

**First Regular Session
Seventy-fourth General Assembly
STATE OF COLORADO**

ENGROSSED

*This Version Includes All Amendments Adopted
on Second Reading in the House of Introduction*

LLS NO. 23-0123.02 Pierce Lively x2059

HOUSE BILL 23-1015

HOUSE SPONSORSHIP

Bird,

SENATE SPONSORSHIP

Liston, Hansen

House Committees

Finance
Appropriations

Senate Committees

A BILL FOR AN ACT

101 **CONCERNING THE TAXATION OF TOBACCO PRODUCTS.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov/>.)

Legislative Oversight Committee Concerning Tax Policy. The bill categorizes the remote sales of certain kinds of tobacco products for purposes of establishing the regulation and taxation of the sales. The bill exempts transactions involving tobacco products other than smokeless tobacco products or roll-your-own tobacco products from the definition of "delivery sale" and instead defines the term "remote retail sale" to include these transactions. The bill then establishes a system for the taxation and licensing of these "remote retail sales" that substantively

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing law.
Dashes through the words or numbers indicate deletions from existing law.

HOUSE
Amended 2nd Reading
March 3, 2023

mirrors the current system of taxation and licensing for "delivery sales".
The bill also resolves an ambiguity about how the "manufacturer's list price" of a tobacco product is determined for both "delivery sales" and "remote retail sales".

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, **amend** 39-28.5-101
3 as follows:

4 **39-28.5-101. Definitions.** As used in this article 28.5, unless the
5 context otherwise requires:

6 (1) "CONSUMER" MEANS ANY PERSON WHO HAS TITLE TO OR
7 POSSESSION OF TOBACCO PRODUCTS FOR THE PERSON'S OWN USE OR
8 CONSUMPTION IN THIS STATE AND NOT FOR RESALE.

9 ~~(1)~~ (2) (a) "Delivery sale" means, EXCEPT AS PROVIDED IN
10 SUBSECTION (2)(b) OF THIS SECTION, the sale of tobacco products to a
11 consumer in this state when:

12 ~~(a)~~ (I) The consumer submits an order for the tobacco products to
13 a delivery seller for sale by means other than an over-the-counter sale on
14 the delivery seller's premises, including, but not limited to, telephone or
15 other voice transmission, the mail or other delivery service, or the internet
16 or other online service; and

17 ~~(b)~~ (II) The tobacco products are delivered when the seller is not
18 in the physical presence of the consumer when the consumer obtains
19 possession of the tobacco products by use of a common carrier, private
20 delivery service, mail, or any other means.

21 (b) "DELIVERY SALE" DOES NOT INCLUDE THE SALE OF CIGARS OR
22 PIPE TOBACCO.

23 ~~(1.2)~~ (3) "Delivery seller" means a person located outside of this

1 state who makes delivery sales.

2 ~~(1.4)~~ (4) "Department" means the department of revenue.

3 ~~(1.5)~~ (5) "Distributing subcontractor" means every person, firm,
4 limited liability company, partnership, or corporation who purchases
5 tobacco products from a distributor for resale to a retailer in this state.

6 ~~(2)~~ (6) "Distributor" means every person who:

7 (a) First receives tobacco products in this state;

8 (b) Sells tobacco products in this state and is primarily liable for
9 the tobacco products tax on such products;

10 (c) First sells or offers for sale in this state tobacco products
11 imported into this state from any other state or country; or

12 (d) Is a delivery seller.

13 ~~(3)~~ (7) (a) "Manufacturer's list price" means, EXCEPT AS PROVIDED
14 IN SUBSECTIONS (7)(b) AND (7)(c) OF THIS SECTION, the invoice price for
15 which a manufacturer or supplier sells a tobacco product to a distributor
16 OR REMOTE RETAIL SELLER exclusive of any discount or other reduction.
17 IN THE CASE OF CIGARS AND PIPE TOBACCO, "MANUFACTURER'S LIST
18 PRICE" IS ALSO KNOWN AS THE ACQUISITION COST.

19 (b) FOR A DELIVERY OR REMOTE RETAIL SELLER, IF DETERMINING
20 THE INVOICE PRICE DESCRIBED IN SUBSECTION (7)(a) OF THIS SECTION IS
21 IMPRACTICABLE, THEN "MANUFACTURER'S LIST PRICE" MEANS THE
22 AVERAGE OF THE ACTUAL PRICE PAID, EXCLUSIVE OF ANY REBATES OR
23 DISCOUNTS APPLIED, FOR THE TOBACCO PRODUCT'S STOCK KEEPING UNIT
24 DURING THE PRECEDING CALENDAR YEAR. THE DEPARTMENT MAY, BY
25 WRITTEN NOTICE TO THE DELIVERY OR REMOTE RETAIL SELLER,
26 PROSPECTIVELY REQUIRE A DELIVERY OR REMOTE RETAIL SELLER TO
27 CALCULATE THE TAX ON THE INVOICE PRICE IF THE DEPARTMENT FINDS

1 THAT THE DELIVERY OR REMOTE RETAIL SELLER'S USE OF THE AVERAGE
2 PRICE PAID WAS FOR THE PURPOSE OF AVOIDING TAX.

3 (c) FOR A MANUFACTURER WHO IS ALSO A DELIVERY SELLER, A
4 REMOTE RETAIL SELLER, OR A RETAILER, AND WHO SELLS TOBACCO
5 PRODUCTS EXCLUSIVELY TO CONSUMERS AND NOT TO SUPPLIERS OR
6 DISTRIBUTORS, "MANUFACTURER'S LIST PRICE" MEANS THE
7 MANUFACTURER'S COST TO MANUFACTURE THE TOBACCO PRODUCT,
8 WHICH INCLUDES THE MANUFACTURING OVERHEAD AND THE COST OF ALL
9 DIRECT MATERIALS AND DIRECT LABOR USED.

10 ~~(3.3)~~ (8) "Modified risk tobacco product" means any tobacco
11 product for which the secretary of the United States department of health
12 and human services has issued an order authorizing the product to be
13 commercially marketed as a modified risk tobacco product in accordance
14 with 21 U.S.C. sec. 387k, or any successor section.

15 ~~(3.7)~~ (9) "Moist snuff" means any finely cut, ground, or powdered
16 tobacco that is not intended to be smoked but does not include any finely
17 cut, ground, or powdered tobacco that is intended to be placed in the nasal
18 cavity.

19 (10) (a) "REMOTE RETAIL SALE" MEANS THE SALE OF CIGARS OR
20 PIPE TOBACCO TO A CONSUMER IN THIS STATE WHEN:

21 (I) THE CONSUMER SUBMITS AN ORDER FOR THE CIGARS OR PIPE
22 TOBACCO TO A REMOTE RETAIL SELLER FOR SALE BY MEANS OTHER THAN
23 AN OVER-THE-COUNTER SALE ON THE REMOTE RETAIL SELLER'S PREMISES,
24 INCLUDING, BUT NOT LIMITED TO, TELEPHONE OR OTHER VOICE
25 TRANSMISSION, THE MAIL OR OTHER DELIVERY SERVICE, OR THE INTERNET
26 OR OTHER ONLINE SERVICE; AND

27 (II) THE CIGARS OR PIPE TOBACCO ARE DELIVERED TO THE

1 CONSUMER BY USE OF A COMMON CARRIER, PRIVATE DELIVERY SERVICE,
2 MAIL, OR ANY OTHER MEANS OF REMOTE DELIVERY, OR WHEN THE REMOTE
3 RETAIL SELLER IS NOT IN THE PHYSICAL PRESENCE OF THE CONSUMER
4 WHEN THE CONSUMER OBTAINS POSSESSION OF THE CIGARS OR PIPE
5 TOBACCO.

6 (b) "REMOTE RETAIL SALE" DOES NOT INCLUDE THE SALE OF
7 TOBACCO PRODUCTS OTHER THAN CIGARS OR PIPE TOBACCO.

8 (11) "REMOTE RETAIL SELLER" MEANS A PERSON LOCATED
9 OUTSIDE OF THIS STATE WHO MAKES REMOTE RETAIL SALES.

10 ~~(4)~~ (12) "Sale" means any transfer, exchange, or barter, in any
11 manner or by any means whatsoever, for a consideration, including all
12 sales made by any person. The term includes:

13 (a) A gift by a person engaged in the business of selling tobacco
14 products, for advertising, as a means of evading the provisions of this
15 ~~article~~ ARTICLE 28.5 or for any other purposes whatsoever; ~~and~~

16 (b) A delivery sale; AND

17 (c) A REMOTE RETAIL SALE.

18 (13) "STOCK KEEPING UNIT" MEANS THE UNIQUE IDENTIFIER
19 ASSIGNED BY THE DISTRIBUTOR OR REMOTE RETAIL SELLER TO VARIOUS
20 ITEMS IN ORDER TO TRACK INVENTORY.

21 ~~(5)~~ (14) "Tobacco products" means cigars, cheroots, stogies,
22 periques, granulated, plug cut, crimp cut, ready rubbed, and other
23 smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco,
24 fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings,
25 cuttings and sweepings of tobacco and other kinds and forms of tobacco,
26 prepared in such manner as to be suitable for chewing or for smoking in
27 a pipe or otherwise, or both for chewing and smoking, but does not

1 include cigarettes ~~which~~ THAT are taxed separately pursuant to article 28
2 of this title TITLE 39.

3 **SECTION 2.** In Colorado Revised Statutes, 39-28.5-102, **amend**
4 (4) as follows:

5 **39-28.5-102. Tax levied.** (4) (a) The tax set forth in this section
6 is collected by the department. ~~and is imposed at the time the distributor:~~

7 (b) IN THE CASE OF A DISTRIBUTOR, THE TAX SET FORTH IN THIS
8 SECTION IS IMPOSED AT THE TIME THE DISTRIBUTOR:

9 (a) (I) Brings, or causes to be brought, into this state from without
10 the state tobacco products for sale;

11 (b) (II) Makes, manufactures, or fabricates tobacco products in
12 this state for sale in this state;

13 (c) (III) Ships or transports tobacco products to retailers in this
14 state to be sold by those retailers; or

15 (d) (IV) Makes a delivery sale.

16 (bc) IN THE CASE OF A REMOTE RETAIL SELLER, THE TAX SET FORTH
17 IN THIS SECTION IS IMPOSTED AT THE TIME THE REMOTE RETAIL SELLER
18 MAKES A REMOTE RETAIL SALE.

19 **SECTION 3.** In Colorado Revised Statutes, **amend**
20 39-28.5-102.5 as follows:

21 **39-28.5-102.5. Tax levied - state constitution.** Pursuant to
22 section 21 of article X of the state constitution, there is levied, in addition
23 to the tax levied pursuant to section 39-28.5-102, a tax on the sale, use,
24 consumption, handling, or distribution of tobacco products by distributors
25 AND REMOTE RETAIL SELLERS, at a rate of twenty percent of the
26 manufacturer's list price. The tax shall be paid to and collected by the
27 department. The tax shall be imposed in the same manner as the tax

1 described in section 39-28.5-102.

2 **SECTION 4.** In Colorado Revised Statutes, 39-28.5-104, **amend**
3 (1) as follows:

4 **39-28.5-104. Licensing required - rules - fines.** (1) It is
5 unlawful for any person to engage in the business of a distributor of
6 tobacco products at any place of business OR TO MAKE DELIVERY OR
7 REMOTE RETAIL SALES without first obtaining a license granted and issued
8 by the department, which license shall be in effect until June 30 following
9 the date of issue, unless sooner revoked. IN THE CASE OF A DISTRIBUTOR
10 LOCATED IN THIS STATE, such license shall be granted only to a person
11 who owns or operates the place from which the person engages in the
12 business of a distributor of tobacco products, and, if such business is
13 operated in two or more separate places IN THIS STATE by any such
14 person, a separate license for each place of business shall be required.
15 Such license shall be renewed only upon timely application and payment
16 of the required fee prior to expiration. Such licenses may be transferred
17 in the discretion of and pursuant to the rules adopted by the department.
18 The fee for a license shall be ten dollars per year, and such fee shall be
19 credited to the general fund. Such fee shall be reduced at the rate of two
20 dollars and fifty cents for each expired quarter of the license year. The
21 department shall, on reasonable notice and after a hearing, suspend or
22 revoke the license of any person violating any provision of this ~~article~~
23 ARTICLE 28.5, and no license shall be issued to such person within a
24 period of two years thereafter. The department may share information on
25 the names and addresses of persons who purchased tobacco products for
26 resale with the department of public health and environment and county
27 and district public health agencies. The department shall refuse to issue

1 a new or renewal distributor OR REMOTE RETAIL SELLER license, and shall
2 revoke a distributor's OR REMOTE RETAIL SELLER'S license, if the
3 distributor OR REMOTE RETAIL SELLER owes the state any delinquent taxes
4 administered by the department or interest thereon pursuant to this title
5 TITLE 39 that have been determined by law to be due and unpaid, unless
6 the distributor OR REMOTE RETAIL SELLER has entered into an agreement
7 approved by the department to pay the amount due. The department shall
8 only issue a new or renewal distributor OR REMOTE RETAIL SELLER license
9 to a distributor OR REMOTE RETAIL SELLER that has a current license issued
10 pursuant to section 39-26-103.

11 **SECTION 5.** In Colorado Revised Statutes, 39-28.5-105, **add** (5)
12 as follows:

13 **39-28.5-105. Books and records to be preserved.** (5) EVERY
14 REMOTE RETAIL SELLER SHALL KEEP COMPLETE AND ACCURATE RECORDS
15 NECESSARY FOR THE DETERMINATION OF THE CORRECT TAX LIABILITY,
16 INCLUDING ITEMIZED INVOICES TO VALIDATE THE ACTUAL COSTS PAID BY
17 THE REMOTE RETAIL SELLER FOR ALL CIGARS AND PIPE TOBACCO OFFERED
18 IN REMOTE RETAIL SALES TO THE CONSUMER WITHIN THIS STATE.

19 **SECTION 6.** In Colorado Revised Statutes, 39-28.5-106, **amend**
20 (1), (2), and (4)(a) as follows:

21 **39-28.5-106. Returns and remittance of tax - civil penalty.**
22 (1) Every distributor AND REMOTE RETAIL SELLER shall file a return with
23 the department each quarter. The return, which shall be upon forms
24 prescribed and furnished by the department, shall contain, among other
25 things, the total amount of tobacco products purchased by the distributor
26 OR REMOTE RETAIL SELLER during the preceding quarter and the tax due
27 thereon.

1 (2) Every distributor AND REMOTE RETAIL SELLER shall file a
2 return with the department by the twentieth day of the month following
3 the month reported and shall therewith remit the amount of tax due, less
4 three and one-third percent of any sum so remitted that consists of tax
5 collected after July 1, 2005, but before January 1, 2021, and less one and
6 six-tenths percent of any sum so remitted that consists of tax collected on
7 or after January 1, 2021, to cover the distributor's OR REMOTE RETAIL
8 SELLER'S expense in the collection and remittance of said tax; except that
9 no part of the tax imposed pursuant to section 39-28.5-102.5 and section
10 21 of article X of the state constitution shall be subject to the discount
11 provided for in this subsection (2). If any distributor OR REMOTE RETAIL
12 SELLER is delinquent in remitting said tax, other than in unusual
13 circumstances shown to the satisfaction of the executive director of the
14 department, the distributor OR REMOTE RETAIL SELLER shall not be
15 allowed to retain any amounts to cover his or her expense in collecting
16 and remitting said tax, and in addition the penalty imposed under section
17 39-28.5-110 (2)(b) shall apply.

18 (4) (a) Any person, firm, limited liability company, partnership,
19 or corporation, other than a distributor OR REMOTE RETAIL SELLER, in
20 possession of tobacco products for which taxes have not otherwise been
21 remitted pursuant to this section shall be liable and responsible for the
22 uncollected tax that is levied pursuant to section 39-28.5-102 and section
23 21 of article X of the state constitution on behalf of the distributor OR
24 REMOTE RETAIL SELLER who failed to pay the tax. The person or entity
25 shall make the payment to the department within thirty days of first taking
26 possession of the tobacco product. The department shall establish a form
27 to be used for remittance of the payment. The department shall remit the

1 proceeds it receives pursuant to this ~~paragraph (a)~~ SUBSECTION (4)(a) to
2 the state treasurer for distribution as follows:

3 **SECTION 7.** In Colorado Revised Statutes, 39-28.5-107, **amend**
4 (2)(a), (2)(b)(I), (2)(b)(III), (2)(c), (2)(d) as follows:

5 **39-28.5-107. When credit may be obtained for tax paid.**

6 (2) (a) Credit shall be given by the department to a distributor OR
7 REMOTE RETAIL SELLER for all taxes levied pursuant to this ~~article~~
8 ARTICLE 28.5 and section 21 of article X of the state constitution and paid
9 pursuant to the provisions of this ~~article~~ ARTICLE 28.5 that are bad debts.
10 Such credit shall offset taxes levied pursuant to this ~~article~~ ARTICLE 28.5
11 and section 21 of article X of the state constitution and paid pursuant to
12 the provisions of this ~~article~~ ARTICLE 28.5 only. No credit shall be given
13 unless the bad debt has been charged off as uncollectible on the books of
14 the distributor OR REMOTE RETAIL SELLER. Subsequent to receiving the
15 credit, if the distributor OR REMOTE RETAIL SELLER receives a payment for
16 the bad debt, the distributor OR REMOTE RETAIL SELLER shall be liable to
17 the department for the amount received and shall remit this amount in the
18 next payment to the department under section 39-28.5-106.

19 (b) Any claim for a bad debt credit under this subsection (2) shall
20 be supported by all of the following:

21 (I) A copy of the original invoice issued by the distributor OR
22 REMOTE RETAIL SELLER;

23 (III) Evidence that the person who ordered and received the
24 tobacco products did not pay the distributor OR REMOTE RETAIL SELLER
25 for them and that the distributor OR REMOTE RETAIL SELLER used
26 reasonable collection practices in attempting to collect the debt.

27 (c) If credit is given to a distributor OR REMOTE RETAIL SELLER for

1 a bad debt, the person who ordered and received the tobacco products but
2 did not pay the distributor OR REMOTE RETAIL SELLER for them shall be
3 liable in an amount equal to the credit for the tax imposed in this article
4 ARTICLE 28.5 on the tobacco products. Subsequent to receiving the credit,
5 if the distributor OR REMOTE RETAIL SELLER receives a payment for the
6 bad debt and the distributor OR REMOTE RETAIL SELLER makes a payment
7 to the department, the amount of taxes owed by such person shall be
8 reduced by the amount paid to the department.

9 (d) As used in this subsection (2), "bad debt" means the taxes
10 attributable to any portion of a debt that is related to a sale of tobacco
11 products subject to tax under this article ARTICLE 28.5, that is not
12 otherwise deductible or excludable, that has become worthless or
13 uncollectible in the time after the tax has been paid pursuant to section
14 39-28.5-106, and that is eligible to be claimed as a deduction pursuant to
15 section 166 of the federal "Internal Revenue Code of 1986", as amended.
16 A bad debt shall not include any interest on the wholesale price of
17 tobacco products, uncollectible amounts on property that remain in the
18 possession of the distributor OR REMOTE RETAIL SELLER until the full
19 purchase price is paid, expenses incurred in attempting to collect any
20 account receivable or any portion of the debt recovered, an account
21 receivable that has been sold to a third party for collection, or repossessed
22 property.

23 **SECTION 8.** In Colorado Revised Statutes, 39-28.5-110, **amend**
24 (1) as follows:

25 **39-28.5-110. Prohibited acts - penalties.** (1) It is unlawful for
26 any distributor PERSON to sell and distribute any tobacco products in this
27 state without a license as required in section 39-28.5-104, or to willfully

1 make any false or fraudulent return or false statement on any return, or to
2 willfully evade the payment of the tax, or any part thereof, as imposed by
3 this ~~article~~ ARTICLE 28.5. Any distributor, REMOTE RETAIL SELLER, or
4 agent thereof who willfully violates any provision of this ~~article~~ ARTICLE
5 28.5 shall be punished as provided by section 39-21-118.

6 **SECTION 9.** In Colorado Revised Statutes, **amend** 39-28.5-112
7 as follows:

8 **39-28.5-112. List of licensed distributors and remote retail**
9 **sellers - published on website.** ~~On or before December 31, 2009,~~ The
10 department shall publish on its website a list of the names and addresses
11 of all licensed distributors AND REMOTE RETAIL SELLERS. The list shall be
12 updated within seven days of any changes to the list.

13 **SECTION 10.** In Colorado Revised Statutes, 39-28.6-102,
14 **amend** (5) and (7)(b) as follows:

15 **39-28.6-102. Definitions.** As used in this article 28.6, unless the
16 context otherwise requires:

17 (5) (a) "Manufacturer's list price" means, EXCEPT AS PROVIDED IN
18 SUBSECTIONS (5)(b) AND (5)(c) OF THIS SECTION, the invoice price for
19 which a manufacturer or supplier sells a nicotine product to a distributor
20 exclusive of any discount or other reduction.

21 (b) FOR A DELIVERY SELLER, IF DETERMINING THE INVOICE PRICE
22 DESCRIBED IN SUBSECTION (5)(a) OF THIS SECTION IS IMPRACTICABLE,
23 THEN "MANUFACTURER'S LIST PRICE" MEANS THE AVERAGE OF THE
24 ACTUAL PRICE PAID, EXCLUSIVE OF ANY REBATES OR DISCOUNTS APPLIED,
25 FOR THE NICOTINE PRODUCT'S STOCK KEEPING UNIT DURING THE
26 PRECEDING CALENDAR YEAR. THE DEPARTMENT MAY, BY WRITTEN NOTICE
27 TO THE DELIVERY SELLER, PROSPECTIVELY REQUIRE A DELIVERY SELLER

1 TO CALCULATE THE TAX ON THE INVOICE PRICE IF THE DEPARTMENT FINDS
2 THAT THE DELIVERY SELLER'S USE OF THE AVERAGE PRICE PAID WAS FOR
3 THE PURPOSE OF AVOIDING TAX.

4 (c) FOR A MANUFACTURER WHO IS ALSO A DELIVERY SELLER OR A
5 RETAILER, AND WHO SELLS NICOTINE PRODUCTS EXCLUSIVELY TO
6 CONSUMERS AND NOT TO SUPPLIERS OR DISTRIBUTORS, "MANUFACTURER'S
7 LIST PRICE" MEANS THE MANUFACTURER'S COST TO MANUFACTURE THE
8 NICOTINE PRODUCT, WHICH INCLUDES THE MANUFACTURING OVERHEAD
9 AND THE COST OF ALL DIRECT MATERIALS AND DIRECT LABOR USED.

10 (7) "Nicotine product" means a product that contains nicotine
11 derived from tobacco or created synthetically that is intended for human
12 consumption, whether by vaporizing, chewing, smoking, absorbing,
13 dissolving, inhaling, snorting, sniffing, aerosolizing, or by any other
14 means, and that is not:

15 (b) Tobacco products, as defined in section ~~39-28.5-101 (5)~~
16 39-28.5-101 (14); or

17 **SECTION 11.** In Colorado Revised Statutes, 18-8-204, **amend**
18 (2)(m) as follows:

19 **18-8-204. Introducing contraband in the second degree -**
20 **definition.** (2) As used in this section, "contraband" means any of the
21 following, but does not include any article or thing referred to in section
22 18-8-203:

23 (m) For purposes of a facility of the department of corrections or
24 any private contract prison, any cigarettes or tobacco products, as defined
25 in section ~~39-28.5-101 (5)~~ 39-28.5-101 (14);

26 **SECTION 12. Act subject to petition - effective date.** This act
27 takes effect January 1, 2024; except that, if a referendum petition is filed

1 pursuant to section 1 (3) of article V of the state constitution against this
2 act or an item, section, or part of this act within the ninety-day period
3 after final adjournment of the general assembly, then the act, item,
4 section, or part will not take effect unless approved by the people at the
5 general election to be held in November 2024 and, in such case, will take
6 effect on the date of the official declaration of the vote thereon by the
7 governor.