21 (exempts persons attaining age 18 before 1/1/17), a pharmacy ban and child-resistant packaging for liquid nicotine containers, reported favorably from the Joint Committee on Public Health and was referred to the Senate Ways and Means Committee on March 19, 2018.

Mississippi: Senate Bill 3048, which, as amended, may have been used to increase the cigarette tax, died due to the failure to meet a procedural deadline.

New York: Assembly Bill 9509B was amended to impose a vapor products tax of \$.40 per fluid milliliter and to authorize a city with one-million population to impose a vapor tax of \$.10 per fluid milliliter. The bill also contains language to allow a city of one-million or more to tax tobacco other than cigarettes at a rate not to exceed 10% of the purchase piece.

Oregon: House Bill 4146, which increases the tax on cigarettes by an undetermined amount, failed due to adjournment.

Utah: House Bill 324, which, as amended, requires tobacco retailers to obtain a city or county permit and changes the definition of those businesses considered retail tobacco specialty stores (and therefore prohibited from being located in certain areas) to include any business that obtains more than 35% of its revenue from tobacco sales, devotes 20% or more of its display or shelf space to tobacco products, or has a self-service display for tobacco products, but grandfathers in such retailers lawfully in business on December 31, 2015, was signed by the Governor on March 19, 2018. Two bills died when the Legislature adjourned: House Bill 88, which would have treated “alternative nicotine products” (pure nicotine, dissolvables, and nicotine laced foods and beverages) and “non-therapeutic nicotine devices” (nicotine inhalers or sprays) as electronic cigarettes for licensing purposes and imposed a tax; and House Bill 296, which would have increased the age for sale, purchase, use and possession of tobacco products from 19 to 20 effective July 1, 2019 and from 20 to 21 effective Jan. 1, 2020.

Vermont: House Bill 922, which imposes a new tax of 46% of wholesale on e-cigarettes and vapor products, was up for third reading on the House floor on March 22, 2018.

Washington: House Bill 1054, which increases the legal age to purchase tobacco products and vapor products from 18 to 21 years of age, failed due to adjournment of the legislature.