STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL July 30, 2014	No. I14-004 (R14-012) Re: Whether certain statutes apply to electronic cigarettes

To: The Honorable Steven B. Yarbrough
Arizona State Senate

Questions Presented

You asked for an opinion regarding whether certain Arizona statutes apply to a "vapor product," more commonly known as an "electronic cigarette." Specifically, you asked the following:

1. Are electronic cigarettes subject to any of the tobacco luxury taxes set forth in Arizona Revised Statutes ("A.R.S.") title 42, chapter 3?
2. Do the smoking prohibitions in A.R.S. § 36-601.01 apply to electronic cigarettes?

Summary Answer

1. No. Electronic cigarettes as described in this Opinion are not subject to any of the tobacco luxury taxes set forth in A.R.S. title 42, chapter 3.
2. No. The smoking prohibitions of A.R.S. § 36-601.01 do not apply to electronic cigarettes.

Background

There is no definition of the term "electronic cigarette" under Arizona law. However, as you state, an electronic cigarette is also referred to and statutorily defined as a vapor product. Arizona law includes a criminal prohibition against furnishing electronic cigarettes to minors. *See* A.R.S. § 13-3622. Section 13-3622 defines "vapor product" as "a noncombustible tobacco-derived product containing nicotine that employs a mechanical heating element, battery or circuit, regardless of shape or size, that can be used to heat a liquid nicotine solution contained in cartridges." A.R.S. § 13-3622(E)(3). Although this definition does not apply to the statutes at the center of your inquiry, it does describe the basic elements of the product commonly referred to as an electronic cigarette.

There are disposable, rechargeable, pen-style, and tank-style versions of electronic cigarettes.[1] The basic components in all versions include a battery and other accompanying electronics, a heating element, and a liquid nicotine solution that is heated to create a vapor (also referred to as an aerosol) that the user inhales. *See* source cited at note 1. The liquid nicotine in electronic cigarettes is "derived" from tobacco. *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891, 893 (D.C. Cir. 2011). In contrast, combustible cigarettes contain actual pieces of tobacco that are ignited and then continue to burn. However, given the infancy of this product market and the current exponential advancement of technology, different versions may already exist or will be created shortly. This Attorney General opinion is limited to an analysis of electronic cigarettes in the forms described above.

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[1] Rachel Grana, Neal Benowitz, Stanton A. Glantz, *Background Paper on E-cigarettes (Electronic Nicotine Delivery Systems)*. Center for Tobacco Control Research and Education, University of California, San Francisco, a WHO Collaborating Center on Tobacco Control. Prepared for World Health Organization Tobacco Free Initiative. December 2013. http://pvw.escholarship.org/uc/item/13p2b72n.

The use of electronic cigarettes has increased significantly in recent years, prompting States to consider regulatory options that include the implementation of luxury taxes, age restrictions, and limitations on where electronic cigarettes can be used. Some States such as New Jersey and Utah have expanded their "smoke-free" prohibitions to include electronic cigarettes. *See* N.J. Rev. Stat. § 26:3D-56(c) & -57(3); Utah Code Ann. § 26-38-2 and -3. The United States Food and Drug Administration ("FDA") has proposed that electronic cigarettes be subject to the Federal Food, Drug, and Cosmetic Act ("the FD&C Act").[2] This legislative and regulatory activity is taking place as public health concerns have arisen based on the still-uncertain health effects from use of or exposure to electronic cigarettes. The FDA's current position is that "[w]e do not currently have sufficient data about e-cigarettes to determine what effects they have on the public health." *See* source cited at note 2. The FDA refers to potential cessation benefits while acknowledging the "existence of toxicants in both the e-cigarette liquid and the exhaled aerosol of some e-cigarettes." *Id.* Notwithstanding the emergent regulatory developments, the essential characteristics of e-cigarettes currently on the market provide a sufficient basis to render an opinion in response to the two questions that you pose.

Analysis

1. Arizona's Luxury Tax on Tobacco Products Does Not Apply to Electronic Cigarettes.

The first question is whether electronic cigarettes, as described above, are subject to the tobacco luxury taxes in A.R.S. title 42, chapter 3. Arizona imposes luxury taxes on tobacco products at rates that vary by category of tobacco product. A.R.S. §§ 42-3052(5)-(9), -3251, -3251.01, -3251.02. The categories of tobacco products subject to Arizona's luxury tax are

[2] Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, Vol. 79, No. 80, Fed. Reg. 23142, 23157 (proposed April 25, 2014) (to be codified at 21 CFR pts. 1100, 1140, and 1143).

enumerated at A.R.S. § 42-3052(5)-(9). These subsections define "cigar," "cigarette," and "tobacco products." A.R.S. § 42-3001(3), (4), (18). However, the definition of "tobacco products" is merely a reference to the categories of tobacco products listed in A.R.S. § 42-3052(5)-(9).[3] The remaining tobacco product categories set forth in A.R.S. § 42-3052(5)-(9) are not defined in the statute, the Arizona Department of Revenue has not promulgated any administrative rules that further describe these categories, and no court has provided a more detailed description of these categories. The answer to your inquiry therefore turns on whether the statutory definitions apply to an electronic cigarette as described above.

Cigarettes and cigars, as defined under Arizona law, are both composed of, among other things, a "roll of tobacco." A.R.S. § 42-3001(3) (defining "cigar" as "any roll of tobacco"); (4) (defining "cigarette" as "[a]ny roll of tobacco").[4] Electronic cigarettes do not contain rolls of tobacco or even pieces of tobacco. Consequently, electronic cigarettes do not come within the existing legislative definitions of the terms "cigar" or "cigarette" for purposes of Arizona's luxury tax on those products.

This leaves the remaining types of "tobacco products" in title 42, specifically smoking tobacco, snuff, fine cut chewing tobacco, cut and granulated tobacco, shorts and refuse of fine cut chewing tobacco, refuse, scraps, clippings, cuttings and sweepings of tobacco, cavendish, plug, and twist tobacco. A.R.S. § 42-3052(6)-(7). According to Arizona Luxury Tax Ruling LTR 04-2, all tobacco products included in A.R.S. § 42-3052(6)-(7) are composed of either tobacco leaves or pieces of tobacco. Arizona Department of Revenue, *Arizona Luxury Tax Ruling*, LTR 04-2 (2004) (citing *Tobacco Encyclopedia* (Ernst Voges ed., 1984)). Again,

[3] This definition also cross-references an article and a statute that have both been repealed.
[4] The phrase "or any substitute for tobacco" has been stricken from this definition of cigarette, effective July 24, 2014. *See* 2014 Ariz. Sess. Laws, ch. 160, § 5.

because electronic cigarettes as described above do not contain tobacco leaves or pieces, they do not come within the categories of tobacco products set forth in A.R.S. § 42-3052(6)-(7).

The same result follows when applying dictionary definitions to the terms used to describe the tobacco products in LTR 04-2. *See* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."); *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990) (stating that absent statutory definitions, courts refer to dictionary definitions to construe a statute's terms); *see also State v. Mahaney,* 193 Ariz. 566, 568, 975 P.2d 156, 158 (App. 1999) (relying on *Webster's College Dictionary* for the definition of a word undefined by statute).

Snuff is "powdered tobacco" that is sniffed, chewed, or rubbed on the gums. *Webster's New World College Dictionary* 1359 (4th ed., 1999). Cavendish is sweetened tobacco pressed into a cake form. *Id.* at 234. Plug is another version of tobacco pressed into cake form or pieces of chewing tobacco. *Id.* at 1108. The other listed tobacco products actually include the word "tobacco," compelling the conclusion that each of them actually contains tobacco. This provides further support for the conclusion that electronic cigarettes do not come within the tobacco product categories set forth in A.R.S. § 42-3052(6) and (7).

Presently, Minnesota alone applies its tobacco luxury tax statutes to electronic cigarettes. Minnesota Department of Revenue, *Revenue Notice #12-10: Tobacco Products Tax--Taxability--E-Cigarettes* (2012). However, Minnesota's luxury tax statute defines "tobacco products" to include any products "derived from tobacco." Minn. Stat. § 297F.01(19). The liquid nicotine in electronic cigarettes is derived from tobacco. *Sottera*, 627 F.3d at 893. Accordingly, Minnesota's luxury tax definitions embrace electronic cigarettes while Arizona's do not.

The "derived from tobacco" phrasing was also essential to the FDA's recent decision to issue proposed rules that subject electronic cigarettes to the FDA's regulatory authority over "tobacco products." *See* source cited at note 2. Like the Minnesota statute, the FD&C Act defines "tobacco products" to mean, among other things, any product "derived from tobacco." 21 USC § 321(rr)(1).[5] The Arizona statute does not include the "derived from" language or any other terms broad enough to apply to electronic cigarettes. Accordingly, electronic cigarettes are not subject to Arizona's tobacco luxury taxes set forth in A.R.S. title 42, chapter 3.

2. The Smoking Prohibitions in A.R.S. § 36-601.01 Do Not Apply to Electronic Cigarettes.

The second question is whether the smoking prohibitions in A.R.S. § 36-601.01 (also referred to as "Smoke-Free Arizona") apply to electronic cigarettes. Proposition 201 added Smoke-Free Arizona to Arizona law on the 2006 General Election ballot, which Arizona voters approved on November 7, 2006. It prohibits "smoking . . . in all public places and places of employment" with a number of express exemptions. A.R.S. § 36-601.01(B). The statute defines the act of "smoking" as "inhaling, exhaling, burning, or carrying or possessing any lighted tobacco product, including cigars, cigarettes, pipe tobacco, and any other lighted tobacco product." A.R.S. § 36-601.01(A)(11). Smoke-Free Arizona does not define "tobacco product" or "lighted," no court has provided a more detailed description of these terms as used in this statute, and the Arizona Department of Health Services ("DHS") has not promulgated a regulation that provides a more detailed description of either term.[6]

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[5] The FDA specifically noted that this does not mean that electronic cigarettes meet the definition of "tobacco product" for federal excise tax purposes because the applicable excise tax statute does not include the "derived from" language. *See* note 2 (citing 26 U.S.C. § 5702(c)).

[6] The DHS has not promulgated a regulation that defines "lighted." It has promulgated a regulation that defines "tobacco products and accessories" to include, in part, "[s]moking materials such as cigars, cigarettes, and pipe tobacco." Ariz. Admin. Code R9-2-101(24)(a). The term "smoking materials," like the term "tobacco products" in A.R.S. § 42-3001(18), essentially embraces other defined terms that do not include electronic cigarettes.

Given that the word "smoking" is limited to specific behavior with regard to "any lighted tobacco product," the answer depends on whether an electronic cigarette is "lighted" and, if so, whether it is a "tobacco product." The applicable dictionary definition of "lighted" is "to set on fire; ignite." *Webster's New World College Dictionary* 829. All sources of information on electronic cigarettes indicate that there is no fire or ignition involved in their use. *See* A.R.S. § 13-3622(E)(3) (defining vapor products as having a "heating element" used to "heat" liquid nicotine to create a vapor that is inhaled); source cited in note 1 (providing a diagram addressing the design of an electronic cigarette, which includes a heating element used to vaporize the nicotine solution); *Sottera*, 627 F.3d at 893 (explaining that electronic cigarettes contain a heater known as an "atomizer" that vaporizes the nicotine). Instead, as explained above, electronic cigarettes use a battery as a power source to generate heat in the heating element, and this heat results in the liquid nicotine converting to vapor. In contrast, combustible tobacco products such as cigars, cigarettes, and pipes must all be "lighted" to be used as intended, i.e., to inhale the smoke generated from burning tobacco.

Moreover, Proposition 201's "Findings and Declaration of Purpose" section states the Proposition's intent as being to protect people from "the health risks of breathing secondhand tobacco smoke." *Publicity Pamphlet, Ballot Proposition and Judicial Performance Review*, Arizona (2006); *Heath v. Kiger*, 217 Ariz. 492, 496, 176 P.3d 690, 694 (2008) (acknowledging that courts are able to consider publicity pamphlet information that Arizona's Secretary of State publishes related to a Proposition). The Proposition materials do not suggest that the Proposition applies to anything other than actions that result in tobacco smoke, the byproduct of burning tobacco. The statutory language, legislative history, and common meaning of statutorily undefined terms all indicate that use of the word "lighted" was intended to apply only to the

burning of a tobacco product, which results in smoke, and not to the use or possession of any product that does not need to be burned, such as an electronic cigarette.

To the contrary, the statute's language and legislative history make clear that Smoke-Free Arizona allows the use of nonlighted tobacco products such as chewing tobacco. For that reason, even if an electronic cigarette was determined to be a tobacco product, its use would nevertheless fall outside Smoke-Free Arizona's prohibitions. However, because of their other qualities, the electronic cigarettes now on the market are not tobacco products under Smoke-Free Arizona in the first instance. Nothing in the statute or legislative history suggests that "smoking" or "tobacco product and accessories" includes electronic cigarettes. The aforementioned definitions of "smoking" and "tobacco product and accessories" both include the same three examples of tobacco products (i.e., cigarettes, cigars, and pipe tobacco), which supports the interpretation that "tobacco products" as used in the statute applies only to products that contain actual pieces of tobacco. The statute's stated intent of protecting people from "secondhand tobacco smoke," which is the byproduct of burning actual pieces of tobacco, further supports this interpretation.

Other States are likewise attempting to determine whether or to what extent their smoking provisions apply to electronic cigarettes. The Kansas Attorney General has concluded that the Kansas Indoor Clean Air Act does not apply to electronic cigarettes because it defines "smoking" as "possession of a *lighted* cigarette, cigar, pipe or *burning tobacco in any other form* or device designed for the use of tobacco." Kansas Attorney General Opinion No. 2011-015 (2011) (citing Kansas Statutes Annotated 2010 Supp. 21-4009(o)) (emphasis added). The Kansas Attorney General concluded that electronic cigarettes are not lighted and do not produce "burning tobacco." *Id.* The New Jersey Smoke Free Act was amended to expand its definition of "smoking" to include the inhaling of "vapor from an electronic smoking device." *See* N.J.

Rev. Stat. § 26:3D-57(3) (as amended by 2009 N.J. Sess. Law Serv. Ch. 182 (assembly 4227 and 4228) (West)). The definition of "electronic smoking devices" includes electronic cigarettes. *Id.* It does not appear that any State has analyzed statutory language similar to that contained in Smoke-Free Arizona and decided that it applies to electronic cigarettes. Based on commonly accepted definitions, the publicity pamphlet information, and other States' interpretations of similar statutes, the smoking prohibitions of Smoke-Free Arizona do not apply to electronic cigarettes.

Conclusion

Electronic cigarettes are not subject to the Arizona tobacco luxury taxes set forth in A.R.S. title 42, chapter 3. The smoking prohibitions of A.R.S. § 36-601.01, also known as Smoke Free Arizona, do not apply to electronic cigarettes.

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