

# Legislative Analysis



## TOBACCO REVISIONS

Phone: (517) 373-8080  
<http://www.house.mi.gov/hfa>

**Senate Bill 781 (S-2) as passed by the Senate**  
**Sponsor: Sen. Jim Ananich**

Analysis available at  
<http://www.legislature.mi.gov>

**Senate Bill 782 (S-1) as passed by the Senate**  
**Sponsor: Sen. Marshall Bullock II**

**Senate Bill 783 (S-1) as passed by the Senate**  
**Sponsor: Sen. Jim Runestad**

**Senate Bill 785 as passed by the Senate**  
**Sponsor: Sen. Dale W. Zorn**

**Senate Bill 784 (S-2) as passed by the Senate**  
**Sponsor: Sen. Lana Theis**

**Senate Bill 786 as passed by the Senate**  
**Sponsor: Sen. Paul Wojno**

**House Committee: Regulatory Reform**  
**Senate Committee: Regulatory Reform**  
**Complete to 6-23-20**

## SUMMARY:

The bills would amend different acts to revise the treatment of tobacco, other nicotine products, and vapor products under the law, including doing all of the following:

- Providing for a tax on the sale of alternative nicotine products and the consumable materials used in electronic smoking devices and increasing the cigar tax cap. (SB 781)
- Requiring a license to sell a tobacco, vapor, or alternative nicotine product and providing for license fees, license sanctions for good cause, and administrative fines for a violation. (SB 782)
- Prohibiting a person who sells vapor products from certain conduct regarding advertising to minors or comparing the health effects of vaping with the health effects of smoking. (SB 783)
- Restricting sales of tobacco, vapor, or alternative nicotine products to individuals who are at least 21 years of age and creating a civil infraction for knowingly selling or furnishing such a product to a minor or failing to make diligent inquiry as to the buyer's age. (SB 784)
- Requiring the Department of Health and Human Services (DHHS) to conduct unannounced compliance checks to identify establishments selling products to minors. (SB 784)
- Requiring a person delivering tobacco products via the mail or common carrier to determine that the person receiving the product is at least 21 years old. (SB 785)

**Senate Bill 781** would amend the Tobacco Products Act to include *alternative nicotine products* and *consumable material* in the definition of tobacco product under that act, beginning January 1, 2021. (Tobacco product currently means cigarettes, cigars, noncigarette smoking tobacco, or smokeless tobacco.)

*Alternative nicotine product* would mean a noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved,

or ingested by any other means, and would not include a product regulated as a drug or device by the Food and Drug Administration (FDA) under 21 USC 351 to 360fff-8.

***Consumable material*** would mean any volume of liquid nicotine solution, other than marijuana, that is depleted as an ***electronic smoking device*** is used.

***Electronic smoking device*** would mean any device that can be used to deliver aerosolized or vaporized consumable material to the person inhaling from the device, including an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah. Electronic smoking device would include any component, part, or accessory of the device, whether or not sold separately, and any consumable material intended to be aerosolized or vaporized during the use of the device. Electronic smoking device would not include any battery or battery charger when sold separately or any drugs, devices, or combination products authorized for sale as tobacco cessation products by the FDA.

Beginning January 1, 2021, the bill would levy a tax on the sale of these products sold in Michigan as follows:

- For consumable materials, 18% of the wholesale price.
- For alternative nicotine products, 50 cents per ounce of alternative nicotine product on the basis of net weight of the alternative nicotine product as listed by the manufacturer.

Beginning October 1, 2021, and each fiscal year thereafter, revenue from the tax imposed on consumable materials would be credited or distributed as follows:

- The first \$250,000 to the Department of Treasury for tax enforcement purposes.
- The next \$2.5 million to local health departments for local public health programs.
- The next \$2.5 million to DHHS for enforcement and compliance purposes under the Youth Tobacco Act.
- The balance to the general fund.

The bill would require every licenser and retailer who has on hand for sale any consumable materials on January 1, 2021, to file a complete inventory of those materials with the Department of Treasury by February 1, 2021. A tax would not be imposed on the consumable materials described in this inventory.

The bill would also require, for consumable material that is sold in the same package as an electronic smoking device, that the records required to be kept under the act by manufacturers, wholesalers, retailers, and transporters, among others, segregate the price paid for the consumable material from the price paid for the electronic smoking device. This requirement would apply to such documents as manufacture, purchase, delivery, and transportation records, statements, and invoices or bills of lading.

Finally, the act imposes a tax of 32% of the wholesale price on Michigan sales of cigars, noncigarette smoking tobacco, and smokeless tobacco. However, the amount of this tax levied on cigars is capped at 50 cents per individual cigar. The bill would increase this cap to 65 cents per individual cigar beginning November 1, 2020, and to 75 cents per individual cigar beginning November 1, 2021.

MCL 205.422 et seq.

**Senate Bill 782** would amend the Youth Tobacco Act. Under the bill, beginning October 1, 2020, a person could not sell a tobacco product, vapor product, or alternative nicotine product at retail without a license. An application for a license would have to be on a form prescribed by the Department of Treasury and signed under penalty of perjury. A separate license would be required for each location where a product was sold, but a single application could be made to the department listing each location where the products would be sold.

The Department of Treasury would have to grant a license to a person who submits a completed application and pays a licensing fee of not more than \$100 per location and would have to issue a certificate of licensure to a person granted a license. The certificate of licensure, or a copy, would have to be displayed prominently and where visible to the public in the person's place of business where a product is sold. Each license would be valid for one year and would have to be renewed annually before December 31 of the year the license expires. The renewal fee could not exceed \$75.

The Department of Treasury could deny, suspend, revoke, or refuse to renew a license for ***good cause*** after providing an opportunity for a hearing. ***Good cause*** would consist of instances in which the department determines that a person has done any of the following:

- Submitted a false or fraudulent license application.
- Provided a false statement in the application.
- Possessed a false or fraudulent certificate of licensure.
- Displayed a false or fraudulent certificate of licensure in a place of business where a product is sold.

The Department of Treasury could promulgate rules to implement the bill. In addition to other remedies provided by law, the department could assess an administrative fine of up to \$500 if it determined that a person violated the provisions of the bill. The department would have to use the fees and fines collected under this new section to administer and enforce the act.

#### **Definitions**

The bill would delete the current definitions of “person who sells vapor products or alternative nicotine products at retail” and “person who sells tobacco products at retail.” Instead, the bill would define ***person who sells tobacco products, vapor products, or alternative nicotine products at retail*** to mean:

- Until September 30, 2009, a person whose ordinary course of business consists, in whole or in part, of the retail sale of a tobacco product subject to state sales tax, a vapor product, or an alternative nicotine product.
- Beginning October 1, 2020, a person whose ordinary course of business consists, in whole or in part, of the retail sale of a tobacco product subject to state sales tax, a vapor product, or an alternative nicotine product, and who is licensed under the bill.

The bill would revise the definition of “vapor product” to exclude ***marijuana*** as a vapor product and as a substance from which a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means can be used to produce vapor. (***Marijuana*** would mean that term as defined in section 7106 of the Public Health Code.)

MCL 722.644 and proposed MCL 722.642d

**Senate Bill 783** would add a new section to the Youth Tobacco Act to prohibit a person who sells vapor products at retail from doing either of the following:

- Advertising a vapor product in a manner that causes a minor to believe that health benefits could be derived from the use of the product, unless the vapor product is approved by the U.S. Food and Drug Administration.
- Promoting a vapor product by comparing the health effects arising from its use with the health effects that arise from the use of tobacco products.

A violation would be a state civil infraction for which a civil fine could be ordered as follows:

- First offense: Up to \$500 in a calendar year.
- Second offense: Up to \$1,000 in a calendar year.
- Third or subsequent offense: Up to \$2,500 in a calendar year.

Subject to the bill's restrictions, a person could sell a vapor product of any flavor to an individual who is at least 21 years of age. Notwithstanding any other provision of the act to the contrary, the presence of the following flavors alone, without more, would not be considered to be appealing to minors:

- Tobacco.
- Menthol.
- Fruit or a combination of common fruits.

Proposed MCL722.641a

**Senate Bill 784** would amend the Youth Tobacco Act. Under the bill, a sales clerk, agent, or employee of a person who sells at retail tobacco products, vapor products, or alternative nicotine products (hereinafter "products") who knowingly sells or furnishes a product to a minor or fails to make diligent inquiry as to whether the individual is a minor would be responsible for a state civil infraction and could be ordered to pay a fine of up to \$250.

#### **Compliance checks**

The bill would allow DHHS to conduct unannounced compliance checks at any time during the open hours of any establishment that sells products by engaging individuals under 21 years of age to enter an establishment and attempt to purchase a product.

An unannounced check would have to be conducted by DHHS at least once every two years on an establishment selling such products. DHHS would have to give any establishment that failed the first compliance check an opportunity to demonstrate that it has a compliance plan in place for identifying the cause of the problem and a remediation plan for addressing the sale of the products to minors. Not less than three months after the failed unannounced compliance check, DHHS would have to conduct an unannounced follow-up compliance check on the establishment. (The bill provides that DHHS would have to "apply this section [i.e., the bill] once in a calendar year" to an establishment selling products. It is unclear what this means.)

An establishment or person that violates the prohibition against selling products by failing a second unannounced compliance check in a calendar year, after being given the opportunity to demonstrate that it has a compliance plan and a remediation plan, would be responsible for a state civil infraction or guilty of a crime as follows:

- First violation: State civil infraction; may be fined up to \$1,000.

- Second violation: State civil infraction; may be fined up to \$1,500, and the establishment or person could not sell a product for at least seven days.
- Third violation: Misdemeanor; punishable by a criminal fine of up to \$2,500, and could not sell a product for at least 30 days.
- Fourth or subsequent violation: Misdemeanor; punishable by a criminal fine of up to \$3,000, and could not sell a product for three years.

DHHS would have to publish the results of all compliance checks at least annually and make them available to the public on request.

[Note: Because the bill seems to limit compliance checks to only once per calendar year, and because there is no current mechanism to track the number of civil infractions a person is issued, it is unclear how the penalties for repeat offenses would be determined.]

#### Affirmative defense

Currently, the act provides a defendant charged with violating the act's prohibition on selling, giving, or furnishing a product to a minor, including through a vending machine, an affirmative defense if the defendant had a written policy to prevent such sales to persons under 18 years of age.

The bill would instead specify that it is an affirmative defense to a charge described above, and also to a charge brought under the new civil infraction of knowingly selling a product to a minor or without making a diligent inquiry regarding an individual's age, that the defendant demanded, was shown, and reasonably relied on ***bona fide documentary evidence*** of the age and identity of the minor and that the defendant reasonably relied on that documentation before furnishing the product to the minor.

***Bona fide documentary evidence*** would mean a document issued by a federal or state government, or a ***municipality*** that includes a photo and the individual's date of birth.

***Municipality*** would mean a county, township, city, village, school district, intermediate school district, community college district, metropolitan district, district library, or another governmental authority or agency in the state that has the power to issue the document.

#### Age verification

Currently, before selling, offering for sale, giving, or furnishing a product to an individual, a person must verify that the individual is at least 18 years old by doing either of the following:

- If the individual looks to be under 27, examining a government-issued photo ID that establishes that the individual is at least 18.
- For internet or remote sales, performing age verification through an independent, third-party age verification system as described by the act.

The bill would amend this provision to require the person to verify that the individual is at least 21 years of age if they look to be under 30 and to verify, for internet or remote sales, that the individual is at least 21.

The bill would also provide that the above provisions would apply to vapor products until September 30, 2020. Beginning October 1, 2020, a person would have to verify that an individual is at least 21 years of age before selling, offering for sale, giving, or furnishing a vapor product to the purchaser by doing one of the following;

- Examining a government-issued photo ID and verifying that it has not expired. This would apply no matter what age the individual appeared to be.)
- For internet or remote sales, performing age verification through the same independent, third-party age verification system as referenced above.

#### Miscellaneous

Finally, the bill provides that fees collected under section 1 of the act would have to be used to offset the costs of enforcing the act. [Note: Section 1 does not impose fees, but it does impose civil and criminal fines. The state constitution requires criminal fine revenue to be allocated to support public libraries. Civil fine revenue, unless specifically designated in statute, is distributed according to provisions of the Revised Judicature Act.]

MCL 722.641

**Senate Bill 785** would amend the Michigan Penal Code to require a person delivering tobacco products through the U.S. Postal Service or any common carrier to ascertain that the individual who receives the tobacco product is 21 (instead of 18) years of age or older.

MCL750.42b

**Senate Bill 786** would amend the Age of Majority Act, which specifies that it supersedes all provisions of law that prescribe duties, liabilities, responsibilities, rights, and legal capacity of people 18 years of age through 20 years of age different from people 21 years of age, including certain listed public acts. The bill would specify that the act does not apply to the Youth Tobacco Act. The bill would make numerous revisions of a technical or editorial nature and include several former provisions of the Michigan Penal Code in the list of statutes that the Age of Majority Act supersedes.

MCL 722.53

#### **Tie-bars**

Senate Bill 782 is tie-barred to SBs 781, 783, and 784. Senate Bills 783 and 784 are tie-barred to each other and to SBs 781 and 782. Senate Bills 785 and 786 are tie-barred to SBs 782, 783, and 784. A bill cannot take effect unless each bill to which it is tie-barred is enacted into law.

### **FISCAL IMPACT:**

**Senate Bill 781**, as written, would be expected to increase total revenue under the tobacco products tax act by roughly \$10 million on a full-year basis.

Increasing the maximum tax that could be levied on a cigar from \$0.50 to \$0.65 for FY 2020-21 and \$0.75 thereafter would be expected to increase revenue from cigar sales (levied at 32% of the wholesale price) by roughly \$1 million on an annual basis. Revenue from other tobacco

products (non-cigarettes) is distributed such that the Medicaid Benefits Trust Fund receives 75% while the remainder accrues to the general fund.

Levying an 18% tax on the wholesale price of consumable materials dispensed by an electronic smoking device could potentially generate between \$7 million to \$10 million on a full-year basis, and taxing alternative nicotine products at \$0.50 per ounce would likely generate less than \$1 million. Of the combined amount received from these two new levies, \$250,000 is earmarked to the Department of Treasury for enforcement, \$2.5 million to local health departments, and \$2.5 million to DHHS. Any remaining revenue accrues to the general fund.

**Senate Bill 782** would generate initial and ongoing administrative and oversight costs for the Department of Treasury. While an estimate of these costs is not available, it is assumed that the costs would be paid for from the licensing fees and administrative fine revenue generated under the provisions of the bill.

**Senate Bill 783** would have an indeterminate fiscal impact on the state and on local units of government. Under the bill, a person who advertises vapor products in a manner that causes minors to believe there are health benefits to using the vapor products, or a person who promotes vapor products by comparing health effects from using vapor products to health effects from using tobacco products would be responsible for a state civil infraction and could be ordered to pay a civil fine for first, second, third, or subsequent offenses. Revenue collected from the payment of civil infraction penalties would increase funding used to support public and county law libraries. Also, under section 8827(4) of the Revised Judicature Act, \$10 of the civil fine would be deposited into the state's Justice System Fund, so revenue to the state would be increased. Justice System Fund revenue supports various justice-related endeavors in the judicial branch, the Departments of State Police, Corrections, Health and Human Services, and Treasury, and the Legislative Retirement System. There is no way to determine the number of offenses that would occur under provisions of the bill, so it is not possible to estimate the amount of additional revenue that would be collected.

**Senate Bill 784** would have an indeterminate fiscal impact on the state and on local units of government. Under the bill, a person who sells tobacco, vapor, or alternative nicotine products at retail knowingly to a minor or who fails to inquire if the individual is a minor would be responsible for a state civil infraction and could be ordered to pay a fine. Under the bill, an establishment that sells tobacco, vapor, or alternative nicotine products that fails a second unannounced compliance check would be responsible for a state civil infraction after a first or second violation and would be guilty of a misdemeanor after a third, fourth, or subsequent violation. Also, under the bill, a person who does not verify that the individual is at least 21 years of age before selling or furnishing a vapor product would be guilty of a misdemeanor. Revenue collected from the payment of civil infraction penalties and from the payment of misdemeanor fines would increase funding used to support public and county law libraries. Also, under section 8827(4) of the Revised Judicature Act, \$10 of the civil fine would be deposited into the state's Justice System Fund, so revenue to the state would be increased. Justice System Fund revenue supports various justice-related endeavors in the judicial branch, the Departments of State Police, Corrections, Health and Human Services, and Treasury, and the Legislative Retirement System. There is no way to determine the number of offenses that would occur under provisions of the bill, so it is not possible to estimate the amount of additional revenue to the state or to local units.

Senate Bill 784 would also increase costs for DHHS or possibly local public health departments for required compliance checks of a minimum of one per year at establishments that sell tobacco and nicotine products. The bill indicates that fees collected under this section would be used to offset the costs of this enforcement. Local health departments may charge for the cost of providing that service.

**Senate Bill 785** would have no fiscal impact on the state or on local units of government.

**Senate Bill 786** would not have an appreciable fiscal impact on any unit of state or local government.

Legislative Analysts: Susan Stutzky  
Rick Yuille

Fiscal Analysts: Jim Stansell  
Benjamin Gielczyk  
Robin Risko  
Susan Fry  
Marcus Coffin

---

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.