

TOBACCO PRODUCTS WITH CHARACTERIZING FLAVOR

Phone: (517) 373-8080
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House Bill 6234 as introduced
Sponsor: Rep. Karen Whitsett

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

House Bill 6235 as introduced
Sponsor: Rep. Stephanie A. Young

Committee: Families, Children and Seniors
Complete to 12-9-24

SUMMARY:

House Bill 6235 would amend the Youth and Tobacco Act to do all of the following:

- Change the name of the act to the Nicotine and Tobacco Act.
- Prohibit selling or advertising a tobacco product that has a characterizing flavor.
- Provide penalties for a violation, a presumption regarding whether a tobacco product has a characterizing flavor, and exceptions.
- Create the Nicotine and Tobacco Regulation Fund.

Prohibitions regarding certain tobacco products

The bill would prohibit a person, other than *nonmanagerial employee* acting within the scope of their employment, from advertising for sale, displaying for sale, marketing, or selling a *nicotine or tobacco product* that has *characterizing flavor*.

In addition, the bill would require a person who employs a nonmanagerial employee to prohibit that employee from advertising for sale, displaying for sale, marketing, or selling a nicotine or tobacco product that has characterizing flavor within the scope of their employment.

Nonmanagerial employee would mean a cashier or clerk that does not have managerial control at their employer under the terms of their employment.

Characterizing flavor would mean either or both of the following:

- A distinguishable taste or aroma, or both, other than the taste or aroma of tobacco, that is imparted by a nicotine or tobacco product or a byproduct produced by a nicotine or tobacco product.
- A cooling or numbing sensation that is imparted by a nicotine or tobacco product or a byproduct produced by a nicotine or tobacco product.

Nicotine or tobacco product would mean any of the following:

- A product that contains, is made of, or is derived from nicotine or tobacco, from any source; that is intended for human consumption or is likely to be consumed by humans, by any means, including inhaling, absorbing, or ingesting; and that is not regulated as a drug or device by the United States Food and Drug Administration (FDA) under 21 USC 351 to 360fff-8.
- An *alternative nicotine product*.

- ***A tobacco product.***
- ***A qualified vapor product.***
- A component, part, or accessory of a product described above, including filters, rolling papers, blunt or hemp wraps, flavor enhancers, or pipes, if the component, part, or accessory is not a product regulated as a drug or device by the FDA under 21 USC 351 to 360fff-8.

Alternative nicotine product means a noncombustible product containing that contains nicotine and is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means, but does not include a tobacco product, a vapor product, food, or a product regulated as a drug or device by the FDA under 21 USC 351 to 360fff-7.360fff-8.

Tobacco product means a product that contains tobacco and is intended for human consumption, including a cigar, a cigarette, noncigarette smoking tobacco, or smokeless tobacco, but does not include a product regulated as a drug or device by the FDA under 21 USC 351 to 360fff-8.

Qualified vapor product would mean one or both of the following:

- ***A vapor product*** for the production of vapor from nicotine or tobacco.
- A vapor product that contains nicotine or tobacco.

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, to produce vapor from nicotine or any other substance, and the use or inhalation of which simulates smoking. Vapor product 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. Vapor product does not include a product regulated as a drug or device by the FDA under 21 USC 351 to 360fff-8.

Penalties

A person that violates the above provisions would be responsible for a civil fine, license suspension or revocation, or both, as follows:

- For a first violation in a period of 36 months, up to \$1,500.
- For a second violation in 36 months, \$2,000. If the person is an establishment licensed under the act (as proposed by House Bill 6002), the Department of Health and Human Services (DHHS) would have to suspend the person's license for 30 days.
- For a third violation in 36 months, \$2,500. If the person is an establishment licensed under the act, DHHS would have to suspend the person's license for one year.
- For a fourth or subsequent violation in 36 months, \$3,000. If the person is an establishment licensed under the act, DHHS would have to revoke the person's license.

The attorney general or the prosecutor of the county where the violation occurred could bring an action to collect the fine. A fine collected would have to be deposited in the Nicotine and Tobacco Regulation Fund proposed by the bill.

Presumption of characterizing flavor

A nicotine or tobacco product advertised for sale, displayed for sale, marketed, or sold by a person would be presumed to have characterizing flavor if the manufacturer of the nicotine or tobacco product, the person, or an employee or agent of any of those entities has done one or more of the following:

- Publicly stated or claimed that the product has characterizing flavor.
- Used text or images, or both, on the product's label or packaging that indicate, explicitly or implicitly, that the product has characterizing flavor.
- Taken action directed to consumers that would reasonably be expected to cause them to believe that the product has characterizing flavor.

A party challenging the presumption would have the burden of proving, by a preponderance of the evidence, that the nicotine or tobacco product does *not* have characterizing flavor.

Exemption

The bill would not apply to hookah tobacco to be sold, for on-site consumption, by a tobacco specialty retail store that has an exemption from the smoking ban under the Public Health Code.

Nicotine and Tobacco Regulation Fund

The state treasurer could deposit money and other assets from any source in the fund and direct the investment of the fund and credit interest and earnings from the investments to the fund. The department would be required to expend money from the fund on appropriation, only for one or more of the following purposes:

- The administration and enforcement of section 2d, including, but not limited to, compliance checks.
- To ensure compliance with applicable law that relates to the retail sale of a nicotine or tobacco product, the education and training of persons that sell, or intend to sell, a nicotine or tobacco product at retail; department staff; and others that are subject to or enforce the applicable law.

The department would be the administrator of the fund for audits of the fund.

Title change

Finally, as noted above, the bill would change the name of the act from the Youth Tobacco Act to the Nicotine and Tobacco Act.

MCL 722.644 and 722.645 and proposed MCL 722.641a and 722.642d

House Bill 6234 would amend the Age of Majority Act to change a reference to the Youth Tobacco Act to instead refer to the Nicotine and Tobacco Act, the title proposed by House Bill 6235. The bill cannot take effect unless House Bill 6235 is also enacted.

MCL 722.52 and 722.53

FISCAL IMPACT:

House Bill 6234 would not have a significant fiscal impact on state expenditures to the Department of Health and Human Services or local units of government.

House Bill 6235 would increase state expenditures to the Department of Health and Human Services by an indeterminate amount. The fiscal impact of the bill would be dependent on the cost of the administration and regulation of the sale of tobacco products to youth in the state. Under the provisions of the bill, the department may expend funds from the Nicotine and Tobacco Regulation Fund for compliance checks and application processing. Increased revenue would be dependent on the amount of civil fees for license violations that are collected from establishments. Civil fees for rule violations range from \$1,500 to \$3,000 depending on the type of violation and number of violations that the establishment has received. This would not require the use of GF/GP.

The bill also would have an indeterminate fiscal impact on the Department of Corrections and on local units of government. The fiscal impact would depend on the number of employees that violate advertising, displaying, marketing, and selling provisions included in the bill and are subsequently ordered to pay a civil fine. The amounts of civil fines ordered would range from \$1,500 for a first violation to \$3,000 for a fourth or subsequent violation. Revenue collected from payment of civil fines is 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 required to be deposited into the state's Justice System Fund, which supports various justice-related endeavors in the judicial branch and legislative branches of government and the Departments of State Police, Corrections, Health and Human Services, and Treasury. The fiscal impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs. Because there is no practical way to determine the number of violations that will occur under provisions of the bill, an estimate of the amount of additional revenue the state would collect, revenue for libraries, or costs to local courts cannot be made.

Legislative Analyst: E. Best
Fiscal Analysts: Sydney Brown
Robin Risko

■ 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.