

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Regulated Industries

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BILL: SB 1080

INTRODUCER: Senator Hutson

SUBJECT: Tobacco and Nicotine Products

DATE: March 8, 2021

REVISED: \_\_\_\_\_

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Oxamendi	Imhof	RI	<b>Pre-meeting</b>
2. _____	_____	HP	_____
3. _____	_____	AP	_____

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**I. Summary:**

SB 1080:

- Increases the minimum age to lawfully purchase and possess tobacco products from 18 years of age to 21 years of age.
- Expands the definition of tobacco products to include vapor-generating electronic devices (vaping products).
- Defines the term “vapor-generating electronic device,” to include the cartridges or containers of nicotine or other substances used with a vaping product.
- Repeals exceptions allowing persons whose disability of nonage has been removed under ch. 743, F.S., persons who serve in the military reserve or on active duty in the United States Armed Forces, emancipated minors, and persons acting in the scope of their lawful employment to possess or purchase tobacco products under current law.
- Prohibits smoking and vaping by any person under 21 years of age on or near school property, regardless of the hours of the day.
- Limits the sale of tobacco products through vending machines to locations that prohibit persons under 21 years of age on the premises.
- Requires age verification before a sale or delivery of tobacco products to a person under 30 years of age. (This complies with federal law.)
- Incorporates conforming provisions.

The effective date of the bill is October 1, 2021.

## **II. Present Situation:**

### **Regulation of Tobacco Products**

The Division of Alcoholic Beverages and Tobacco (division) within the Department of Business and Professional Regulation (DBPR) is the state agency responsible for the regulation and enforcement of tobacco products under ch. 569, F.S.

#### ***Tobacco Products Definitions***

Section 569.002(6), F.S., defines the term “tobacco products” to include loose tobacco leaves and products made from tobacco leaves, in whole or in part, and cigarette wrappers, which can be used for smoking, sniffing, or chewing.

Section 210.25(12), F.S., provides a separate definition for the term “tobacco products” in the context of the taxation of these products and the licensing of tobacco product manufacturers, importers, exporters, distributing agents, or wholesale dealers under part II of ch. 210, F.S. In this context the term “tobacco products” means:

loose tobacco suitable for smoking; snuff; snuff flour; cavendish; plug and twist tobacco; fine cuts and other chewing tobaccos; shorts; refuse scraps; clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing; but “tobacco products” does not include cigarettes, as defined by s. 210.01(1), or cigars.

The definition of “tobacco products” in s. 569.002(6), F.S., is limited to the regulation of tobacco products by the division under ch. 569, F.S., and does not affect the taxation of such products under ch. 210, F.S.

#### ***Retail Tobacco Products Dealer Permits***

A person must obtain a retail tobacco products dealer permit from the division for each place of business where tobacco products are sold, including sales made through a vending machine.<sup>1</sup> Section 569.003, F.S., relates to retail tobacco products dealer permits, the permit application, qualifications, fees, renewals, and duplicates. Section 569.003(2), F.S., stipulates that permits may only be issued to persons who are 18 years of age or older or to corporations the officers of which are 18 years of age or older. The division is authorized to refuse to issue a permit to any person, firm, association, or corporation whose permit has been revoked; to any corporation with an officer who has had his or her permit revoked; or to any person who is or has been an officer of a corporation whose permit has been revoked.

The fee for an annual permit is established in rule by the division at an amount to cover the regulatory costs of the program, not to exceed \$50. The fees are deposited into the Alcoholic Beverage and Tobacco Trust Fund within the DBPR.<sup>2</sup>

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<sup>1</sup> Section 569.003, F.S.

<sup>2</sup> Section 569.003(1)(c), F.S.

### **Mail Order, Internet, Other Remote Sales of Tobacco Products, and Tobacco Products Permits**

Section 210.095(5), F.S., provides requirements for the delivery of mail order, Internet, and other remote sales of tobacco products, including age verification requirements, all of which is generally referred to as “delivery sales.” It also defines 10 relevant terms.

Specific notice and shipping requirements are provided for all delivery sales, whether in-state or out-of-state. Each person who mails, ships, or otherwise delivers tobacco products in connection with an order for a delivery sale is required to:

- Include, as part of the shipping documents, in a clear and conspicuous manner, the following statement: “Tobacco Products: Florida law prohibits shipping to individuals under 18 years of age and requires the payment of all applicable taxes.”
- Use a method of mailing, shipping, or delivery which obligates the delivery service to:
  - Require the signature of an adult who resides at the delivery address and obtain proof of the legal minimum purchase age of the individual accepting delivery, if the individual appears to be under 27 years of age.
  - Require proof that the individual accepting delivery is either the addressee or the adult designated by the addressee, in the form of a valid, government-issued identification card bearing a photograph of the individual who signs to accept delivery of the shipping container.
- Provide to the delivery service, if such service is used, evidence of full compliance with requirements for the collection and remittance of all taxes imposed on tobacco products by this state with respect to the delivery sale.<sup>3</sup>

If a person accepts a purchase order for a delivery sale and delivers the tobacco products without using a delivery service, the person must comply with all of the requirements that apply to a delivery service.<sup>4</sup> Before making sales or shipping orders, entities must provide specific notice to the division as to shipper and receiver, with monthly reporting.<sup>5</sup> There are requirements specific to purchase orders.<sup>6</sup>

Section 210.095(8), F.S., provides that the penalty for the following violations of the delivery sale requirements is a misdemeanor of the third degree:

- A delivery sale delivers tobacco products, on behalf of a delivery service, to an individual who is under 18 years of age.
- A violation of any provision in s. 210.095, F.S., by an individual who is under 18 years of age.

Florida law does not provide a criminal penalty classification for a misdemeanor of the third degree. However, the prohibitions and second degree misdemeanor penalties<sup>7</sup> in s. 569.101, F.S.,

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<sup>3</sup> Section 210.095(5), F.S.

<sup>4</sup> *Id.*

<sup>5</sup> Section 210.095(6), F.S.

<sup>6</sup> Section 210.095(7), F.S.

<sup>7</sup> Section 775.082, F.S., provides that the penalty for a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S., provides that the penalty for a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

(prohibiting the sale, delivery, bartering, furnishing, or giving, directly or indirectly, to any person who is under 18 years of age, any tobacco product, and s. 569.11, F.S., prohibiting persons under 18 years of age from possessing, directly or indirectly, any tobacco product) apply to s. 210.095, F.S., relating to the delivery of tobacco products to persons under the age of 18.

Section 210.15, F.S., relates to permits for the sale of specific tobacco products. A requirement for issuance of such a permit is for a person to be of good moral character and not less than 18 years of age. In addition, permits to corporations may be issued only to corporations whose officers are of good moral character and not less than 18 years of age.<sup>8</sup>

### ***Signage Requirement***

Retail tobacco products dealers must post a clear and conspicuous sign that the sale of tobacco products is prohibited to persons under the age of 18 and that proof of age is required for purchase. The division is required to make the signs available to retailers dealers and must also have instructional material in the form of a calendar or similar format to assist in determining the age of the person attempting to purchase a tobacco product.<sup>9</sup>

### ***Annual Report***

The DBPR is required to submit an annual report to the Governor and Legislature regarding the enforcement of tobacco products, including:

- The number and results of compliance visits by the division;
- The number of violations for failure of a retailer to hold a valid license;
- The number of violations for selling tobacco products to anyone under the age of 18 and the results of administrative hearings on such violations; and
- The number of people under the age of 18 cited for violations, including sanctions imposed as a result of such citation, related to misrepresenting their age, purchasing tobacco products underage, or misrepresenting military service for the purpose of obtaining tobacco products underage.<sup>10</sup>

### **Tobacco Products and Minors**

Current law prohibits the sales of tobacco products to, and the possession of tobacco products by, person under the age of 18. Section 569.101, F.S., prohibits the sale, delivery, bartering, furnishing, or giving of tobacco products to persons under the age of 18. A violation of this prohibition is a second degree misdemeanor.<sup>11</sup> A second or subsequent violation within one year of the first violation is a first degree misdemeanor.<sup>12</sup>

It is a complete defense to a person charged with a violation of s. 569.101, F.S., if the buyer or recipient falsely evidenced that he or she was 18 years of age or older, a prudent person would

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<sup>8</sup> Section 210.15(2)(b), F.S.

<sup>9</sup> Section 569.14, F.S.

<sup>10</sup> Section 569.19, F.S.

<sup>11</sup> *Supra* note 6.

<sup>12</sup> Section 775.082, F.S., provides that the penalty for a misdemeanor of the first degree is punishable by a term of imprisonment not exceeding one year. Section 775.083, F.S., provides that the penalty for a misdemeanor of the first degree is punishable by a fine not to exceed \$1,000.

believe the buyer or recipient to be 18 years of age or older, and the buyer or recipient presented false identification<sup>13</sup> upon which the person relied in good faith.<sup>14</sup>

Section 569.11, F.S., prohibits persons under the age of 18 years from possessing, directly or indirectly, any tobacco products:

- A first violation of this prohibition is a non-criminal violation with a penalty of 16 hours of community service or a \$25 fine, and attendance at a school-approved anti-tobacco program, if locally available.
- A second or subsequent violation within 12 weeks of the first violation is punishable with a \$25 fine.

Any second or subsequent violation within the 12-week time period after the first violation is punishable as a first violation.<sup>15</sup>

Eighty percent of all civil penalties received by a county court under s. 569.11, F.S., must be remitted to the Department of Revenue for transfer to the Department of Education for teacher training, and for research and evaluation to reduce and prevent the use of tobacco products, nicotine products, or nicotine dispensing devices by children. The remaining 20 percent of civil penalties received by a county court must remain with the clerk of the county court to cover administrative costs.<sup>16</sup>

Section 569.002(7), F.S., provides that the term “any person under the age of 18” does not include any person under age 18 who:

- Has had his or her disability of nonage removed under ch. 743, F.S.;
- Is in the military reserve or on active duty in the Armed Forces of the United States;
- Is otherwise emancipated by a court of competent jurisdiction and released from parental care and responsibility; or
- Is acting in his or her scope of lawful employment with an entity licensed under the provisions of ch. 210, F.S., relating to taxation of cigarettes and other tobacco products, or ch. 569, F.S., relating to tobacco products.

To prevent persons under 18 years of age from purchasing or receiving tobacco products, the sale or delivery of tobacco products is prohibited, except when those products are under the direct control or line of sight of the dealer or the dealer’s agent or employee. If a tobacco product is sold from a vending machine, the vending machine must have:

- An operational lock-out device which is under the control of the dealer or the dealer’s agent or employee who directly regulates the sale of items through the machine by triggering the lock-out device to allow the dispensing of one tobacco product;
- A mechanism on the lock-out device to prevent the machine from functioning if the power source for the lock-out device fails or if the lock-out device is disabled; and

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<sup>13</sup> Identification includes carefully checking “a driver license or an identification card issued by this state or another state of the United States, a passport, or a United States armed services identification card presented by the buyer or recipient and acted in good faith and in reliance upon the representation and appearance of the buyer or recipient in the belief that the buyer or recipient was 18 years of age or older.” See s. 569.101(3)(c), F.S.

<sup>14</sup> Section 569.101(3)(c), F.S.

<sup>15</sup> Section 569.11(1), F.S.

<sup>16</sup> Section 569.11(6), F.S.

- A mechanism to ensure that only one tobacco product is dispensed at a time.<sup>17</sup>

These requirements for the sale of tobacco products do not apply to an establishment that prohibits persons under 18 years of age on the premises and do not apply to the sale or delivery of cigars and pipe tobacco.<sup>18</sup>

Section 569.0075, F.S., prohibits the giving of sample tobacco products to persons under the age of 18.

Section 569.12, F.S., provides enforcement authority to full-time, part-time, and auxiliary law enforcement officers for the provisions of ch. 569, F.S. The section also authorizes a county or municipality to designate certain of its employees or agents as tobacco product enforcement officers within specified guidelines. Such enforcement officers are authorized to issue a citation to a person under 18 years of age based on a reasonable cause to believe that a civil infraction has been committed. Similar authority is provided for correctional probation officers. Details are provided as to the required elements of the citation.

Retail tobacco products dealers (retailers) must post a clear and conspicuous sign that the sale of tobacco products is prohibited to persons under the age of 18 and that proof of age is required for purchase. The division is required to make the signs available to retailers. Retailers must also have instructional material in the form of a calendar or similar format to assist in determining the age of the person attempting to purchase a tobacco product.<sup>19</sup>

Section 569.19, F.S., requires the division to annually provide to the Legislature and the Governor, by December 31, a progress report on its enforcement actions specific to the number and results of compliance visits, number of violations for failure of a retailer to hold a valid license, number of violations of selling tobacco products to persons under age 18, results of administrative hearings on these issues, and number of persons under age 18 cited for violations of underage purchases and sanctions imposed as a result of a citation.

Section 386.212, F.S., in the Florida Clean Indoor Air Act,<sup>20</sup> prohibits any person under the age of 18 from smoking tobacco within 1,000 feet of a public or private elementary, middle, or secondary school between the hours of 6:00 a.m. and midnight.<sup>21</sup> A violation of this prohibition is punishable by a maximum noncriminal civil penalty not to exceed \$25, or 50 hours of community service or, where available, successful completion of a school-approved anti-tobacco “alternative to suspension” program.<sup>22</sup>

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<sup>17</sup> Section 569.007(1), F.S.

<sup>18</sup> Section 569.007(2) and (3), F.S.

<sup>19</sup> Section 569.14, F.S.

<sup>20</sup> Part II of ch. 386, F.S.

<sup>21</sup> Section 386.212(1), F.S.

<sup>22</sup> Section 386.212(3), F.S.

### **Administrative Penalties**

A retail tobacco dealer permit-holder can be disciplined under the division's penalty guidelines. For a violation of the prohibition in s. 569.06, F.S., against the sale of tobacco products to persons under 18 years of age, the guidelines provide:

- 1st occurrence -- \$500 fine.
- 2nd occurrence -- \$1,000 fine.
- 3rd occurrence -- \$2,000 fine and a 20-day suspension of the dealer permit.
- 4th occurrence -- revocation of the dealer permit.

These penalties are based on a single violation in which the permit-holder committed or knew about the violation; or a pattern of at least three violations on different dates within a 12-week period by employees, independent contractors, agents, or patrons on the licensed premises or in the scope of employment in which the permit-holder did not participate; or violations which were occurring in an open and notorious manner on the licensed premises.<sup>23</sup>

Section 569.008, F.S., provides a process for a retail tobacco products dealer to mitigate penalties imposed against a dealer because of an employee's illegal sale of a tobacco product to a person under 18 years of age.<sup>24</sup> The process encourages retail tobacco products dealers to comply with responsible practices. The division may mitigate penalties if:

- The dealer is qualified as a responsible dealer having established and implemented specified practices designed to ensure that the dealer's employees comply with ch. 569, F.S., such as employee training;
- The dealer had no knowledge of that employee's violation at the time of the violation and did not direct, approve, or participate in the violation; or
- The sale was made through a vending machine equipped with an operational lock-out device.<sup>25</sup>

### **Nicotine Dispensing Devices**

Section 877.112, F.S., provides requirements for the sale of nicotine dispensing devices and nicotine products to minors, such as electronic cigarettes (e-cigarettes). This statute extends the current prohibitions related to tobacco products to the sale, gifting, possession, or use of nicotine dispensing devices and nicotine products to and by persons under 18 years of age.

A license is not required to sell or offer for sale "nicotine dispensing devices" or "nicotine products."

A "nicotine dispensing device" is:

any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or

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<sup>23</sup> Fla. Admin. Code R. 61A-2.022(1) (2019).

<sup>24</sup> The Florida Responsible Vendor Act in ss. 561.701 - 561.706, F.S., provides a comparable process for mitigation of penalties against vendors of alcoholic beverages.

<sup>25</sup> Section 569.008(3), F.S.

other similar device or product, any replacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.<sup>26</sup>

A “nicotine product” is:

any product that contains nicotine, including liquid nicotine intended for human consumption, whether inhaled, chewed, absorbed, dissolved or ingested by any means. The definition does not include a tobacco product under Florida law, a drug or device under federal law, or a product that contains incidental nicotine.<sup>27</sup>

The sale or giving of nicotine products or nicotine dispensing devices to any person under 18 years of age is prohibited and punishable as a second degree misdemeanor.<sup>28</sup> It is a complete defense to a violation if an underage person falsely misrepresented his or her age, the underage person had the appearance to a prudent person to 18 years of age or older, and the person carefully checked, and relied on, the driver license or identification card of the recipient.<sup>29</sup>

Persons under 18 years of age possessing, purchasing, or misrepresenting their age or military service to obtain nicotine products or nicotine dispensing devices commit a noncriminal violation. The penalty is 16 hours of community service or a \$25 fine for a first violation, and attendance at a school-approved anti-tobacco and nicotine program, if available. A second or subsequent violation within 12 weeks of the first violation requires a \$25 fine. Any second or subsequent violation not within the 12-week time period after the first violation is punishable as provided for a first violation.<sup>30</sup>

If a person under 18 years of age is found by the court to have committed such a noncriminal violation and that person has failed to complete community service, pay the required fine, or attend a school-approved anti-tobacco and nicotine program, if locally available, the court may direct the Department of Highway Safety and Motor Vehicles to withhold issuance of or suspend the driver license or driving privilege of that person for 30 or 45 consecutive days, depending on the infraction.<sup>31</sup>

Eighty percent of civil penalties specific to possession of nicotine products or nicotine dispensing devices by minors and misrepresenting age in making such purchases are remitted to the Department of Revenue for transfer to the Department of Education for teacher training and for research and evaluation to reduce and prevent the use of tobacco products, nicotine products, or nicotine dispensing devices by children. The remaining 20 percent of civil penalties received by a county court are retained by the clerk of the county court to cover administrative costs.<sup>32</sup>

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<sup>26</sup> Section 877.112(1)(a), F.S.

<sup>27</sup> Section 877.112(1)(b), F.S.

<sup>28</sup> *Supra* note 5.

<sup>29</sup> Section 877.112(5), F.S.

<sup>30</sup> Sections 877.112(6) and (7), F.S.

<sup>31</sup> Section 877.112(8), F.S.

<sup>32</sup> Section 877.112(9), F.S.



Subsection 877.112(10), F.S., requires a retail dealer of nicotine products and nicotine dispensing devices to post signs that the sale of nicotine products and nicotine dispensing devices to persons under 18 years of age is prohibited. This signage requirement is similar to the signs required for retail tobacco products dealers under s. 569.14, F.S.

Nicotine products or nicotine dispensing devices may not be sold or delivered by self-service merchandising, except when such products are under the direct control of, or in the line of sight where effective control may be reasonably maintained by, the retailer or their agent or employee.<sup>33</sup>

To prevent persons under 18 years of age from purchasing or receiving nicotine products or nicotine dispensing devices, s. 877.112(12), F.S., requires retailers to comply with restrictions identical to the restrictions on the sale of tobacco products in s. 569.007(1), F.S., such as requiring the products to be sold or delivered only when under the direct control or line of sight of the retailer and requiring a lock-out device if the products are sold or delivered from a vending machine.

### **Regulation of Vaping**

During the 2019 legislative session, CS/SB 7012<sup>34</sup> was enacted to implement Amendment 9 to the Florida Constitution,<sup>35</sup> which was approved by the voters of Florida on November 6, 2018, to ban the use of vapor-generating electronic devices, such as electronic cigarettes (e-cigarettes), in enclosed indoor workplaces, as part of the Florida Clean Indoor Air Act. The use of e-cigarettes is commonly referred to as vaping.

The use of vapor-generating electronic devices is permitted in the enclosed indoor workplace of a “vapor-generating device retailer” or “retail vape shop,” which is defined as “any enclosed indoor workplace dedicated to or predominantly for the retail sale of vapor-generating electronic devices and components, parts, and accessories for such products, in which the sale of other products or services is merely incidental.” Vaping is permitted at the same locations authorized to permit tobacco smoking, i.e., private residences whenever not being used for certain commercial purposes, stand-alone bars, designated rooms in hotels and other public lodging establishments, retail tobacco shops, facilities owned or leased by a membership association, smoking cessation program locations, medical or scientific research locations, and customs smoking rooms in airport in-transit lounges.<sup>36</sup>

Local governments may adopt more restrictive local ordinances on the use of vapor-generating electronic devices.<sup>37</sup>

The above provisions were approved by the Governor and took effect July 1, 2019.

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<sup>33</sup> Section 877.112(11), F.S.

<sup>34</sup> See ch. 2019-14, Laws of Fla.

<sup>35</sup> FLA. CONST. art. X, s. 20.

<sup>36</sup> See ch. 386, part II, F.S.

<sup>37</sup> *Id.*

Unlike the retail sale of tobacco products, which is subject to regulation under ch. 569, F.S., the sale of vape products is only regulated under the provisions of s. 877.112, F.S. While tobacco products in Florida are subject to specific taxation under ch. 210, F.S., vaping products are only subject to sales taxes.

### **Rates of Youth Vaping**

According to Centers for Disease Control (CDC) latest National Youth Tobacco Surveys, electronic cigarettes (e-cigarettes) were the most commonly used tobacco product among high school (19.6 percent; 3.02 million) and middle school (4.7; 550,000) students.<sup>38</sup> The CDC found that:

From 2019 to 2020, decreases in current use of any tobacco product, any combustible tobacco product, multiple tobacco products, e-cigarettes, cigars, and smokeless tobacco occurred among high school and middle school students; these declines resulted in an estimated 1.73 million fewer current youth tobacco product users in 2020 than in 2019 (6.20 million) (3). From 2019 to 2020, no significant change occurred in the use of cigarettes, hookahs, pipe tobacco, or heated tobacco products. The comprehensive and sustained implementation of evidence-based tobacco control strategies at the national, state, and local levels, combined with tobacco product regulation by FDA, is warranted to help sustain this progress and to prevent and reduce all forms of tobacco product use among U.S. youths.<sup>39</sup>

The study found that use of e-cigarettes declined from 2019 to 2020, reversing previous trends. The declines were likely attributable to multiple factors at the national, state, and local levels. The report noted that “in December 2019, the federal minimum age of sale of all tobacco product types increased from 18 to 21 years.<sup>40</sup> The report indicated that the FDA issued guidance in January 2020 to prioritize enforcement against certain flavored e-cigarette products that appeal to youths, including mint and fruit flavors.<sup>41</sup> Further the FDA reported stated that “several states and communities also recently restricted the sale of flavored tobacco products, including e-cigarettes.<sup>42</sup>

Nearly 70 percent of e-cigarette users reported using a flavored product, and the availability of flavors such as mint and chocolate was a reason that many students cited for trying e-cigarettes.

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<sup>38</sup> Centers for Disease Control and Prevention, *Tobacco Product Use Among Middle and High School Students — United States, 2020, December 18, 2020*, available at [Tobacco Product Use Among Middle and High School Students — United States, 2020 | MMWR \(cdc.gov\)](https://www.cdc.gov/mmwr/mmwr0000a000.htm) (last visited March 6, 2021).

<sup>39</sup> *Id.*

<sup>40</sup> Food and Drug Administration, *Newly signed legislation raises federal minimum age of sale of tobacco products to 21, 2019*, available at <https://www.fda.gov/tobacco-products/ctp-newsroom/newly-signed-legislation-raises-federal-minimum-age-sale-tobacco-products-21>[external icon](#) (last visited March 6, 2021).

<sup>41</sup> FDA Center for Tobacco Products, *Enforcement priorities for Electronic Nicotine Delivery Systems (ENDS) and other deemed products on the market without premarket authorization (revised)*, available at <https://www.fda.gov/media/133880/download> (last visited March 6, 2021).

<sup>42</sup> See Campaign for Tobacco Free Kids, *States & Localities that have Restricted the Sale of Flavored Tobacco Products*, available at [0398.pdf \(tobaccofreekids.org\)](https://www.tobaccofreekids.org/0398.pdf) (last visited March 6, 2021).

The findings came a year after the U.S. Surgeon General declared the surge in youth vaping an epidemic.<sup>43</sup>

### **Health Issues Relating to Vaping**

The CDC is conducting an ongoing national investigation of vaping-related lung injuries. The CDC, the federal Food and Drug Administration (FDA), state and local health departments, and public health and clinical stakeholders have been investigating and monitoring the nationwide illness outbreak related to vaping. The condition has been labelled “E-cigarette, or Vaping, product use-Associated Lung Injury,” or EVALI. AS of February 18, 2020, the CDC reports that 2,807 people have been hospitalized and 68 people have died across 29 states and Washington, D.C.<sup>44</sup> Two of the deaths have occurred in Florida, and 103 cases of vaping-related illness hospitalizations have been documented in Florida as of December 3, 2019.<sup>45</sup>

### **National Minimum Age of Sale of Tobacco Products**

As part of the federal budget revisions adopted in December 2019 and signed into law on December 20, 2019, the federal minimum age for the sale of tobacco products was increased to 21 years of age.<sup>46</sup> The specific tobacco provisions in the budget amended section 906(d) of the Federal Food, Drug, and Cosmetic Act to increase the federal minimum age to purchase tobacco products from 18 to 21 years of age, and to prohibit retailers from selling tobacco products to any person younger than 21 years of age. The provisions also require the FDA to update its applicable tobacco regulations within specified timelines.

As part of the rule update process, the FDA must update the relevant age verification requirements to require age verification for individuals under age 30 (as opposed to the current age verification threshold for individuals under age 27).

### **U.S. Federal Food and Drug Administration Enforcement**

The FDA has “deemed” ENDS products, i.e., vaping products, to be tobacco products.<sup>47</sup> A brief explanation of “deeming” is helpful in this context. The Family Smoking Prevention and Tobacco Control Act (2009) (the act) authorized the FDA to regulate tobacco products. The act broadly defined “tobacco products” as any product that is “made or derived from tobacco” and

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<sup>43</sup> See “Surgeon General Warns Youth Vaping Is Now An ‘Epidemic,’” December 18, 2018, *available at* <https://www.npr.org/sections/health-shots/2018/12/18/677755266/surgeon-general-warns-youth-vaping-is-now-an-epidemic> (last visited Feb. 25, 2021).

<sup>44</sup> Centers for Disease Control and Prevention, *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, *available at*: [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html) (last visited Feb. 26, 2021).

<sup>45</sup> See Naseem S. Miller, *Florida reports second vaping death*, Orlando Sentinel, Dec. 11, 2019, *available at*: <http://www.orlandosentinel.com/news/os-ne-florida-reports-second-vaping-death-20191211-dvz3tehxebvkvkavhe2jdiepe-story.html> (last visited Feb 26, 2021).

<sup>46</sup> See the “Further Consolidated Appropriations Act, 2020,” Rules Committee print 116-44, Text of the House Amendment to the Senate Amendment to H.R. 1865, December 16, 2019, beginning at page 1492 of 1773, *available at* <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116HR1865SA-RCP116-44.PDF> (last visited Jan. 25, 2020).

<sup>47</sup> See 21 CFR 1100-1143. For all intents and purposes, “Electronic Nicotine Delivery Systems” or ENDS products is a reference to vaping products.

that is “intended for human consumption.” However, the act, when passed, immediately applied to a few products, namely cigarettes, cigarette tobacco, smokeless tobacco, and roll-your-own tobacco. To regulate any other tobacco products, the act requires the FDA to assert jurisdiction through regulation. In other words, for the FDA to start regulating cigars, e-cigarettes, hookah, and other products not regulated by the federal government, the FDA must create a rule through its formal notice-and-comment rulemaking process. A rule, or regulation, that extends the FDA’s jurisdiction to all tobacco products is often referred to as a Deeming Regulation because the language of the act states that the FDA can regulate additional tobacco products that it “deems to be subject” to the act.<sup>48</sup>

New tobacco products may not be legally marketed in the United States without a tobacco product marketing order from the FDA, which evaluates based on the product's risks to the population as a whole. A “new tobacco product” is any ENDS product is:

- Any tobacco product (including those products in test markets) that was not commercially marketed in the United States as of February 15, 2007; or
- Any modification (including a change in design, any component, any part, or any constituent, including a smoke constituent, or in the content, delivery or form of nicotine, or any other additive or ingredient) of a tobacco product where the modified product was commercially marketed in the United States after February 15, 2007.<sup>49</sup>

The affected products include:

- Any flavored, cartridge-based ENDS product (other than a tobacco- or menthol-flavored ENDS product);
- All other ENDS products for which the manufacturer has failed to take (or is failing to take) adequate measures to prevent minors’ access; and
- Any ENDS product that is targeted to minors or whose marketing is likely to promote use of ENDS by minors.<sup>50</sup>

There are three pathways to market for a person intending to market new tobacco products:

- A premarketing order issued by the FDA after submission of a premarket application;
- A finding by the FDA that the product is “substantial equivalent” to a “predicate” product and does not raise different questions of public health than the predicate product; and
- Receiving an exemption from demonstrating substantial equivalence.<sup>51</sup>

New tobacco products commercially marketed after February 15, 2007 but before March 22, 2011 with a Substantial Equivalency Report submitted by March 22, 2011, are known as

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<sup>48</sup> See *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; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products*, available at: <https://www.federalregister.gov/documents/2016/05/10/2016-10685/deeming-tobacco-products-to-be-subject-to-the-federal-food-drug-and-cosmetic-act-as-amended-by-the> (Feb. 26, 2021.) See also Tobacco Control Legal Consortium, *A Deeming Regulation: What is Possible Under the Law*, available at: <https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-deeming-reg-what-is-possible-2014.pdf> (last visited Feb. 26, 2021).

<sup>49</sup> Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §910(a)(1).

<sup>50</sup> *Supra*, note 48.

<sup>51</sup> FDA, *Market and Distribute a Tobacco Product*, available at: <https://www.fda.gov/tobacco-products/products-guidance-regulations/market-and-distribute-tobacco-product> (last visited Feb. 26, 2021).

“provisional SE tobacco products” and may continue to be marketed unless FDA issues an order that the new product is not substantially equivalent.<sup>52</sup>

### III. Effect of Proposed Changes:

#### Sales Restrictions

**Section 1** amends s. 210.15 (1)(b), F.S., relating to permits for the sale of tobacco products, to increase the minimum age for the issuance of such permits from 18 years of age to 21 years of age.

**Section 5** amends s. 569.007(1) and (2), F.S., to modify the general restrictions on the sale or delivery of tobacco products. The bill reflects the increase in the age for the purchase of tobacco products to at least 21 years of age from 18 years of age. Under the bill, sales of tobacco products from a vending machine are only permissible from a machine that is located in an establishment that prohibits persons under age 21 on the licensed premises at all times.

**Section 6** amends s. 569.101, F.S., relating to the prohibition and penalties against the sale, delivery, barter, furnishing, or giving of tobacco products to an under-age person, to increase in the minimum age for lawful purchase of tobacco products to 21 years of age from 18 years of age.

The bill creates s. 569.101(4), F.S., to require a person to verify that a person purchasing a tobacco product is not under 21 years of age. Such verification is not required for any person over the age of 29. Age must be verified by the means of identification specified in s. 569.101(3)(c), F.S., which requires age verification by carefully checking a driver license, an identification card issued by this state or another state of the United States, a passport, or a United States armed services identification card presented by the buyer or recipient.

**Section 7** repeals s. 877.112, F.S., to eliminate the prohibition on the sale or delivery of nicotine dispensing devices and nicotine products to persons under the age of 18, and requirements for the sale of such products, including signage requirements. This prohibition and requirements are incorporated into the provisions of ch. 569, F.S., by the bill.

**Section 8** amends s. 210.095(5)(a) and (b), F.S., relating to mail order, Internet, and remote sales of tobacco products, and age verification related for such sales. The bill revises the labeling requirement for shipped tobacco products to indicate that Florida law prohibits shipping tobacco products to individuals under 21 years of age, rather than 18 years of age. Proof of legal minimum purchase age of the individual accepting delivery is required if the individual appears to be under 30 years of age, rather than the current 27 years of age. (This latter provision is modified to ensure conformity with recent federal law provisions.<sup>53</sup>)

**Section 11** bill amends s. 569.11, F.S., relating to the prohibition on the possession of tobacco products by minors, to increase in the minimum age from 18 years of age to 21 years of age.

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<sup>52</sup> *Id.*

<sup>53</sup> *Supra* note 46.

## **Smoking and Vaping Prohibited Near School Property; Penalties**

**Section 2** amends s. 386.212, F.S., relating to smoking and vaping on or near school property and related penalties, to prohibit smoking and vaping by persons under the age of 21 during any hour of day, on public or private school property or within 1,000 feet of such property. Under current law, that prohibition applies only to persons under 18 years of age between the hours of 6:00 a.m. and midnight. Current law and the bill provide an exception to this prohibition for any person occupying a moving vehicle or within a private residence.

## **Definitions**

**Section 3** amends s. 569.002, F.S., which provides definitions specific to the regulation of tobacco products, to redefine the term “tobacco products” to include:

- Any product containing, made of, or derived from tobacco or nicotine that is intended for human consumption or is likely to be consumed, whether inhaled, absorbed, or ingested by any other means, including, but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus;
- Any vapor-generating electronic device and any substances that may be aerosolized or vaporized by such device, whether or not any of the substance contains nicotine; or
- Any component, part, or accessory of a product described above, whether or not any of these contain tobacco or nicotine, including but not limited to, filters, rolling papers, blunt or hemp wraps, and pipes.

The bill defines the term “vapor-generating electronic device” to mean:

any product that employs an electronic, chemical, or mechanical means capable of producing vapor or aerosol from a nicotine product or any other substance, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product; any replacement cartridge for such device; and any other container of nicotine in a solution or other substance form intended to be used with or within an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, a vape pen, an electronic hookah, or other similar device or product.

The term includes any component, part, or accessory of the device and any substance intended to be aerosolized or vaporized during the use of the device, including any substance that does not contain nicotine.

Under the bill, the term “tobacco product” does not include drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

By expanding the definition of the term “tobacco products” to include “vapor-generating electronic device,” i.e., vaping products, the bill requires the retail dealers of such products to be licensed as a retail tobacco products dealer.

The bill also deletes the definition of the term “any person under the age of 18,” which allows persons whose disability of nonage has been removed under ch. 743, F.S., persons who serve in the military reserve or on active duty in the United States Armed Forces, emancipated minors, and persons acting in the scope of their lawful employment to possess or purchase tobacco products under current law. Under the bill such persons, if under the age of 21, would be prohibited from possessing or purchase tobacco products.

### **Signage Requirements**

**Section 13** amends s. 569.14, F.S., to revise the signage requirements for dealers of tobacco products. Under current law, the required notice must state that the sales of tobacco products, nicotine products, and nicotine dispensing devices to persons under the age of 18 is prohibited. The bill amends the requirements to reflect the increase in the minimum age from 18 years of age to 21 years of age and to remove the references to nicotine products and nicotine dispensing devices. Under the bill, a nicotine product or nicotine dispensing device is included in the definition of the term “tobacco product.”

### **Conforming Provisions**

The bill amends ss. 569.003(2)(a), 569.0075, 569.008, 569.12(2)(b) and (3), and 569.19(3) and (4), F.S., respectively, to incorporate conforming provisions to reflect the increase in the minimum age for the purchase or sale of tobacco and nicotine products from 18 years of age to 21 years of age.

### **Effective Date**

**Section 15** provides an effective date of October 1, 2021.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

### **D. State Tax or Fee Increases:**

The bill amends s. 569.002(7), F.S., to revise the definition of “tobacco products” to include vapor-generating electronic devices. The bill requires retail dealers of vapor-generating electronic devices, such as electronic cigarettes, to pay an annual license fee of \$50 for a retail tobacco product dealer permit.

Article VII, Section 19 of the Florida Constitution requires a “state tax or fee imposed, authorized, or raised under this section must be contained in a separate bill that contains no other subject.” A “fee” is defined by the Florida Constitution to mean “any charge or payment required by law, including any fee for service, fee or cost for licenses, and charge for service.”

Article VII, Section 19 of the Florida Constitution also requires that a tax or fee raised by the Legislature must be approved by two-thirds of the membership of each house of the Legislature.

E. Other Constitutional Issues:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Retail dealers of vapor-generating electronic devices, such as electronic cigarettes, will be required to obtain a retail tobacco product dealer permit. The annual license fee for a retail tobacco products dealer permit is \$50.

C. Government Sector Impact:

The Department of Business and Professional Regulation (DBPR) states that, although the number of retail dealers of vapor-generating devices and nicotine products is not known, each retail shop would need to get a \$50 tobacco retail permit each year, which will result in a positive but indeterminate increase in state revenues. Additionally, there may be a small indeterminate increase in state revenue if the number of infractions increases due to the increase in lawful age from 18 to 21 years of age.<sup>54</sup>

**VI. Technical Deficiencies:**

None.

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<sup>54</sup> See Department of Business and Professional Regulation, *SB 1080 Bill Analysis*, p. 7 (Feb. 24, 2021) (on file with the Senate Committee on Regulated Industries).



## VII. Related Issues:

### **Age of Tobacco Purchase in Other States**

As of January 1, 2021, 31 states have raised the tobacco purchase age to 21 years of age, along with Washington, DC, and over 500 localities.<sup>55</sup> In Florida, Alachua County and the City of Fort Lauderdale have raised their minimum age for purchase of tobacco products to 21 years of age.<sup>56</sup>

### **Age Restrictions on Youth Access to Electronic Cigarettes in Other States**

As of December 15, 2020, all states and the District of Columbia have laws that restrict youth access to electronic cigarettes, or e-cigarettes. In this context, “e-cigarette” broadly refers to any product, and its component parts and accessories, that contains nicotine and/or other substances intended for use in the form of an aerosol, often referred to as vapor. In 32 states, the restriction is set at age 21. Two states set the restriction at age 19. In 16 states, the restriction is set at age 18. There are certain exceptions and exemptions that are applicable within any given state.<sup>57</sup>

The bill amends s. 569.002(6), F.S., to modify the definition of “tobacco products” in the context of the regulation of the retail sale of tobacco products. Section 210.25(11), F.S., relating to the taxation of on tobacco products other than cigarettes or cigars, also defines the term “tobacco products.” Because the bill does not revise the definition of “tobacco products” in part II ch. 210, F.S., which governs the excise tax and surcharge imposed and collected on tobacco products other than cigars and cigarettes, the bill does not affect:

- The taxation of vapor-generating electronic devices;
- The collection of excise taxes and surcharge taxes on other tobacco products; or
- The licensure, reporting, and recordkeeping of manufacturers and distributors of vapor-generating electronic devices or other tobacco products.

### **Types of Vaping Devices Subject to Federal Enforcement Priorities**

The vaping devices that are subject to enhanced enforcement by the FDA are cartridge-based vaping devices. Tank-based vaping devices will not be subject to enhanced federal FDA enforcement.<sup>58</sup>

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<sup>55</sup> See Campaign for Tobacco-Free Kids, *States and Localities that have Raised the Minimum Legal Sale Age for Tobacco Products to 21*, available at:

[https://www.tobaccofreekids.org/assets/content/what\\_we\\_do/state\\_local\\_issues/sales\\_21/states\\_localities\\_MLSA\\_21.pdf](https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf) (last visited Feb. 25, 2021).

<sup>56</sup> *Id.*

<sup>57</sup> See Public Health Law Center at Mitchell Hamline School of Law, “Youth Access to E-Cigarettes, States with Laws Restricting Youth Access to E-Cigarettes, Enacted as of December 15, 2020,” available at:

<https://www.publichealthlawcenter.org/sites/default/files/States-with-Laws-Restricting-Youth-Access-to-ECigarettes-Dec2020.pdf> (last visited Feb. 25, 2021).

<sup>58</sup> *Supra* note 48.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 210.15, 386.212, 569.002, 569.003, 569.007, 569.101, 210.095, 569.0075, 569.008, 569.11, 569.12, 569.14, and 569.19.

This bill repeals section 877.112 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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