

ONE HUNDRED SIXTH LEGISLATURE - FIRST SESSION - 2019
COMMITTEE STATEMENT
LB397

Hearing Date: Monday March 04, 2019
Committee On: General Affairs
Introducer: Briese
One Liner: Change provisions relating to tobacco and other nicotine products and tobacco manufacturers

Roll Call Vote - Final Committee Action:
Advanced to General File

Vote Results:
Aye: 8 Senators Arch, Blood, Brandt, Briese, Hunt, Lowe, Moser, Wayne
Nay:
Absent:
Present Not Voting:

Oral Testimony:

Proponents:

Tom Briese
Daniel Muelleman
Kathy Siefken
Tim Keigher

Representing:

Introducer
Nebraska Attorney's General Office
Nebraska Grocery Industry Association
Nebraska Petroleum Marketers and Convenience Store Assn.

Opponents:

Tim Bowen
John Lindsay
Eric Johnson

Representing:

Alohma Vapor and Nebraska Vape Vendor Alliance
Winnebago Tribe
Nebraska Vape Vendor Alliance

Neutral:

Representing:

Summary of purpose and/or changes:

LB397 addresses concerns in areas of tobacco and nicotine laws by making four main changes and harmonizing provisions. This legislation addresses tobacco product market changes and provide additional enforcement tools to the Attorney Generals Office. The major changes in LB397 are as follows:

1. LB397 amends sections 28-1218 to 28-1429.03 to provide new definitions and retail licensing terms to address existing potential legal loopholes and anticipate new and soon to arrive products in the consumer nicotine market by creating a new definition of Electronic Nicotine Delivery Systems or ENDS. LB397 requires ENDS retailers to obtain the same license as cigarette and other product retailers in order to prevent a resurgence of unregulated Non-Participating Manufacturers (NPM) fringe products in Nebraska and safeguard against future Tobacco Master Settlement Agreement (MSA) problems.

2. LB397 adds a new section (Section 12) within section 69-2703.02 to allow for NPM escrow assignments. Nebraska currently has half a dozen Nonparticipating Manufactures (NPM) active in the State, but the Attorney General must continue to monitor dozens of additional inactive NPM due to the continued existence of NPM escrow amounts on deposit for sales in previous years by companies that are no longer active. This new section 12 within LB397 would

provide inactive NPMs with the option to assign those escrow accounts to the State and will likely lead to receipt of NPM escrow money in lieu of maintained oversight or prosecution.

3. LB397 amends section 69-2707.01 which deals with the bond requirements for the NPM Adjustment Settlement Agreement (NPMASA). The NPMASA says that non-compliant NPM cigarettes are cigarettes on which state excise tax (SET) was paid but escrow is not deposited, or is released by ways other than as provided for by state or assignment. The NPMASA allows for exclusion of cigarettes from the count of non-compliant NPM cigarettes that would have otherwise applied, but only if the relevant state has the appropriate NPM bond statute in effect as described in the settlement. This is a safe harbor provisions on the default laws.

4. LB397 amends section 77-2601 (5) to update the definition of cigarette for tax and stamping purpose. LB397 changes Nebraska law to classify cigarettes for tax and stamp purposes in much the same way as the consumer market views and purchases their tobacco products. Included in the new definition of cigarette is the entire class of mass produced, high consumable, affordable priced, tobacco-based nicotine delivery systems available such as the small filtered cigars sold in packs of 20 and cartons of 200 for half the price of the cheapest cigarette. LB397 also would include in such a definition the new class of product called the heat not burn tobacco product. LB397 includes heat not burn as taxable cigarettes and therefore fixes and avoids tax and escrow loopholes for current products on the market and anticipates those of future products.

LB397 makes the following changes by section:

Section One of the Bill: Amends section 28-418 to add electronic nicotine delivery systems language in place of vapor products language for purposes of the statute which makes possession of certain products under the age of eighteen a Class V Misdemeanor unless a person charged with a violation under this section furnishes evidence of the person or persons selling or giving him or her the products.

Section Two of the Bill: Amends Section 28-418.01 to define for purposes of section 28-418-39-1429.03 certain products including electronic nicotine delivery systems.

Electronic delivery system means any product or device containing nicotine, tobacco, or tobacco derivatives that employs a heating element, power source, electronic circuit or other electronic, chemical or mechanical means, regardless of shape or size to stimulate smoking by delivering the nicotine, tobacco, or tobacco derivatives in vapor, fog, mist, gas or aerosol form to a person inhaling from the product or device.

Electronic nicotine delivery system includes, but is not limited to the following:

- Any substance containing nicotine, tobacco, or tobacco derivatives, whether sold separately or in combination with a product or device that is intended to deliver to a person nicotine, tobacco, or tobacco derivatives in vapor, fog, mist, gas, or aerosol form;

- Any product or device marketed, manufactured, distributed, or sold as an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, electronic hookah, or similar products, names, descriptors or devices; or

- Any component, part, or accessory of such a product or device that is used during operation of the product or device when sold in combination with any substance containing nicotine, tobacco, or tobacco derivatives.

Electronic nicotine delivery system does not include the following:

- An alternative nicotine product, cigarette, cigar, or other tobacco product, or any product regulated as a drug or device by the United States Food and Drug Administration under Chapter V of the Federal Food, Drug and Cosmetic Act; or

- Any component, part, or accessory of such a product or device that is used during operation of the product or device when not sold in combination with any substance containing nicotine, tobacco, or tobacco derivatives.

Adds language that would amend the definition of what is and is not considered a self-service display to add an electronic nicotine delivery system in the list of products included and remove vapor product language.

Removes language defining vapor products.

Section Three of the Bill: Amends section 28-419 to include electronic nicotine delivery systems language and remove vapor products language from the Class III Misdemeanor offense of selling, giving or furnishing such tobacco products to any minor under eighteen years of age.

Section Four of the Bill: Amends section 28-1419 to include electronic nicotine delivery system language in the list of products that it is unlawful to sell, keep for sale or give away in course of trade without obtaining a license to do so in accordance with section 28-1421 and 28-1422. Includes electronic nicotine delivery system in the list of products it is unlawful to purchase or receive for purposes of resale without a valid tobacco license to retail such products at the time the products are purchased or received.

Section Five of the Bill: Amends section 28-1421 which describes the license process for sale of cigars, tobacco, cigarettes and cigarette material to include electronic nicotine delivery systems.

Section Six of the Bill: Amends section 28-1423 to add electronic nicotine delivery systems to the list of products that if more than 150,000 are sold at wholesale by a person, partnership, LLC or Cooperation the required annual license fee is \$100 and if less than that is sold at wholesale annually the required license fee annually is \$15. Any individual, partnership, LLC or corporation applying for a license fee of \$15 must include a sworn affidavit that less than they sell less than 150,000 in aggregate of such products at wholesale annually. Amends language specifying that any person swearing falsely in such affidavit will be guilty of perjury and upon conviction punished under 28-915 and will have their wholesalers licensed revoked until the \$100 fee is paid, by removing the \$100 specification so it reads until the fee is paid.

Section Seven of the Bill: Amends section 28-1424 to specify the license provided for in section 28-1421 and 28-1422 also authorizes the sale electronic nicotine delivery systems.

Section Eight of the Bill: Amends Section 28-1425 to remove vape products language and include electronic nicotine delivery systems language to the list of products that if any licensee shall sell, give, or furnish in any way to any person under the age of eighteen years is guilty of a Class III misdemeanor.

Section Nine of the Bill: Amends section 28-1427 to remove vape products language and include electronic nicotine delivery systems language to the list of products that if any person under the age of eighteen years who obtains such products from a licensee by representing that he or she is of the age of eighteen years or over is guilty of a Class V misdemeanor.

Section Ten of the Bill: Amends section 28-1429.02 to remove vape products language and include electronic nicotine delivery systems language to this section which provides that except as provided in subsection (2) of this section it shall be unlawful to dispense such products from a vending machine or similar device and adds electronic nicotine delivery system language for violation and conviction of this section. Adds electronic nicotine delivery system language and removes vapor products language to subsection (2) of this section which sets out under what circumstances such products may be dispensed from a vending machine or similar device.

Section Eleven of the Bill: Amends section 28-1429.03 to remove vape products language and include electronic nicotine delivery system language in this section which specifies when such products can and cannot be sold or distributed through a self-service display.

Section Twelve of the Bill: Adds a new section which specifies that notwithstanding subdivision (2) (b) of section 69-2703, a tobacco product manufacturer that elects to place funds into a qualified escrow fund pursuant to subdivision (2) (a) of section 69-2703 may make an irrevocable assignment of its interest in the fund to the benefit of the State of Nebraska. Such assignment shall be permanent and apply all monetary amounts in the subject qualified escrow fund or that may subsequently come into the fund, including those deposited into the qualified escrow fund prior to the assignment being executed, those deposited into the qualified escrow fund after the assignment is executed, and

interest or other appreciation on the amounts. The tobacco product manufacturer, the Attorney General, and the financial institution where the qualified escrow fund is maintained may make such amendments to the qualified escrow fund agreement, the title to the account, and the account itself as may be necessary to effectuate an assignment of rights executed pursuant to this subsection (1) or a withdrawal of amounts from the qualified escrow fund pursuant to subsection (2) of this section. An assignment of rights executed pursuant to this section shall be in writing, shall have received prior approval issued in writing by the Attorney General, shall be signed by the tobacco product manufacturer or a duly authorized representative of the tobacco product manufacturer making the assignment, and shall become effective upon delivery of the assignment to the Attorney General and the financial institution where the qualified escrow fund is maintained.

(2) Notwithstanding subdivision (2)(b) of section 69-2703, any escrow amounts assigned to the State of Nebraska pursuant to subsection (1) of this section shall be withdrawn by the state upon request by the State Treasurer and approval by the Attorney General. Any amounts withdrawn pursuant to this subsection shall be remitted to the State Treasurer for distribution in accordance with Article VII, Section 5, of the Constitution of Nebraska, and shall be calculated on a dollar-for-dollar basis as a credit against any judgment or settlement described in subdivision (2) (b) of section 69-2703 which may be obtained against the tobacco product manufacturer who has assigned the amounts in the subject qualified escrow fund. Nothing in this section shall be construed to relieve a tobacco product manufacturer from any past, current, or future obligations the manufacturer may have pursuant to section 69-2701 to 69-2711 and section 12 of this act.

Section Thirteen of the Bill: Amends section 69-2705 to add section 12 of this act to this list of sections that a package as defined must be applied consistent with.

Section Fourteen of the Bill: Amends section 69-2706 to add section 12 of this act to a lists of sections which the State can enforce against nonparticipating manufacturers who consent to be sued under enforcement of such provisions.

Section Fifteen of the Bill: Amends section 69-2707 to add section 12 of this act to a list of enforcement provisions for the requirement of nonparticipating manufacturers to have an agent in Nebraska for purpose of service of process.

Section Sixteen of the Bill: Amends section 2707.01 to update bond requirements for the Non-Participating Manufacturers Adjustment Settlement Agreement. Specifies that all nonparticipating manufacturers are subject to the certification requirements of section 69-2706, or whose sales are authorized pursuant to an agreement under section 77-2602.06 shall post a bond or its cash equivalent, for the benefit of the state which is subject to execution under subsection 5 of this section.

Requires that the cash equivalent of the bond shall be posted by the nonparticipating manufacturer in an account approved by the Attorney General.

Adds the requirement to provide evidence to the Attorney General to the requirement that a nonparticipating manufacturer shall post the bond or its cash equivalent and shall provide evidence of such posting to the Tax Commissioner annually as required by section 69-2607, and at least ten days in advance of each calendar quarters as a condition t the nonparticipating manufacturer and its brands or brand families being including in the directory.

Specifies that the amount of the bond or its cash equivalent, shall be the greater of:

- (a) One hundred thousand dollars;
- (b) The greatest required escrow amount due from the nonparticipating manufacturer, or its predecessors, successors, affiliates, importers or stamping agents, as such terms may be defined and liabilities may be established within section 69-2701 to 69-2711 and section 12 of this act, for any of the precedent twenty calendar quarters; or
- (c) The greatest required annual total of quarterly escrow amounts due from the nonparticipating manufacturer, or its predecessors, affiliates, importers or stamping agents, as such terms may be defined and liabilities may be established within section 69-2701 to 69-2711 and section 12 of this act, for any of the preceding five calendar years, if the Attorney

General deems the nonparticipating manufacturer to pose an elevated risk of non-compliance.

The Attorney General may deem a nonparticipating manufacturer to pose an elevated risk for noncompliance if:

(a) The nonparticipating manufacturer or its brand or brand families, or any predecessor, successor, affiliate, or importer or any of their brands or brand families, has failed to deposit fully the amount due on an escrow obligations with respect to any state at any time during the calendar year or within the preceding five calendar years unless either;

(i) The nonparticipating manufacturer did not underdeposit knowingly or recklessly and promptly cured the underdeposit within one hundred eighty days of notice; or

(ii) The underdeposit or lack of deposit is the subject of a good faith dispute as documented to the satisfaction of the Attorney General and the underdeposit is cured within one hundred eighty days of entry of a final order establishing the amount of the required escrow deposit;

(b) Any state has removed the nonparticipating manufacturer or its brands or brand families, or any predecessor, successor, affiliate, or importer or any of their brands or brand families from the states tobacco directory for noncompliance with the states escrow deposit or tobacco tax laws at any time during the calendar year or within the preceding five calendar years;

(c) Any state has litigation pending against, or an unsatisfied final judgment against, the nonparticipating manufacturer or its brands or brand families, or any predecessor, successor, affiliate, or importer or any of their brands of brand families for escrow for penalties, fees, costs, refunds, or attorneys fees related to noncompliance with state escrow laws;

(d) The nonparticipating manufacturer, or any predecessor, successor, or affiliate, sells its cigarettes or tobacco products directly to consumers via remote or other non-face-to-face means;

(e) A state or federal court determines that the nonparticipating manufacturer, or any predecessor, successor, or affiliate, has violated any tobacco tax or tobacco control law or engaged in unfair business practice or unfair competition;

(f) Any state has suspended or revoked a license granted to the nonparticipating manufacturer, or any predecessor, successor, or affiliate, to engage in any aspect of tobacco business;

(g) Any state or federal court has determined that the nonparticipating manufacturer, or any predecessor, successor, or affiliate, failed to comply with state or federal law imposing marking, labeling, and stamping requirements or requiring information to be affixed to, or contained in, the labels, markings, or packaging; or

(h) The nonparticipating manufacturer fails to submit or complete any required forms, documents, certification, or notices, in a timely manner or to the satisfaction of the Attorney General or Tax Commissioner.

Removes original language setting out factors to determine the amount of the bond and replaces with new subsection (2) language.

Section Seventeen of the Bill: Amends section 69-2709 which sets out when the license of a stamping agent shall be subject to termination unless expressly permitted under certain statutes including section 12 of this act.

Adds section 12 of this act to a list of statutes that it is unlawful for any manufacturer, importer, or stamping agent to knowingly submit any false information required pursuant to such sections.

Adds section 12 of this act to a list of statutes that if licensee acts inconsistent with its directory license shall be subject to termination.

Section Eighteen of the Bill: Amends section 69-2710 to include section 12 of this act to a list of sections that a tobacco product manufacturer shall have 30 days to come into compliance with before it can be removed from the directory.

Adds section 12 of this act to the list of sections that a tobacco product manufacturer must provide evidence of compliance with and the Tax Commissioner must determine compliance with during an Administrative hearing regarding the Tax Commissioners original determination not to include such manufacturer in the directory.

Section Nineteen of the Bill: Amends section 69-2710.01 which requires a report to the Tax Commissioner if any person during a month acquired, purchased, sold, possessed, transferred, transported or caused to be transported in or into this state cigarettes of a tobacco product manufacturer or brand family that was not in the directory at the time to add section

12 of this act to a list of sections the Tax Commissioner must enforce.

Section Twenty of the Bill: Amends section 69-2710.03 to add section 12 of this act to a list of sections the Tax Commissioner may adopt and promulgate rules and regulation to carry out.

Section Twenty One of the Bill: Amends section 77-2601 to amend the definition of cigarettes for tax and stamping purposes. Cigarette definition is amended to be: any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consist or contains (a) any roll of tobacco wrapped in paper or in any substance not containing tobacco; (b) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered or purchased by, consumers as a cigarette; or (c) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subdivision (5)(a) of this section.

Removes original language defining cigarettes.

Section Twenty Two of the Bill: Amends section 77-2603 to add section 12 of this act to a list of statutes which specifies that a tax meter impression on a package of cigarettes shall be treated as stamped cigarettes for purposes of such sections.

Adds section 12 of this act to section requirements that must be met in order to be a licensed stamping agent.

Adds section 12 of this act to requirements that must be met by applicants located outside the state in designating an agent for service of process in Nebraska.

Section Twenty Three of the Bill: Original Sections are repealed.

Tom Briese, Chairperson