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## Coates' Canons Blog: Regulating Electronic Cigarettes in North Carolina, Part 1: Federal and State Regulation

By Jill Moore

Article: <https://canons.sog.unc.edu/regulating-electronic-cigarettes-in-north-carolina-part-1-federal-and-state-regulation/>

This entry was posted on July 31, 2014 and is filed under Boards Of Public Health, Ordinances & Police Powers, Public Health, Smoking Laws

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**UPDATE: The 2014 Technical Corrections Act (S.L. 2014-115) made further changes to state regulation of vapor products in correctional facilities. An updated summary of 2014 legislation on this issue is available [here](#).**

If you watch television commercials or consume any form of news media, you've heard of e-cigarettes—battery-operated products that can look a lot like conventional cigarettes, but they don't burn tobacco. They work by heating a cartridge with a solution that includes nicotine and sometimes flavors. Heating the solution produces a vapor that the e-cigarette user inhales. Many brands of e-cigarettes have an end that lights up when the product is in use, mimicking the appearance of a conventional tobacco cigarette. Use of the products is described as “vaping” rather than smoking.

E-cigarettes are the subject of pending federal rules, and they have recently been the subject of some state law regulation as well. Depending on where you live, they may also be the subject of local regulations. In this two-post series, I'll summarize the current status of e-cigarette regulation in North Carolina. Today's post addresses federal and state regulation of electronic cigarettes and other vapor products. Part 2 will address local government authority to regulate these products in North Carolina.

### Federal Regulation of E-Cigarettes

In late April, the federal Food and Drug Administration (FDA) announced its intent to regulate e-cigarettes and certain other products under the authority of the Family Smoking Prevention and Tobacco Control Act of 2009. The proposed rule is available [here](#). The rule would prohibit sales of the products to youth, require the products to include health warnings, prohibit most vending machine sales, and require manufacturers to register their products with the FDA and provide ingredient lists. It would also subject new products to pre-market FDA review, and permit manufacturers to make claims about reduced risks associated with vapor products only if the FDA confirms that such claims are supported by scientific evidence. The comment period on the proposed rule closed on July 9. Final regulatory action is expected by June 2015.

The FDA also has the authority to regulate products that are marketed as smoking cessation aids, such as nicotine skin patches or chewing gum. This authority falls under Chapter V of the federal Food, Drug, and Cosmetic Act. The next section describes several recently enacted state laws addressing electronic cigarettes—note that they have all specifically excluded any products that are regulated under Chapter V. To date, the FDA has not approved e-cigarettes or other vapor products as **smoking cessation devices**.

### State Regulation of E-Cigarettes in North Carolina

There is no comprehensive statewide regulation of e-cigarettes and other vapor products in North Carolina, but recent legislation has tackled three issues related to these products: sales to minors under the age of 18, taxation of the products, and use of the products in correctional facilities.

#### *Sales to Minors Prohibited*

Legislation enacted in 2013 banned the sale of e-cigarettes to minors in North Carolina, effective August 1, 2013. The sale of tobacco products to minors had long been prohibited by state law (**G.S. 14-313**), but the definition of “tobacco product”

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in the statute referred only to products that actually contained tobacco. E-cigarettes contain nicotine, which is derived from tobacco, but they don't contain tobacco itself. **S.L. 2013-165** (S 530) amended the definition of tobacco product to include vapor products, defined as noncombustible products that use a mechanical heating element, battery, or electronic circuit to heat a liquid nicotine solution in a vapor cartridge. This definition captures electronic cigars, cigarillos and pipes as well as e-cigarettes. (However, products regulated by the FDA as smoking cessation devices under Chapter V of the federal Food, Drug and Cosmetic Act would be specifically excluded.) The law made it a class 2 misdemeanor to sell or distribute vapor products to a person under the age of 18. Proof of age is required if the seller reasonably believes a prospective purchaser is younger than 18.

Other provisions in the new legislation required retail distributors to post signs informing consumers of the prohibition on sales to minors, and prohibited the sale of vapor products through vending machines (with an exception for vending machines in establishments that are open only to persons age 18 or older, or that are under the continuous control of the owner, licensee or employee). Another new provision addressed Internet sales of both conventional tobacco products and vapor products. It requires persons engaged in Internet distribution of these products to verify the age of a person who orders the product, using an independent, third-party age verification service that compares public record information to the information provided by the person who places the order.

The legislation also addressed some aspects of local regulation of vapor products. The statute amended by S.L. 2013-165 already included a "statewide uniformity" provision prohibiting local ordinances or rules concerning the sale, distribution, display, or promotion of cigarettes and other tobacco products (G.S. 14-313(e)). The new legislation amended this provision to add tobacco-derived products, vapor products, and cigarette wrapping products to the list of items that are subject to this prohibition. However, note that this provision does not address local regulation of *use* of the products—it is limited to local regulation of sale, distribution, display or promotion. My next post will discuss local regulation of use of tobacco products in more detail, but for now I'll just point out that local governments have regulated the use of tobacco products for many years. The legislature has defined the parameters for local regulation of *smoking* in various ways since 1993, but it has never taken similar action affecting local regulation of the use of smokeless tobacco products. (For more information about the history of local smoking regulation in North Carolina, see this **2009 health law bulletin**, authored by my colleague Aimee Wall.)

#### *Taxation of E-cigarettes*

In May, the General Assembly enacted omnibus tax legislation that created a new excise tax on vapor products. Section 15.1 of **S.L. 2014-3** (H 1050) defines the terms "vapor product" and "consumable product" for purposes of state tax laws. The definition of vapor product is similar but not identical to the definition of that term in the law banning sales of vapor products to minors, and includes electronic cigarettes, cigars, cigarillos, and pipes. (However, products regulated by the FDA as smoking cessation devices under Chapter V of the federal Food, Drug and Cosmetic Act would be specifically excluded.) The definition of "consumable product" is "[a]ny nicotine liquid solution or other material that is depleted as a vapor product is used."

The legislation imposes a tax on the consumable product—or in other words, the nicotine solution that is used in e-cigarettes and other vapor products. The tax is set at 5 cents per milliliter of consumable product. The **fiscal note** for the legislation estimated that the tax will generate about \$5 million in revenue annually.

#### *Prohibition on E-cigarettes in Correctional Facilities*

The **omnibus tax legislation** also included provisions addressing e-cigarettes and other vapor products in correctional facilities.

**G.S. 148-23.1** prohibits tobacco products on state correctional facility premises. Section 15.2(a) of the omnibus tax bill amended G.S. 148-23.1 to add vapor products to the list of prohibited tobacco products. This prohibition extends to all persons on the premises, including employees and visitors as well as inmates. It became effective July 1, 2014.

Section 15.2(b) amends a criminal statute (**G.S. 14-258.1**) to prohibit all persons from furnishing vapor products to inmates of prisons or jails, and to prohibit local jail inmates from possessing vapor products. Violation of the statute is a class 1 misdemeanor. This provision becomes effective December 1, 2014.

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However, pending legislation could change the new provisions. Two versions of **House Bill 1133** (the technical corrections bill) have modified the correctional facilities provisions, but in different ways. The **third edition** of the bill, which was approved by the House, amended both of the above provisions to provide that vapor products would be allowed in prisons or jails for inmates involved in authorized smoking cessation programs. House Bill 1133 is now in its **fifth edition**, having been modified by the Senate. The Senate's modifications removed the House's provisions affecting state prison inmates. The Senate would also rewrite G.S. 14-258.1 to expressly permit local confinement facilities to give or sell vapor products to inmates in their custody. Earlier today, the House failed to concur in the Senate's version of this 67-page, multi-issue bill, so it will not become law unless the two chambers reach an agreement on the bill and the Governor either signs it or at least declines to veto it. **[UPDATE: The version of H 1133 that ultimately passed expressly permits local jails to give or sell vapor products to inmates. An updated summary of legislation regarding vapor products in correctional facilities is available here.]**

#### *E-cigarettes in Restaurants and Bars Subject to NC's Smoke-Free Public Places Law*

I'll conclude the discussion of state regulation of e-cigarettes by noting a significant state law that *does not* apply to e-cigarettes: North Carolina's Smoke-Free Public Places Law (**G.S. Chapter 130A, Article 23**). This law prohibits smoking in most of North Carolina's restaurants and bars, as well as in state government buildings and vehicles. It also authorizes local governments to adopt ordinances, board of health rules, or policies restricting smoking in local government buildings or grounds, and in public places (subject to some restrictions). However, this law addresses only *smoking*, which it defines as "the use or possession of a lighted cigarette, lighted cigar, lighted pipe, or any other lighted tobacco product." When the law was first enacted, there was some debate about whether e-cigarettes even counted as a tobacco product for purposes of this law. While the recent trend has been to include e-cigarettes and other vapor products in the definition of tobacco products for regulatory purposes, this law still does not cover them, because they are not lighted products. (Lighted is not defined in the statute, but in this context it probably means ignited or burning, terms that do not describe the mechanism of action of vapor products.)

This interpretation means that e-cigarettes are not subject to the statewide ban on smoking in restaurants and bars. (Of course, the owners or operators of restaurants and bars may certainly choose to prohibit the use of e-cigarettes on their premises.) This interpretation also means that this particular law does not provide local governments with the authority to regulate the use of e-cigarettes on local government property or in public places. That authority comes from other laws, which will be the subject of my next post.

## Links

- [www.sog.unc.edu/resources/legal-summaries/sl-2014-3-section-152-sl-2014-115-section-23-vapor-products-correctional-facilities](http://www.sog.unc.edu/resources/legal-summaries/sl-2014-3-section-152-sl-2014-115-section-23-vapor-products-correctional-facilities)
- [www.federalregister.gov/articles/2014/04/25/2014-09491/deeming-tobacco-products-to-be-subject-to-the-federal-food-drug-and-cosmetic-act-as-amended-by-the](http://www.federalregister.gov/articles/2014/04/25/2014-09491/deeming-tobacco-products-to-be-subject-to-the-federal-food-drug-and-cosmetic-act-as-amended-by-the)
- [www.fda.gov/forconsumers/consumerupdates/ucm198176.htm](http://www.fda.gov/forconsumers/consumerupdates/ucm198176.htm)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=14-313](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=14-313)
- [www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2013-2014/SL2013-165.pdf](http://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2013-2014/SL2013-165.pdf)
- [sogpubs.unc.edu/electronicversions/pdfs/hlb90.pdf](http://sogpubs.unc.edu/electronicversions/pdfs/hlb90.pdf)
- [www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2013-2014/SL2014-3.pdf](http://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2013-2014/SL2014-3.pdf)
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