

IN THE SENATE

SENATE BILL NO. 1366

BY STATE AFFAIRS COMMITTEE

AN ACT

1 RELATING TO ELECTRONIC SMOKING DEVICES; AMENDING CHAPTER 57, TITLE 39, IDAHO  
2 CODE, BY THE ADDITION OF A NEW SECTION 39-5719, IDAHO CODE, TO ESTAB-  
3 LISH PROVISIONS REGARDING MANUFACTURER CERTIFICATION, AN ELECTRONIC  
4 SMOKING DEVICE DIRECTORY, AND PENALTIES; AND DECLARING AN EMERGENCY AND  
5 PROVIDING AN EFFECTIVE DATE.  
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7 Be It Enacted by the Legislature of the State of Idaho:

8 SECTION 1. That Chapter 57, Title 39, Idaho Code, be, and the same is  
9 hereby amended by the addition thereto of a NEW SECTION, to be known and des-  
10 ignated as Section 39-5719, Idaho Code, and to read as follows:

11 39-5719. ELECTRONIC SMOKING DEVICE DIRECTORY. (1) No later than Au-  
12 gust 1, 2024, and annually thereafter, every manufacturer of electronic  
13 smoking devices that are sold for retail sale in this state, whether directly  
14 or through a distributor, wholesaler, retailer, or similar intermediary or  
15 intermediaries, shall certify under penalty of perjury on a form and in the  
16 manner prescribed by the department that the manufacturer agrees to comply  
17 with the provisions of this chapter and that:

18 (a) The manufacturer has received a marketing authorization or similar  
19 order for the electronic smoking device from the United States food and  
20 drug administration pursuant to 21 U.S.C. 387j; or

21 (b) The electronic smoking device was marketed in the United States as  
22 of August 8, 2016, the manufacturer submitted a premarket tobacco prod-  
23 uct application for the electronic smoking device to the United States  
24 food and drug administration pursuant to 21 U.S.C. 387j on or before  
25 September 9, 2020, and the application either remains under review by  
26 the United States food and drug administration or a final decision on  
27 the application has not otherwise taken effect.

28 (2) A manufacturer shall submit a certification form that separately  
29 lists each electronic smoking device that is sold in this state.

30 (3) Each annual certification form required by subsections (1) and (2)  
31 of this section shall be accompanied by:

32 (a) A copy of the marketing authorization or other order for the  
33 electronic smoking device issued by the United States food and drug ad-  
34 ministration pursuant to 21 U.S.C. 387j, or evidence that the premarket  
35 tobacco product application for an electronic smoking device marketed  
36 in the United States as of August 8, 2016, was submitted to the United  
37 States food and drug administration by September 9, 2020, and a final  
38 authorization or order has not yet taken effect; and

39 (b) A payment of one thousand dollars (\$1,000) for each electronic  
40 smoking device the first time a manufacturer submits a certification  
41 form for that electronic smoking device and a payment of five hundred  
42 dollars (\$500) annually thereafter for each electronic smoking device.

1 (4) A manufacturer required to submit a certification form pursuant to  
2 subsections (1) and (2) of this section shall notify the department within  
3 thirty (30) days of any material change to the certification form, includ-  
4 ing the issuance or denial of a marketing authorization or other order by the  
5 United States food and drug administration pursuant to 21 U.S.C. 387j, or any  
6 other order or action by the United States food and drug administration or  
7 any court that affects the ability of the electronic smoking device to be in-  
8 troduced or delivered into interstate commerce for commercial distribution  
9 in the United States.

10 (5) No later than October 1, 2024, the department shall maintain and  
11 make publicly available on its website a directory that lists all electronic  
12 smoking device manufacturers and electronic smoking devices for which cer-  
13 tification forms have been submitted and shall update the directory as nec-  
14 essary to ensure accuracy.

15 (6) The department shall send monthly notifications to each retailer,  
16 distributor, or wholesaler that has qualified or registered with the depart-  
17 ment, by electronic communication, containing a list of all changes that  
18 have been made to the directory in the previous month.

19 (7) (a) The department shall provide manufacturers notice and an oppor-  
20 tunity to cure deficiencies before removing manufacturers or products  
21 from the directory.

22 (b) The department may not remove the manufacturer or its products from  
23 the directory until at least fifteen (15) days after the manufacturer  
24 has been given notice of an intended action. Notice shall be sufficient  
25 and be deemed immediately received by a manufacturer if the notice is  
26 sent either electronically or by facsimile to an email address or fac-  
27 simile number provided by the manufacturer in its most recent certifi-  
28 cation filed under subsections (1) and (2) of this section.

29 (c) The electronic smoking device manufacturer shall have fifteen (15)  
30 business days from the date of service of the notice of the department's  
31 intended action to establish that the electronic smoking device manu-  
32 facturer or its products should be included in the directory.

33 (d) A determination by the department to not include or to remove from  
34 the directory a manufacturer or an electronic smoking device shall  
35 be subject to review by the filing of a civil action for prospective  
36 declaratory or injunctive relief.

37 (8) (a) If the department determines that a product shall be removed  
38 from the directory pursuant to the requirements of subsection (7) of  
39 this section, each retailer, distributor, and wholesaler shall have  
40 thirty (30) days from the day the department provides notice that such  
41 product is removed from the directory to remove the product from its  
42 inventory. After thirty (30) days following removal from the direc-  
43 tory, the electronic smoking devices of a manufacturer identified in  
44 the notice of removal shall be considered contraband and are subject to  
45 seizure, forfeiture, and destruction and may not be purchased or sold  
46 for retail sale in this state. The cost of such seizure, forfeiture, and  
47 destruction shall be borne by the retailer, distributor, or wholesaler  
48 from whom the products are confiscated.

49 (b) If a manufacturer voluntarily removes a product from the directory  
50 for reasons other than a change in the product's marketing authoriza-

1 tion status pursuant to 21 U.S.C. 387j, the manufacturer shall compen-  
2 sate retailers for removing the product from the retailer's inventory,  
3 unless applicable contractual provisions between the manufacturer and  
4 retailer apply.

5 (9) (a) Except as provided in paragraphs (b) and (c) of this subsection,  
6 beginning October 1, 2024, or on the date that the department first  
7 makes the directory available for public inspection on its website,  
8 whichever is later, electronic smoking devices not included in the di-  
9 rectory may not be sold for retail sale in this state, either directly  
10 or through an importer, distributor, wholesaler, retailer, or similar  
11 intermediary or intermediaries.

12 (b) Each retailer shall have sixty (60) days from the date that the de-  
13 partment first makes the directory available for inspection on its pub-  
14 lic website to sell products that were in its inventory and not included  
15 in the directory or to remove those products from inventory.

16 (c) Each distributor or wholesaler shall have sixty (60) days from the  
17 date that the department first makes the directory available for in-  
18 spection on its public website to remove any products not listed in the  
19 directory that were intended for sale in the state from its inventory.

20 (d) After sixty (60) days following publication of the directory on the  
21 department's public website, electronic smoking devices not listed in  
22 the directory and intended for sale in the state are subject to seizure,  
23 forfeiture, and destruction and may not be purchased or sold for retail  
24 sale in the state except as provided in subsection (8) of this section.  
25 The cost of such seizure, forfeiture, and destruction shall be borne by  
26 the person from whom the products are confiscated.

27 (10) A manufacturer of electronic smoking devices that offers for re-  
28 tail sale a product not listed in the directory described in subsection (5)  
29 of this section shall be subject to a one thousand dollar (\$1,000) daily fine  
30 for each product offered for sale in violation of this section until the of-  
31 fending product is removed from the market or until the offending product is  
32 properly listed on the directory.

33 (11) A retailer, distributor, or wholesaler who sells or offers for sale  
34 an electronic smoking device for retail sale in this state that is not in-  
35 cluded in the directory in violation of this section shall be subject to the  
36 following penalties:

37 (a) For a first violation, a civil penalty of no more than five hundred  
38 dollars (\$500);

39 (b) For a second violation within a thirty-six (36) month period, a  
40 civil penalty of at least seven hundred fifty dollars (\$750) but no more  
41 than one thousand dollars (\$1,000). The department may suspend the per-  
42 mit of a permittee for fourteen (14) days;

43 (c) For a third violation within a thirty-six (36) month period, a civil  
44 penalty of at least one thousand dollars (\$1,000) but no more than one  
45 thousand five hundred dollars (\$1,500). The department shall suspend  
46 the permit of a permittee for sixty (60) days; and

47 (d) For a fourth or any subsequent violation within a thirty-six (36)  
48 month period, a civil penalty of at least one thousand five hundred dol-  
49 lars (\$1,500) but no more than three thousand dollars (\$3,000). The de-

1           partment shall suspend the permit of a permittee for a period of at least  
2           one (1) year.

3           (12) A fourth or any subsequent violation of this section within a  
4           thirty-six (36) month period shall constitute a violation of the consumer  
5           protection act pursuant to chapter 6, title 48, Idaho Code, enforceable by  
6           the attorney general, and, in addition to any remedies or penalties set forth  
7           in this section, shall be subject to any remedies or penalties available for  
8           a violation under the consumer protection act.

9           (13) All fees and penalties collected by the department pursuant to this  
10          section shall be used for administration and enforcement of this section.

11          (14) Each retailer, distributor, and wholesaler that sells or dis-  
12          tributes electronic smoking devices in this state shall be subject to at  
13          least two (2) unannounced compliance checks annually for the purpose of  
14          enforcing this section. Unannounced follow-up compliance checks of all  
15          noncompliant retailers, distributors, and wholesalers shall be conducted  
16          within thirty (30) days after any violation of this section. The department  
17          shall publish the results of all compliance checks at least annually and  
18          shall make the results available to the public upon request.

19          (15) An agent for service of process is required, pursuant to the fol-  
20          lowing provisions:

21          (a) Any nonresident or foreign manufacturer of electronic smoking de-  
22          vices that has not registered to do business in this state as a foreign  
23          corporation or business entity shall, as a condition precedent to hav-  
24          ing its products listed or retained in the directory, appoint and con-  
25          tinually engage without interruption the services of an agent in this  
26          state to act as agent for the service of process on whom all process,  
27          and any action or proceeding against it concerning or arising out of the  
28          enforcement of this section, may be served in any manner authorized by  
29          law. Such service shall constitute legal and valid service of process  
30          on the manufacturer. The manufacturer shall provide the name, address,  
31          phone number, and proof of the appointment and availability of such  
32          agent to, and to the satisfaction of, the department.

33          (b) The manufacturer shall provide notice to the department thirty  
34          (30) calendar days prior to termination of the authority of an agent and  
35          shall further provide proof to the satisfaction of the department of the  
36          appointment of a new agent no less than five (5) calendar days prior to  
37          the termination of an existing agent appointment. In the event an agent  
38          terminates an appointment, the manufacturer shall notify the attorney  
39          general of said termination within five (5) calendar days and shall in-  
40          clude proof to the satisfaction of the department of the appointment of  
41          a new agent.

42          (c) Any manufacturer whose electronic smoking devices are sold in this  
43          state, without appointing or designating an agent as required in this  
44          subsection, shall be deemed to have appointed the secretary of state as  
45          such agent and may be proceeded against in courts of this state by ser-  
46          vice of process upon the secretary of state. However, the appointment  
47          of the secretary of state as such agent shall not satisfy the condition  
48          precedent to having its products listed or retained in the directory.

49          (16) The department may promulgate rules necessary to effect the pur-  
50          poses of this section, subject to approval by the legislature.

1 (17) Beginning January 31, 2025, and annually thereafter, the depart-  
2 ment shall provide a report to the germane committees of the Idaho legisla-  
3 ture regarding the status of the directory, manufacturers, and products in-  
4 cluded in the directory, revenue and expenditures related to administration  
5 of this section, and enforcement activities undertaken pursuant to this sec-  
6 tion.

7 (18) (a) For purposes of this section, the term "electronic smoking de-  
8 vice" means any noncombustible product that:

9 (i) Employs a heating element, power source, electronic circuit,  
10 or other electronic, chemical, or mechanical means, regardless of  
11 shape or size, to produce vapor from nicotine in a solution; and

12 (ii) Includes a consumable nicotine liquid solution suitable for  
13 use in an electronic smoking device, whether sold with the product  
14 or separately.

15 (b) Electronic smoking device does not include any product regulated as  
16 a drug or device under chapter V of the federal food, drug, and cosmetic  
17 act pursuant to 21 U.S.C. 351, et seq.

18 SECTION 2. An emergency existing therefor, which emergency is hereby  
19 declared to exist, this act shall be in full force and effect on and after  
20 July 1, 2024.