



# E-CIGARETTE POLICY, REGULATION AND MARKETING

Issue brief #3 in a series of three on e-cigarettes

Many recent reports have shown that the use of electronic cigarettes, commonly known as e-cigarettes, has risen sharply among both adults and youth in the United States. The long-term health effects of e-cigarette use are not known, and regulation at the local, state and federal levels is lagging. This brief is the third and final in a series of three discussing the public health issues related to e-cigarettes in Kansas: (1) *E-Cigarettes and Their Use in the U.S. and Kansas*; (2) *Health Effects of E-Cigarettes*; and, (3) *E-Cigarette Policy, Regulation and Marketing*.

In the absence of national legislation on e-cigarettes, federal agencies, state legislatures and city councils have taken steps to restrict e-cigarette access. This issue brief explores the policy and regulatory options at the federal and state levels that affect e-cigarette sales, use and marketing.

frequent marketing as smoking cessation devices under the Food, Drug and Cosmetic Act. However, that move was struck down in 2010 by the U.S. Court of Appeals in the District of Columbia.

## History of E-Cigarette Policy

**2003:** *The modern e-cigarette is invented in China.*

**2007:** *E-cigarettes enter the U.S. market.*

**2010:** *The Kansas Indoor Clean Air Act passes in Kansas, banning smoking in most public places.*

**2011:** *Kansas Attorney General rules that e-cigarettes are NOT included as a smoking/tobacco product under the Kansas Indoor Clean Air Act.*

**2012:** *Kansas state legislators ban the possession and sale of e-cigarettes to minors.*

**2014:** *The FDA proposes regulation of e-cigarettes as tobacco products under the Tobacco Control Act.*

**2014-2015:** *Some Kansas municipalities, including Hutchinson, Kansas City, McPherson, Olathe, Overland Park, Topeka, Salina, Reno County and Park City, pass bans on e-cigarette use in some public places.*

**2015:** *Kansas state legislators pass HB 2109, which creates a new \$0.20/mL tax on e-cigarette fluid effective July 1, 2016.*

## Policy and Regulation

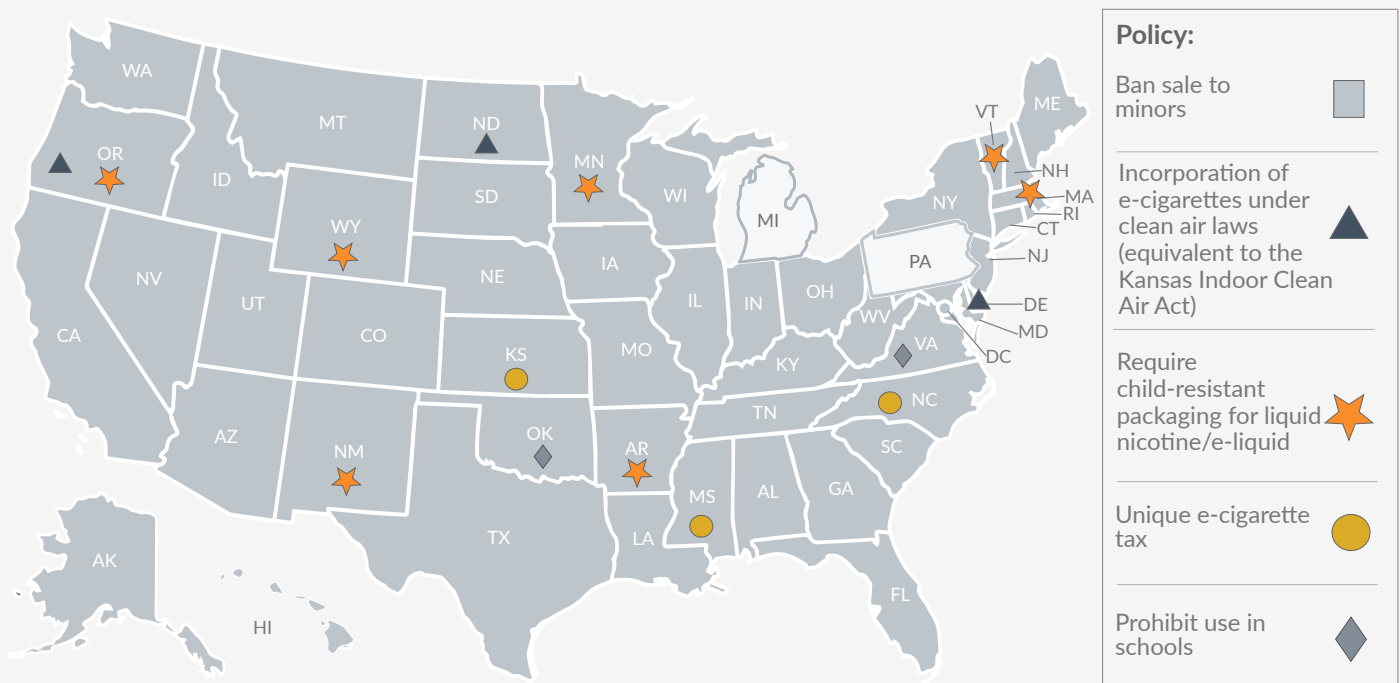
### Federal

Though the U.S. Food and Drug Administration (FDA) gained control over the marketing and regulation of most tobacco products in 2009, e-cigarettes are not presently subject to the FDA's authority. The FDA first proposed regulation of e-cigarettes as drug-delivery products, based on their

### KEY POINTS

- The FDA has proposed federal regulation that would include requirements such as health warning labels on e-cigarette packaging; however, this rule has not yet been finalized.
- In Kansas, the sale of e-cigarettes is banned to anyone under the age of 18, and a special e-cigarette tax of \$0.20/mL consumable material is scheduled to take effect on July 1, 2016.
- The Kansas Indoor Clean Air Act does not include a ban on the use of e-cigarettes in public places, as ruled by the state's attorney general in 2011. However, several cities in Kansas have passed local ordinances that prohibit e-cigarette smoking in a number of public places.
- There are many policy and regulatory options that lawmakers may consider regarding e-cigarettes, such as childproofing liquid nicotine containers and banning free samples.

Figure 1. State Legislative Action on E-Cigarettes, October 2015



Source: KHI analysis of data from the National Conference of State Legislatures, 2015.

Since that ruling, the FDA has instead moved towards redefining “tobacco products” under the Family Smoking Prevention and Tobacco Control Act of 2009 to incorporate e-cigarettes and other newer tobacco products. In April 2014, the FDA proposed a rule to regulate e-cigarettes, however, the rule has not been finalized.

## What would FDA regulation do?

If the proposed rule is ultimately approved, the FDA will have control over several major aspects of e-cigarette sales, including:

- Banning the sale of e-cigarettes to minors;
- Requiring health warning labels on e-cigarette packaging and prohibition on claims of “reduced risk” unless confirmed by FDA;
- Registration of e-cigarette manufacturers;
- Disclosure of all product ingredients, and;
- Prohibition of vending machine sales in facilities that admit youth.

## State

In the absence of federal regulation, state legislators have begun to take action on restricting e-cigarette

use. According to the National Conference of State Legislatures, a total of 49 states, including the District of Columbia, have banned the sale of e-cigarettes to minors.

In 2012, Kansas state legislators enacted a ban on the sale of e-cigarettes to minors (KSA 79-3321) and outlawed possession of e-cigarettes by minors. During the 2015 session, policymakers, as a part of a larger tax bill, included a sales tax on e-cigarettes at the rate of \$0.20/milliliter of e-liquid (HB 2109) beginning July 1, 2016. Previously, e-cigarettes were taxed only at the general sales tax rate. Conventional cigarettes are taxed at \$1.29 per pack, making the price point comparable for e-cigarettes containing at least 6.5 mL of fluid.

In 2010, the Kansas Indoor Clean Air Act went into effect, banning smoking in most public places, including restaurants, workplaces and health care facilities. However, in 2011, the Kansas attorney general issued an opinion clarifying that e-cigarettes are not included as a smoking device under the act. Thus, e-cigarettes are still legal for use in most public places in Kansas.

## Local

Following the Kansas attorney general’s opinion, momentum has grown among local communities to ban e-cigarettes in some public places. Beginning in 2014, several municipalities in Kansas began incorporating

Figure 2. E-Cigarette Policies among Kansas Board of Regents Universities, September 2015

BANNED	NOT BANNED
University of Kansas	Kansas State University
Pittsburg State University	Emporia State University (except residence halls)
Fort Hays State University (effective 2016)	
Wichita State University	

Source: KHI analysis of university tobacco policies as published, 2015.

some form of ban on public e-cigarette use in their clean air ordinances, including nine to-date; Hutchinson, Kansas City, McPherson, Olathe, Overland Park, Topeka, Salina, Reno County and Park City. A few examples include:

*Hutchinson:* In November 2015, the city council passed an ordinance, similar to the Kansas Indoor Clean Air Act, banning the use of e-cigarettes in most public areas and workplaces.

*Olathe:* In January 2015, Olathe defined “e-cigarette” in their Indoor Clean Air Ordinance and added the use of e-cigarettes to their definition of smoking, which is prohibited in public places, public transportation and places of employment.

*McPherson:* The McPherson Uniform Public Offense Code was updated in September 2014 to make e-cigarettes equivalent to traditional cigarettes, effectively banning them in most public places.

*Reno County:* In April 2014, the County revised its Smoke Free Workplace Policy to include e-cigarette use under the definition of smoking, and to ban their use in all county vehicles and buildings.

Recently, the City of Lawrence’s Parks and Recreation Department announced that it is drafting a policy to ban the use of all tobacco products, as well as e-cigarettes, on any of the department’s land, including all 54 city parks.

## Schools and Universities

Schools and universities have also moved to ban e-cigarette use on their campuses. The University of Kansas, Pittsburg State University, Wichita State

University and Fort Hays State University have added e-cigarettes to their campus tobacco-free policies. Emporia State University bans e-cigarette use within residence halls. Kansas State University currently has no policy.

Finally, K-12 schools in Kansas are considering e-cigarette policies. Under state law, minors are not allowed to possess e-cigarettes; however, concern remains over students who have already turned 18 or adult staff using the products. In response, the Kansas Association of School Boards issued a policy recommendation in 2013 to prohibit e-cigarette use on school grounds, which a number of school districts have adopted.

## Marketing

In addition to concerns regarding the potential health effects of e-cigarette use, health advocates have also stressed the need for regulatory action regarding the marketing and advertising of e-cigarettes, specifically advertising to youth. Although traditional cigarette marketing is highly regulated, these regulations do not apply to e-cigarette advertisements.

In 2012, manufacturers spent \$18.3 million on e-cigarette advertising via media channels, up from \$6.4 million in 2011. Between 2011 and 2013, exposure to e-cigarette television ads increased by 256 percent for children age 12 to 17, and by 321 percent for young adults age 18 to 24. The FDA’s proposed rule does not include marketing and advertising restrictions.

## Policy Options

State and local policymakers in Kansas may want to consider some of the policy options enacted in other jurisdictions to address concerns about the use of e-cigarettes. The most common policies adopted across the country include:

- **Definition of tobacco products:** Inclusion of e-cigarette products in the definition of tobacco products in clean air acts and other laws and ordinances.
- **Retailer licensing:** Requiring licensing or registration of all e-cigarette retailers.
- **Ban on free samples:** Prohibits distribution of free e-cigarette products to minors.
- **Retail displays:** Prohibits self-service displays of e-cigarette products or vending machines in places accessible to minors.



Some health advocates have pointed to the similarities between recent e-cigarette ads directed at youth and those used by tobacco companies in the 1950s that **emphasized the glamour and sophistication of cigarette use.**

Yes, today's  
Source: Photo from BusinessInsider.com, 2015.

- **Internet sales:** Prohibits mail or internet sales of e-cigarettes to minors.
- **Bans on use in locations accessible to minors:** Prohibit e-cigarette use in or near schools, school buses, day care facilities, playgrounds and other publicly owned buildings and land.
- **Child-resistant packaging:** Requiring e-liquids containing nicotine to pass either federal or local standards for child-proofing.

## Objections to E-Cigarette Restrictions

Some e-cigarette producers, retailers and users support restrictions reducing access to e-cigarettes by minors. Others are opposed to the FDA's proposed rule, particularly those provisions that would increase the cost of manufacturing and sales, such as comprehensive product labeling. Because of the additional costs to comply with federal law, retailers say that most current producers of e-cigarettes would be financially burdened to the point of exiting the U.S. market. New requirements may limit consumer choice to the largest e-cigarette retailers—which are primarily owned by large tobacco

companies. Opponents to restrictions also argue that banning e-cigarette use in public spaces may be premature or unwarranted, as the literature has not yet established the potential harm of secondhand vapor exposure.

## The Future of E-Cigarette Regulation

E-cigarettes have become big business in the U.S., as reflected in their growing popularity in Kansas. The e-cigarette industry has changed rapidly in recent years in both size and approach to marketing, with projections of \$10 billion in sales by 2017. While the jury is still out on whether e-cigarettes are safe for use in public places, a lack of long-term evidence on their health effects and the glamorization of e-cigarette use for a generation of youth may be causes for concern. It will be critical that policymakers and other stakeholders remain up-to-date as research determines whether e-cigarette use is a safer method of nicotine delivery, or a gateway to addiction for today's youth.

*This is the third and final brief in the series exploring the topic of e-cigarettes. To view the entire series, please visit our website at [khi.org](http://khi.org).*

### ABOUT THE ISSUE BRIEF

This brief is based on work done by Andrea Hinton and Linda Sheppard, J.D. This publication is available online at [khi.org/policy/article/E-cigSeries3](http://khi.org/policy/article/E-cigSeries3).

### KANSAS HEALTH INSTITUTE

The Kansas Health Institute delivers credible information and research enabling policy leaders to make informed health policy decisions that enhance their effectiveness as champions for a healthier Kansas. The Kansas Health Institute is a nonprofit, nonpartisan health policy and research organization based in Topeka that was established in 1995 with a multiyear grant from the Kansas Health Foundation.

Copyright © Kansas Health Institute 2016. Materials may be reprinted with written permission. Reference publication number KHI/16-05.

212 SW 8<sup>th</sup> Avenue | Suite 300  
Topeka, Kansas | 66603-3936

785.233.5443

[khi.org](http://khi.org)

[f/KHIorg](https://www.facebook.com/KHIorg)

[@KHIorg](https://twitter.com/KHIorg)