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BILL



ANALYSIS

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Senate Bill 231 (as passed by the Senate)
Sponsor: Senator Rick Jones
Committee: Regulatory Reform

Date Completed: 6-1-15

RATIONALE

The Youth Tobacco Act prohibits a retailer from selling or furnishing tobacco products to minors (individuals under 18 years old), and makes it illegal for a minor to purchase or possess tobacco products in all but a few limited circumstances. The Act also prescribes penalties associated with the possession of tobacco products by minors and the sale of tobacco products to minors. The Act applies only to tobacco products, however. Concerns have been raised by health advocates and others about the use of vapor products (e.g., electronic, or e-cigarettes) and alternative nicotine products by minors. Likewise, people are concerned because businesses and individuals can legally sell these products to minors. To address these concerns, it has been suggested that the sale of vapor products and alternative nicotine products to minors, and the possession and use of these products by minors, should be prohibited.

CONTENT

The bill would amend the Youth Tobacco Act to do the following:

- **Prohibit a person from selling or giving a vapor product or alternative nicotine product to a minor.**
- **Require signs posted by retailers to indicate that the purchase of vapor or alternative nicotine products by minors was illegal.**
- **Require a person to verify that an individual was at least 18 before selling or furnishing a vapor product or alternative nicotine product to him or her.**
- **Extend the affirmative defense of having and enforcing a preventative written policy to a charge of selling a vapor or alternative nicotine product to a minor.**
- **Prohibit a minor from possessing or using a vapor product or alternative nicotine product.**

The bill would take effect 90 days after its enactment.

Selling, Giving, or Furnishing Vapor or Alternative Nicotine Product to a Minor

The bill would prohibit a person from selling, giving, or furnishing a vapor product or alternative nicotine product to a minor, including through a vending machine or other means. Currently, it is a misdemeanor to sell, give, or furnish a tobacco product to a minor, and a violator is subject to a maximum \$50 fine for each violation. The bill would extend this penalty to the proposed prohibition.

The bill specifies that "tobacco product" would not include a vapor product, an alternative nicotine product, or a product regulated as a drug or device by the U.S. Food and Drug Administration (FDA). The bill would define "alternative nicotine product" as "a noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means". The term would not include a tobacco product, a vapor product, or a product regulated as a drug or device by the FDA.

The bill would define "vapor product" as "a noncombustible product containing nicotine that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor from nicotine in a solution or other form". The term would include an electronic cigarette, electronic cigar, electronic pipe, or similar product or device and a vapor cartridge or other container of nicotine in a solution or other form that is intended to be used with or in such a product or device. It would not include a product regulated as a drug or device by the FDA.

Required Retail Sign

The Act requires a person who sells tobacco products at retail to post a conspicuous sign in a place close to the point of sale. The sign must include a specific statement about the illegality of the purchase of tobacco products by a minor. The Act also requires the Department of Community Health to produce the signs, and distribute them free of charge to people who sell tobacco products at retail. The bill would extend the sign requirement to a person who sells vapor products or alternative nicotine products at retail, and would modify the sign's statement to include those products. Also, where the Act refers to the Department of Community Health, the bill instead would refer to the Department of Health and Human Services.

"Person who sells vapor products or alternative nicotine products at retail" would mean a person whose ordinary course of business consists, in whole or in part, of the retail sale of vapor products or alternative nicotine products.

Age Verification Requirement

The bill would require a person to verify that an individual was at least 18 years old before selling, offering to sell, giving, or furnishing a vapor or alternative nicotine product to the individual. If the individual appeared to be under 27 years old, the person would have to examine a government-issued photographic identification that established that the individual was at least 18 years old. If the sale were made by the internet or another remote sales method, the person would have to perform an age verification through an independent, third-party age verification service that compared information from a commercially available database, or aggregate of databases, that was regularly used by government agencies and businesses for the purpose of verifying age and identity, to the personal information entered by the individual when ordering, that established that the individual was at least 18 years old. A person who violated the age-verification requirement would be guilty of a misdemeanor, and would be subject to a maximum \$50 fine for each violation.

Affirmative Defense & Employment Exemption

Currently, it is an affirmative defense to a charge of selling a tobacco product to a minor that the defendant had in force at the time of arrest and continues to have in force a written policy to prevent the sale of tobacco products to minors and that the defendant enforced and continues to enforce the policy. The bill would extend this affirmative defense to a charge of selling vapor products or alternative nicotine products to minors.

The Act's prohibition against giving or furnishing a tobacco product to a minor does not apply to the handling or transportation of the product by a minor under the terms of his or her employment. The bill would extend this exception to a minor's handling or transportation of a vapor product or alternative nicotine product.

Purchase, Possession, or Use of Vapor or Alternative Nicotine Products

The Act prohibits a minor from purchasing or attempting to purchase a tobacco product, possessing or attempting to possess a tobacco product, or using a tobacco product in a public place. It also prohibits a minor from presenting or offering to an individual a purported proof of age that is false, fraudulent, or not actually his or her own proof of age, for the purpose of purchasing, possessing, or attempting to purchase or possess a tobacco product. A violation is a misdemeanor punishable by a maximum fine of \$50 for each violation. Pursuant to a probation order, the court also may

require a violator to participate in a health promotion and risk reduction assessment program, if available. The Act also allows a court to order a violator to perform community service in a hospice, nursing home, or long-term care facility.

Under the bill, the prohibitions and penalties also would apply to activities involving tobacco products, vapor products, or alternative nicotine products.

The prohibitions do not apply to a minor participating in an undercover law enforcement operation or compliance check. They also do not apply to the handling or transportation of a tobacco product by a minor under the terms of his or her employment. The bill would refer to a vapor product or alternative nicotine product, as well as a tobacco product, in those provisions.

MCL 722.641 et al.

BACKGROUND

Introduction

E-cigarettes, and similar devices, are a relatively new nicotine delivery system. While devices vary in their appearance and specific method of operation, they have a few basic elements in common. A solution of water, dissolved nicotine, and other ingredients (usually flavoring) is heated with a heating element (usually battery-powered). This vaporizes the nicotine solution, which passes into a mouthpiece and is inhaled in a manner similar to cigarette smoking. Often, glycerol or propylene glycol is added to the solution to give the appearance of smoke when the solution is vaporized. The concentration of nicotine contained in the solution can be customized by the retailer to the buyer's specifications, and many manufacturers make nicotine-free solutions.

Regulation of E-Cigarettes

The Food and Drug Administration regulates tobacco products through the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), unless a product is marketed for therapeutic purposes, in which case it is regulated by the drugs and devices provisions of the Federal Food, Drug, and Cosmetic Act (FDCA). In 2010, the FDA attempted to use its regulatory power under the FDCA to block shipments of e-cigarettes (marketed and labeled for "smoking pleasure") into the U.S., asserting that the e-cigarettes were adulterated, misbranded, or unapproved drug-device combinations regulated by the FDCA. The U.S. Court of Appeals for the District of Columbia Circuit, in *Sottera, Inc. v Food & Drug Administration*, 627 F.3d 891 (2010), held that the proper authority to regulate e-cigarettes arises out of the Tobacco Control Act, unless the device is marketed for therapeutic purposes.

The FDA signaled its intent to act along the jurisdictional boundaries set by the *Sottera* decision and regulate e-cigarettes and similar devices in accordance with the Tobacco Control Act. While rules regulating the advertising, ingredients, and sale of e-cigarettes and like devices were originally expected in late-2013, the FDA issued a Notice of Proposed Rulemaking (NPRM) and announced its proposed rules on April 24, 2014.¹ Among other things, the proposed rules would deem all products meeting the Tobacco Control Act's definition of a "tobacco product" to be subject to the FDA's authority.² The NPRM comment period ended on July 9, 2014, and final action on those rules is expected in June 2015.

¹ "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", 79 Federal Register 23141, April 25, 2014; "FDA proposes to extend its tobacco authority to additional tobacco products, including e-cigarettes", FDA Press Release, 4-24-14, retrieved 5-21-15, at: <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm394667.htm>.

² Under the Tobacco Control Act, "tobacco product" means "any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product)". The definition does not include an article regulated as a drug or device. 21 U.S.C. § 321(rr)(1)-(2).

State regulation of e-cigarettes has taken a variety of approaches. A majority of states have enacted legislation banning the sale e-cigarettes to minors, or are in the process of enacting such legislation.³ Some jurisdictions (e.g., New York City and New Jersey) have chosen to regulate vapor products in the same ways as their tobacco product counterparts.⁴ In Michigan, there are no laws or regulations banning the possession and use of e-cigarettes or similar devices by minors, or the sale of these devices to minors.

Health Impacts

Little is known about the health impact of vapor products, as few studies have been done to determine the effectiveness of e-cigarettes as nicotine delivery devices, or their impact on public health. The research conducted to-date has yielded mixed results from a public health perspective. For example, some studies have shown that smokers who use e-cigarettes for smoking cessation are more likely to report continued abstinence.⁵ Other work suggests that e-cigarette vapors may have an effect similar to cigarette smoke in COPD-emphysema pathogenesis, or rejects, among other things, the claims made by e-cigarette manufacturers that e-cigarettes are a safer method of smoking or function as an effective smoking cessation method.⁶ The effects of nicotine on the human body are well documented. In concentrations found in cigarettes, nicotine is a pharmacological agent that has a marked effect on brain and cardiovascular function.⁷ However, small doses of nicotine can be highly toxic and potentially fatal.

One concern with vapor products is accidental skin exposure to the nicotine solution used in e-cigarettes, as nicotine is readily absorbed through the skin.⁸ Exposure to some higher-concentration vapor product solutions could lead to systemic poisoning and death, simply through skin contact, or accidental ingestion.⁹ This concern is heightened in the case of children, who generally have less tolerance to nicotine.¹⁰ In addition, less is known about the impact of nicotine on adolescent development.

Other concerns deal with the operation of the devices themselves. Users and manufacturers of e-cigarettes have claimed that e-cigarettes may be a healthy alternative to smoking tobacco; however, much remains unknown about e-cigarette use. For instance, very little research has been done to determine the long-term effects of inhaling the vapor-causing components of the liquid (e.g., propylene glycol). Another issue is determining the actual concentration of nicotine delivered in the course of the product's use. A set of tests performed by the Georgetown University School of Medicine and the Schroeder Institute for Tobacco Research and Policy Studies, in addition to testing by the FDA, indicated that nicotine concentrations for e-cigarettes vary based on manufacturers, devices, and liquids, as well as "puff-to-puff".¹¹ The tests also indicated the

³ "Alternative Nicotine Products, Electronic Cigarettes", National Conference of State Legislature, 5-19-15, retrieved 5-21-15, at: <http://www.ncsl.org/research/health/alternative-nicotine-products-e-cigarettes.aspx>.

⁴ Morgan Windsor, "Bloomberg signs his last 22 bills; one regulates e-cigarette use", *CNN*, 12-31-13, retrieved 2-20-14 at: <http://edition.cnn.com/2013/12/30/politics/mayor-bloomberg-last-bills/index.html>; Reid Wilson, "Awaiting FDA, states pursue their own e-cigarette rules", *Washington Post GovBeat*, 10-29-13, retrieved 2-20-14 at: <http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/29/awaiting-fda-states-pursue-their-own-e-cigarette-rules>.

⁵ See, e.g., Jamie Brown, et al., "Real-world effectiveness of e-cigarettes when used to aid smoking cessation: a cross-sectional population study", Research Report, *Addiction*, vol. 109: 1531-1540 (2014).

⁶ See, respectively, Prashanth Shivalingappa, Colin Westphal, and Neeraj Vij, "Airway exposure of e-cigarette-vapors impairs autophagy and induces aggresome-formation", Abstract, *The FASEB Journal*, vol. 29 no. 1 Supplement, LB631 (April 2015), retrieved 5-21-15 at:

http://www.fasebj.org/content/29/1_Supplement/LB631.short, and Rachel Grana, Neal Benowitz, and Stanton Glantz, "E-Cigarettes: A Scientific Review", *Circulation*, vol. 129:1972-1986 (2014).

⁷ U.S. Surgeon General, U.S. Department of Health and Human Services, *The Health Consequences of Smoking: Nicotine Addiction* (1988), iv, at: <http://profiles.nlm.nih.gov/ps/access/NNBBZD.pdf>.

⁸ U.S. Surgeon General, *The Health Consequences of Smoking: Nicotine Addiction*, 16, 31, and 593.

⁹ U.S. Surgeon General, *The Health Consequences of Smoking: Nicotine Addiction*, 607.

¹⁰ International Programme on Chemical Safety, "Nicotine", *Poison Information Monograph*, at: <http://www.inchem.org/documents/pims/chemical/nicotine.htm#DivisionTitle:7.2.1.2%20Children>. See Section 7, on Toxicology.

¹¹ Nathan K. Cobb, et al., "Novel Nicotine Delivery Systems and Public Health: The Rise of the 'E-Cigarette'", *American Journal of Public Health* 100 (2010), 2340-2342, doi: 10.2105/AJPH.2010.199281; U.S. Food and Drug

presence of various irritants, solvents, genotoxins, and carcinogens.¹² The report noted that the presence of these substances was "of unclear significance but needs further consideration".

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill is needed to prevent minors from purchasing vapor products, such as e-cigarettes, and alternative nicotine products. As of May 2015, at least 42 other states, and one territory, have passed laws preventing the sale of e-cigarettes and like products to minors.¹³ E-cigarette manufacturers develop fruit and other sweet flavorings that appeal to youths. Some retailers use cartoon characters in their marketing, or have developed "skins" for their e-cigarettes with designs featuring bright colors or games that are usually marketed to minors, such as Angry Birds.¹⁴

Additionally, surveys by the Centers for Disease Control and Prevention show that e-cigarette use among students in middle and high school is increasing. In 2011, the National Youth Tobacco Survey indicated that 4.7% of school students reported trying an e-cigarette in the past year.¹⁵ By 2012, that percentage had increased to 10%, and an estimated 1.78 million students in middle and high school reported using e-cigarettes.¹⁶ This is concerning because the effects of nicotine, and e-cigarette, use on adolescent development are not well understood and could have lasting implications for youths who use these products. Adult use of the products also is increasing and may continue to increase if minors continue to have access to these products and are able to develop an addiction to them when they are young. Young e-cigarette smokers also may shift to tobacco product use.

Opposing Argument

The bill would not go far enough, in that it would categorize vapor products and alternative nicotine products separately from tobacco products. The differing categorization of these products could cause youths and other consumers to view vapor products and alternative nicotine products as being fundamentally different from tobacco products. Any attempt to define these products separately from tobacco products also could conflict with the FDA's proposed regulations. The State should include e-cigarettes and other nicotine-containing vapor products in the existing definition of tobacco products, making it clear that they would be subject to the same restrictions. Furthermore, this designation would allow the State to tax those products as tobacco products.

Response: Michigan is one of the few states that has not passed legislation to prevent minors from accessing e-cigarettes and similar devices. The bills would prevent retailers from selling vapor products and alternative nicotine devices to minors, and prevent minors from buying or possessing these products. The legislation would be a good first step, and could be amended or supplemented once the FDA provides more guidance.

Legislative Analyst: Jeff Mann

FISCAL IMPACT

The bill could result in a marginal increase in misdemeanor penalties associated with violations of the Youth Tobacco Act. These misdemeanors are punishable by a fine of up to \$50, the revenue

Administration, "Evaluation of e-cigarettes", 2009, retrieved 2-20-14 at: <http://www.fda.gov/downloads/Drugs/ScienceResearch/UCM173250.pdf>.

¹² Cobb, *et al.*, 2341.

¹³ See n.3.

¹⁴ See <http://www.whitecloudelectroniccigarettes.com/accessories/vapor-jackets>.

¹⁵ Catherine Corey, *et al.*, "Notes from the Field: Electronic Cigarette Use Among Middle and High School Students—United States, 2011-2012", *Morbidity and Mortality Weekly Report* 62 (9-6-13), 729. Actual survey data and other information are available at: http://www.cdc.gov/tobacco/data_statistics/surveys/nyts.

¹⁶ Corey, *et al.*, 729.

from which benefits public libraries. For youths violating the Act, additional punishments may include community service and participation in health risk reduction programming. The bill would not have a significant impact on State and local criminal justice costs.

Fiscal Analyst: John Maxwell

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.