



Senate Fiscal Agency
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BILL ANALYSIS



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Senate Bills 781 through 786 (as introduced 2-5-20)

Sponsor: Senator Jim Ananich (S.B. 781)
Senator Marshall Bullock II (S.B. 782)
Senator Jim Runestad (S.B. 783)
Senator Lana Theis (S.B. 784)
Senator Dale W. Zorn (S.B. 785)
Senator Paul Wojno (S.B. 786)

Committee: Regulatory Reform

Date Completed: 2-24-20

CONTENT

Senate Bill 781 would amend the Tobacco Products Tax Act to do the following:

- Levy a 24% tax on the wholesale price of consumable materials, beginning January 1, 2021, and require the revenue generated from the tax to be credited to the State's General Fund.
- Exclude consumable material from a 32% tax on the wholesale price on cigars, noncigarette smoking tobacco, and smokeless tobacco.
- Require every licensee and retailer who, on January 1, 2021, had on hand for sale any consumable materials to file a complete inventory of those consumable materials before February 1, 2021, to the Department of Treasury.

Senate Bill 782 would amend the Youth Tobacco Act to do the following:

- Prohibit a person from selling a vapor product unless that person was licensed beginning June 1, 2020.
- Require the Department of Licensing and Regulatory Affairs (LARA) to grant a license to a person who submitted a completed application and paid a licensing fee (which could not exceed \$25 per license) to LARA.
- Require LARA to issue a certificate of licensure to a person who was granted a license under the bill, and require that person to display it in the person's place of business where a vapor product was sold.
- Specify that each license would be valid for one year and would have to be renewed annually before December 31 of the year that the license expired.
- Allow LARA to assess an administrative fine of not more than \$500 if it determined that a person violated the bill.

Senate Bill 783 would amend the Youth Tobacco Act to do the following:

- Prohibit a person who sold vapor products at retail from advertising those products in certain manners.
- Prescribe a misdemeanor penalty and fine for a person who violated the bill's provisions.

- **Allow a person to sell a vapor product of any flavor to an individual who was at least 21 years of age, subject to the bill's restrictions.**

Senate Bill 784 would amend the Youth Tobacco Act to do the following:

- **Increase the fines included in the penalty for a person who sells, furnishes, or gives a tobacco product, vapor product, or alternative nicotine product to a minor.**
- **Modify various provisions relating to vapor products to raise the age, from 18 to 21, that is referenced currently in those provisions.**

Senate Bill 785 would amend the Michigan Penal Code to require a person that distributed a tobacco product to ascertain that the individual who received the tobacco product was 21, instead of 18, years of age or older.

Senate Bill 786 would amend the Age of Majority Act to specify that the Act would not apply to the Youth Tobacco Act.

Senate Bills 781, 782, 783, and 784 are tie-barred to each other. Senate Bills 785 and 786 are tie-barred to Senate Bills 782, 783, and 784.

Senate Bill 781

Tax

The Tobacco Products Tax Act lists the amount of tax levied on different tobacco products sold in Michigan. The bill would levy a 24% tax on the wholesale price of consumable materials, beginning January 1, 2021. The revenue generated from the tax would have to be credited to the State's General Fund.

"Tobacco product" currently means cigarettes, cigars, noncigarette smoking tobacco, or smokeless tobacco. The term would include consumable material beginning January 1, 2021. Under the bill, "consumable material" would mean any liquid nicotine solution 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. The term would include any component, part, or accessory of the device, whether or not sold separately, and would include any consumable material intended to be aerosolized or vaporized during the use of the device. The term would not include any battery or battery charger when sold separately, or drugs, devices, or combination products authorized for sale as tobacco cessation products by the United States Food and Drug Administration.

Under the Act, beginning July 1, 2004, there is a 32% tax on the wholesale price on cigars, noncigarette smoking tobacco, and smokeless tobacco. Under the bill, consumable material would be excluded from this provision.

Consumable Materials Inventory

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

Senate Bill 782

The bill would amend the Youth Tobacco Act to prohibit, beginning June 1, 2020, a person from selling a vapor product unless that person was licensed. ("Vapor product" means a noncombustible product 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 or any other substance, and the use or inhalation of which simulates smoking. The term includes an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and a vapor cartridge or other container of nicotine or other substance in a solution or other form that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device. The term does not include a product regulated as a drug or device by the United States Food and Drug Administration.)

An application for a license would have to be in a form prescribed by LARA and signed under penalty of perjury. A person would have to obtain a separate license for each location where a vapor product was sold. A person who sold a vapor product at more than one location could submit a single application to LARA that listed each location where a vapor product was sold.

The Department would have to grant a license to a person who submitted a completed application and paid the licensing fee to LARA. The Department would have to establish a licensing fee for a license to offset the administrative costs in implementing the bill, but the cost of the licensing fee could not exceed \$25 per license. The Department would have to issue a certificate of licensure to a person who was granted a license under the bill. A person would have to display the certificate, or a duplicate copy of the certificate, prominently and where visible to the public in the person's place of business where a vapor product was sold.

Each license would be valid for one year and would have to be renewed annually before December 31 of the year that the license expired. The Department could deny, suspend, revoke, or refuse to renew a license for good cause. "Good cause" would consist of instances in which LARA determined that a person had done any of the following:

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

The Department could not deny, suspend, revoke, or refuse to renew a person's license unless the person was given an opportunity for a hearing. A hearing and an appeal would have to be conducted under the Administrative Procedures Act. The Department also could promulgate rules under the Act.

In addition to any other remedies provided by law, if LARA determined that a person violated the bill, it could assess an administrative fine of not more than \$500.

Under the Youth Tobacco Act, "person who sells vapor products or alternative nicotine products at retail" means a person whose ordinary business consists, in whole or in part, of the retail sale of vapor products or alternative nicotine products. The bill would delete this term. Instead, the bill would define "person who sells alternative nicotine products at retail" as a person whose ordinary course of business consists, in whole or in part, of the retail sale of an alternative nicotine product. "Person who sells vapor products at retail" would mean the following:

- Until May 31, 2020, a person whose ordinary course of business consists, in whole or in part, of the retail sale of a vapor product.
- Beginning June 1, 2020, a person whose ordinary course of business consists, in whole or in part, of the retail sale of a vapor product and who is licensed under the bill.

Senate Bill 783

The bill would amend the Youth Tobacco Act to prohibit a person who sold vapor products at retail from doing any of the following:

- Advertising a vapor product with the intent to encourage a minor to use a vapor product.
- Enticing a minor to use a vapor product through the use of a display that included any of the following: a cartoon; an image, character, or phrase that was similar to an image, character, or phrase popularly used in advertising to children; a video game, movie, or animated television show that was known to appeal primarily to minors; an imitation of candy in packaging or labeling; a name common to "candy" or "candies", or other variants in spelling such as "kandy" or "kandeez"; and the names of common dessert foods, including milkshake, cupcake, or thin mint.
- Displaying a vapor product that had on its packaging an indication or illustration, including a brand element, that could cause a minor to believe that the product was flavored if there was a reasonable belief that the indication or illustration could appeal to a minor.
- Advertising a vapor product in a manner that caused a minor to believe that health benefits could be derived from the use of the vapor product, unless the product was approved by the United States Food and Drug Administration.
- Promoting a vapor product, by means of lifestyle advertising.
- Promoting a vapor product by comparing the health effects that arise from the use of vapor products with the health effects that arise from the use of tobacco products.
- Promoting a vapor product by means of a paid or unpaid sponsorship of a concert, sports event, or any event with an audience that had a significant percentage of minors or an event with paid participants who were minors.

"Lifestyle advertising" would mean advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life, including one that includes glamour, recreation, excitement, vitality, risk, or daring.

A person who violated the provisions above would be guilty of a misdemeanor punishable by a fine as follows:

- For a first offense, not more than \$500.
- For a second offense, no more than \$1,000.
- For a third or subsequent offense, not more than \$2,500.

Subject to the bill's restrictions, a person could sell a vapor product of any flavor to an individual who was at least 21 years of age.

Senate Bill 784

Under the Youth Tobacco Act, a person may not sell, give, or furnish a tobacco product, vapor product, or alternative nicotine product to a minor, including through a vending machine. A person who violates this provision (or other specified provisions) is guilty of a misdemeanor punishable by a fine as follows:

- For a first offense, not more than \$100.
- For a second offense, no more than \$500.

-- For a third or subsequent offense, not more than \$2,500.

Under the bill, for a first offense, the fine would be increased from \$100 to \$500; for a second offense, the fine would be increased from \$500 to \$1,000.

Under the Act, a person who sells tobacco products, vapor products, or alternative nicotine products at retail must post, in a place close to the point of sale and conspicuous to both employees and customers, a sign produced by the Department of Health and Human Services that includes the following statement: "The purchase of a tobacco product, vapor product, or alternative nicotine product by a minor under 18 years of age and the provision of a tobacco product, vapor product, or alternative nicotine product to a minor are prohibited by law. A minor who unlawfully purchases or uses a tobacco product, vapor product, or alternative nicotine product is subject to criminal penalties." The bill would modify, from 18 to 21, the age listed in the statement above.

Under the Act, it is an affirmative defense to the charge of selling, giving, or furnishing a tobacco product, vapor product, or alternative nicotine 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 those products to people under 18 years of age and that the defendant enforced and continues to enforce the policy. The bill would increase, from 18 to 21, the age listed in this provision.

Under the Act, before selling, offering for sale, giving, or furnishing a tobacco product, vapor product, or an alternative nicotine product to an individual, a person must verify that the individual is at least 18 years of age by doing one of the following:

- If the individual appears to be under 27 years of age, examining a government-issued photographic identification that establishes that the individual is at least 18 years of age.
- For sales made by the internet or other remote sales method, performing an age verification through an independent, third-party age verification service that compares information available from a commercially available database, or aggregate of databases, that are regularly used by government agencies and businesses for the purpose of age and identity verification to the personal information entered by the individual during the ordering process that establishes that the individual is 18 years of age or older.

The bill specifies that the provisions would apply to a vapor product until May 31, 2020, and would modify references to 18 years of age to 21 years of age.

Beginning June 1, 2020, before selling, offering for sale, giving, or furnishing a vapor product to an individual, a person would have to verify that the individual was at least 21 years of age by doing one of the following:

- Scanning a government-issued photograph identification to verify that the purchaser was at least 21 years of age and that the photographic identification had not expired.
- For sales made by the internet or other remote sales method, performing an age verification through an independent, third-party age verification service that compared information available from a commercially available database, or aggregate of databases, that were regularly used by government agencies and businesses for the purpose of age and identity verification to the personal information entered by the individual during the ordering process that established that the individual was 21 years of age or older.

Senate Bill 785

Under the Michigan Penal Code, a person may not, as part of his, her, or its business, either

directly or through an agent, distribute tobacco products to people who did not previously pay or agree to pay for the products unless all of the following are met:

- The person or agent that distributes the tobacco product distributes only tobacco products regularly sold or manufactured by that person or agent.
- The individual who receives the tobacco product is physically present to receive the product.
- Distribution is not prohibited by any local ordinance.

In addition, the person that distributes the tobacco product must ascertain that the individual who receives the tobacco product is 18 years of age or older. The bill would increase, from 18 to 21, the age listed in this provision.

Senate Bill 786

The Age of Majority Act defines the age that an individual is considered a legal adult. Generally, a person who is at least 18 years old is an adult for all purposes. The Act 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 specifies that notwithstanding the provisions above, the Act does not apply to the Youth Tobacco Act.

MCL 205.422 et al. (S.B. 781)

Legislative Analyst: Drew Krogulecki

MCL 722.644 et al. (S.B. 782)

Proposed MCL 722.641a (S.B. 783)

MCL 722.641 (S.B. 784)

MCL 750.42b (S.B. 785)

MCL 722.53 (S.B. 786)

FISCAL IMPACT

Senate Bill 781

The bill would increase General Fund revenue by approximately \$15.0 million per year on a full-year basis, although the actual amount could differ substantially from the estimate. In terms of the potential market for liquid nicotine products, the market is expected to grow substantially over the next few years, perhaps increasing four-fold by 2024. However, this growth could be offset by any of a number of Federal taxes currently under consideration. Estimates for one bill before Congress suggest its proposed tax could reduce e-liquid sales by 22%. Furthermore, to the extent that many of the affected products are ordered over the internet, while the State may be able to collect sales tax on those sales, it is unclear the degree to which the State would be able to assess tobacco taxes on online sales.

Revenue generated by the bill also would be affected by how the proposed tax base ultimately was interpreted. While many proposed taxes levy the tax on the volume of liquid in the product, the bill would levy a 24% tax on the "wholesale price". Electronic cigarette products are delivered in a variety of ways, including prefilled cartridges, rechargeables, disposables, and e-liquids. The bill is unclear if the price of the delivery device would be included in the tax base. To the extent that the bill was interpreted to tax only the liquid nicotine in the device, the bill would generate less revenue than estimated because the available data include the price of the delivery device. In fact, for "bundled" products, such as disposables, it is possible the tax under the bill could not be levied at all.

Finally, recent Federal rules limiting sales of tobacco products to those over the age of 21 could reduce any revenue the bill would generate, especially if those new rules are enforced successfully. Furthermore, the bill's provisions excluding inventoried products from the tax could reduce the projected revenue, particularly during the first year.

Senate Bill 782

The bill would have an indeterminate fiscal impact on LARA and no fiscal impact on local units of government. The total fiscal impact would depend on the number of businesses that sold vapor products. The Department of Licensing and Regulatory Affairs likely would incur increased administrative costs because of the development of the licensing program. There likely would be one-time costs to LARA associated with information technology upgrades and staff training.

The proposed \$25 license fee would be equal to the current fee levied on sellers of tobacco products. It is unclear whether this fee would provide the Department with sufficient revenue to develop and administer the licensure program.

The bill also would allow the Department to levy an administrative fine of \$500 on a person that violated its provisions.

Senate Bills 783 & 784

The bills could result in additional revenues for local libraries. Although it is unknown how many people would be prosecuted under the bills' provisions, any additional revenue from imposed fines would go to local libraries.

Senate Bill 785

The bill would have no fiscal impact on State or local government.

Senate Bill 786

The bill would have no fiscal impact on State or local government.

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