

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 169 Nicotine Dispensing Devices

**SPONSOR(S):** Regulatory Affairs Committee; Government Operations Appropriations Subcommittee; Business & Professional Regulation Subcommittee; Artilles; Renuart and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/SB 224

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professional Regulation Subcommittee	12 Y, 0 N, As CS	Butler	Luczynski
2) Government Operations Appropriations Subcommittee	13 Y, 0 N, As CS	Topp	Topp
3) Regulatory Affairs Committee	12 Y, 5 N, As CS	Butler	Hamon

### SUMMARY ANALYSIS

Electronic cigarettes (e-cigarettes) are devices, usually shaped like cigarettes, cigars or pipes that allow users to inhale vaporized nicotine, flavor, and other chemicals, without fire, smoke, ash, or carbon dioxide.

The Center for Disease Control & Prevention estimates that the number of middle and high school students using e-cigarettes has more than doubled from 2011 to 2012. Several states have passed regulations banning the sale of e-cigarettes to minors under the age of 18. Several counties, universities, and school boards in Florida have also passed regulations on e-cigarettes, similar to those in place for smoking, to restrict their use in public places and on their campuses.

The bill defines a "nicotine product" as any product that contains nicotine, including liquid nicotine, that is intended for human consumption, whether inhaled, chewed, absorbed, dissolved or ingested by any means, but does not include a tobacco product under Florida law, a drug or device under Federal Law, or a product with incidental nicotine. The bill defines "nicotine dispensing devices" as 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, any similar device, any replacement cartridge, and any container of nicotine in a solution or other form for such devices.

The sale or giving of "nicotine products" or "nicotine dispensing devices" to minors under the age of 18 is prohibited and punishable as a second degree misdemeanor. It creates a noncriminal violation for persons under 18 years to possess, purchase, or misrepresent their age or military service to obtain "nicotine products" or "nicotine dispensing devices" in certain circumstances.

The bill prohibits the sale or delivery of nicotine products or nicotine dispensing devices except when such products are under the direct control, or line of sight where effective control may be reasonably maintained, of the retailer or their agent or employee.

The bill preempts to the state regulation of the sale of products related to "tobacco products," "nicotine products," and "nicotine dispensing devices." Local governments would be prohibited from enacting new laws, ordinances or regulations of the sale of such products and existing local laws, ordinances, or regulations of such products would be nullified.

The bill is not anticipated to have a fiscal impact.  
The bill provides an effective date of July 1, 2014.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### Electronic Cigarettes

Electronic cigarettes, also known as e-cigarettes, are electronic products that allow users to inhale vaporized nicotine, flavor, and other chemicals, without fire, smoke, ash, or carbon dioxide. Electronic cigarettes are manufactured to resemble cigarettes, cigars, or pipes, but some are manufactured to resemble pens and USB memory sticks.<sup>1</sup>

E-Cigarette vendors include retailers who also sell tobacco products, retailers who do not sell tobacco products, and Internet retailers. According to the Department of Business and Professional Regulation (DBPR), there are 27,039 tobacco permit holders<sup>2</sup> in Florida; however, the number that also sell e-cigarettes is unknown. Additionally, there is no data on the number of retailers with physical or Internet stores that sell e-cigarettes, but not tobacco products.

##### Federal Regulation of Tobacco Products

The Family Smoking Prevention and Tobacco Control Act of 2009 (Tobacco Control Act)<sup>3</sup> gives the Food and Drug Administration (FDA) authority to regulate the manufacture, distribution, and marketing of tobacco products to protect the public health. Among other provisions, the Tobacco Control Act provides advertising and labeling guidelines,<sup>4</sup> provides standards for tobacco products,<sup>5</sup> and requires face-to-face transactions for tobacco sales with certain exceptions.<sup>6</sup>

Federal law requires that a retailer may sell cigarettes and smokeless tobacco only in “direct, face-to-face exchanges between the retailer and the customer.”<sup>7</sup> This language explicitly prohibits vending machines and self-service displays.<sup>8</sup> This language is referred to in the industry as the “behind the counter” language; however, this does not specifically require that a retailer place cigarettes or smokeless tobacco behind the counter. A locked display case would likely meet the self-service display prohibition.

Facilities that prohibit minors under the age of 18 are exempted from this federal requirement and these requirements do not apply to cigars, cigarillos, nicotine products, or nicotine dispensing devices.

Federal law preempts states from providing additional or different requirements for tobacco products in regards to “standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.”<sup>9</sup> However, federal law explicitly preserves the right of states, or any political subdivision of a state, to provide any other law, rule, regulation or other measure related to “prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of” tobacco products to require more stringent requirements for tobacco products beyond federal requirements.<sup>10</sup>

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<sup>1</sup> *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891 (D.C. Cir. 2010); *see also* U.S. Food & Drug Administration, News & Events, What are Electronic Cigarettes?, available at <http://www.fda.gov/newsevents/publichealthfocus/ucm172906.htm> (Last visited January 23, 2014).

<sup>2</sup> Florida Department of Business and Professional Regulation, 2014 Agency Legislative Bill Analysis for SB 224 (Oct. 30, 2013) (on file with the Business & Professional Regulation Subcommittee).

<sup>3</sup> Federal Food, Drug, and Cosmetic Act, 21 USC s. 351 et seq.

<sup>4</sup> 15 U.S.C. s. 1333, s. 1335 (2012).

<sup>5</sup> 21 U.S.C. s. 387g (2012).

<sup>6</sup> 21 U.S.C. s. 387f (2012).

<sup>7</sup> 21 C.F.R. § 1140.16

<sup>8</sup> 21 C.F.R. § 1140.16

<sup>9</sup> 21 U.S.C. s. 387p (2012).

<sup>10</sup> 21 U.S.C. s. 387p (2012).

### Tobacco Regulation in Florida

DBPR licenses and regulates businesses and professionals in Florida. It is structured to include separate divisions and various professional boards responsible for carrying out DBPR's mission to license efficiently and regulate fairly. The Division of Alcoholic Beverage and Tobacco (Division) within DBPR is responsible for the enforcement of ch. 569, F.S., regulating tobacco products.

Smoking is regulated by ss. 386.201 through 386.2125, F.S., titled the Florida Indoor Clean Air Act (FICAA). The FICAA prohibits smoking within an indoor workplace, with certain exceptions, and preempts the regulation of smoking to the state. The current preemption has an exception that allows school districts to further restrict smoking on their property.

### Definitions and Licensing

Section 569.002, F.S., states that the terms "dealer" and "retail tobacco products dealer" are synonymous terms that refer to "the holder of a retail tobacco products dealer permit (tobacco permit)."

Section 569.002(6), F.S., defines the term "tobacco products" to include:

[L]oose 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(11), F.S., relating to the tax on tobacco products other than cigarettes or cigars, defines the term "tobacco products" to mean:

[L]oose 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)[F.S.], or cigars.

Section 569.003, F.S., requires:

Each person, firm, association, or corporation that seeks to deal, at retail, in tobacco products within this state, or to allow a tobacco products vending machine to be located on its premises in this state, must obtain a retail tobacco products dealer permit for each place of business or the premises where tobacco products are sold.

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

### General Provisions, Prohibitions, and Penalties Related to Minors

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>

Section 569.101(3), F.S., provides a complete defense to a person charged with a violation of this section if the buyer or recipient falsely evidenced that he or she was 18 years of age or older, a prudent person would 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 upon in good faith.

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<sup>11</sup> Sections 775.082 and 775.083, F.S. (providing penalties for a misdemeanor of the second degree).

<sup>12</sup> *Id.* (providing penalties for a misdemeanor of the first degree).

<sup>13</sup> *See* s. 569.101(2)(c), F.S., (requiring carefully checking the identification presented by the buyer or recipient and acting 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).

Section 569.11, F.S., prohibits persons under the age of 18 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 violation within 12 weeks of the first violation is punishable with a \$25 fine. A third or subsequent violation within 12 weeks of the first violation requires that the person must be punished with the suspension or revocation of his or her driver's license or driving privilege, as provided in s. 322.056, F.S.

In FY 2012-13, the Department of Highway Safety and Motor Vehicles revoked the driver's license for one person and suspended the driver's license for 561 persons for underage possession of tobacco products, and suspended the driver's license for one underage person for misrepresenting the age to purchase tobacco products.<sup>14</sup>

Section 569.14, F.S., requires that 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 retail tobacco products dealers. Retail tobacco products dealers 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.

It is not clear whether the tobacco prohibitions for minors in current law include e-cigarettes as tobacco products. In an attempt to restrict minors' access to e-cigarettes, the Division's Internet site advises:

Electronic cigarettes containing nicotine from tobacco leaves are tobacco products regulated in the state, and that it is unlawful to sell tobacco products, including electronic cigarettes, to a person under 18 years of age.<sup>15</sup>

Currently, the Division's sworn law enforcement officers, as well as the non-sworn inspectors, routinely inspect tobacco permit holders for compliance with ch. 569, F.S. The Division's sworn law enforcement officers also perform what is termed "surveys," which are undercover operations with underage operatives, as a means of enforcing the prohibitions on the sale of tobacco products to persons less than 18 years of age; and the prohibition on possession of tobacco products by persons less than 18 years of age.<sup>16</sup>

According to the DBPR, for the period of January 1, 2012 through December 28, 2012, the Division performed 2,805 visits of retail tobacco dealers to determine compliance with ch. 569, F.S. These inspections resulted in 270 arrests for selling, delivering, furnishing, or giving tobacco products to persons under the age of 18. These visits also found three violations for failure to hold a valid tobacco permit.

According to the Division, 29 administrative cases were initiated against licensees for selling tobacco products to underage persons and 28 civil penalties were collected. Section 569.008(5), F.S., requires a pattern of three or more violations by the employees of the tobacco permit holder during a 180 period before a permit holder can be sanctioned for sales made by his or her employee. During this same period, the Division also cited 136 persons under the age of 18 for possession of tobacco products.

#### Federal Regulation of E-Cigarettes

The FDA is a federal agency within the Department of Health and Human Services tasked with regulating tobacco products. The FDA's organization consists of the Office of the Commissioner and four directorates overseeing the core functions of the agency: Medical Products and Tobacco; Foods;

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<sup>14</sup> Florida Department of Highway Safety and Motor Vehicles, 2014 Agency Legislative Analysis for SB 224 (Oct. 4, 2013) (on file with the Business & Professional Regulation Subcommittee).

<sup>15</sup> See Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, <http://www.myfloridalicense.com/dbpr/abt/index.html> (Last visited Jan. 24, 2013).

<sup>16</sup> Florida Department of Business and Professional Regulation, 2014 Agency Legislative Bill Analysis for SB 224 (Oct. 30, 2013) (on file with the Business & Professional Regulation Subcommittee).

Global Regulatory Operations and Policy; and Operations.<sup>17</sup> The Office of Medical Products and Tobacco provides advice and regulatory oversight to the FDA Commissioner through the centers for drug, biologics, medical devices, and tobacco products. The office also oversees the agency's special medical programs.<sup>18</sup>

Electronic cigarettes that are marketed for therapeutic purposes are regulated by the FDA Center for Drug Evaluation and Research (CDER).<sup>19</sup> The FDA Center for Tobacco Products regulates cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco.

The authority of the FDA to regulate e-cigarettes is based on the Tobacco Control Act.<sup>20</sup> Enacted on June 22, 2009, this act amended the Federal Food, Drug, and Cosmetic Act (FDCA) to authorize the FDA to regulate "tobacco products." The Tobacco Control Act defines the term "tobacco product," in part, as any product "made or derived from tobacco" that is not a "drug," "device," or combination product under the FDCA.

The Food and Drug Administration initially determined that certain e-cigarettes were both a drug and a device under the FDCA.<sup>21</sup> Products that fall under the authority of the FDCA as drugs or devices must go through a preapproval process before they can be marketed or sold to the consumer. Tobacco products do not have to go through a preapproval process.

The regulatory classification of e-cigarettes as tobacco products was resolved by the United States Court of Appeals for the District of Columbia Circuit, in *Sottera, Inc. v. Food & Drug Administration*.<sup>22</sup> The court determined that the FDA has the authority to regulate e-cigarettes as "tobacco products" under the Family Smoking and Tobacco Control Act of 2009<sup>23</sup> not as drugs/devices under the FDCA.

The case involved Sottera, Inc., an importer and distributor of e-cigarettes, whose shipment of e-cigarettes had been denied entry by the FDA because, the FDA asserted, they appeared to be adulterated, misbranded, or unapproved drug-device combinations under the FDCA. The company sought an injunction to bar the FDA from denying their e-cigarettes entry into the United States and from regulating e-cigarettes under the drug-device combinations under the FDCA. The United States District Court for the District of Columbia granted the injunction and agreed that e-cigarettes were subject to regulation as tobacco products and were not subject to regulation as drugs/devices under FDCA.

On appeal, the United States Court of Appeals for the District of Columbia Circuit held that e-cigarettes and other products made or derived from tobacco should be regulated as "tobacco products," and not regulated as drugs/devices unless they are marketed for therapeutic purposes. The FDA did not appeal this decision. The FDA has stated its intent to issue a proposed rule that would extend FDA's tobacco product regulatory authority to products that meet the statutory definition of "tobacco product."<sup>24</sup>

The National Association of Attorneys General issued a letter to the commissioner of the FDA urging the FDA to immediately regulate the sale and advertising of e-cigarettes as "tobacco products." The letter was signed by 42 attorneys general, including Florida Attorney General Pam Bondi. The letter

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<sup>17</sup> See U.S. Food & Drug Administration, FDA Organization, *available at* <http://www.fda.gov/AboutFDA/CentersOffices/default.htm>. (Last visited Jan. 24, 2014).

<sup>18</sup> See U.S. Food & Drug Administration, Office of Medical Products and Tobacco, *available at* <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/default.htm>. (Last visited Jan. 24, 2014).

<sup>19</sup> See U.S. Food & Drug Administration, News & Events, FDA Regulation of e-Cigarettes, *available at* <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm172906.htm> (Last visited Jan. 24, 2014).

<sup>20</sup> Federal Food, Drug, and Cosmetic Act, 21 USC s. 351 et seq.

<sup>21</sup> See Department of Health & Human Service, Food and Drug Administration, Letter to Matt Salmon, President of Electronic Cigarette Association, dated September 8, 2010, *available at* <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/UCM225263.pdf> (Last visited October 10, 2013).

<sup>22</sup> *Sottera, Inc. v. Food & Drug Administration*, 627 F.3d 891 (D.C. Cir. 2010).

<sup>23</sup> The Family Smoking and Tobacco Control Act of 2009, Pub.L. 111-31, 123 Stat. 1776.

<sup>24</sup> See Department of Health & Human Services, Food & Drug Administration, Unified Entry, "Tobacco Products" Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act, (Dec. 2013) *available at* <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=0910-AG38> (Last visited Jan. 24, 2014).

noted that e-cigarettes with fruit and candy flavors that appeal to youth and advertising have led consumers to believe that e-cigarettes are a safe alternative to cigarettes. The letter asserted that e-cigarettes are addictive, and regulatory oversight was needed to ensure the safety of e-cigarette ingredients.<sup>25</sup>

Some e-cigarettes specifically note in their marketing that e-cigarettes have not been evaluated by the FDA, are not intended to help people to stop smoking, and are not intended to treat, prevent or cure any disease or condition. Some retailers also assert that they voluntarily restrict sales to persons who are 18 years of age or older.

The Centers for Disease Control and Prevention reported that the number of middle school and high school students in the United States who used electronic cigarettes doubled in 2012 compared to the previous year. According to the report, nearly 1.78 million students tried e-cigarettes in 2012 nationwide.<sup>26</sup> In Florida, 4.3 percent of middle school students and 12.1 percent of high school students have tried e-cigarettes in 2013. The number of Florida high school students who have tried e-cigarettes has increased from 6 percent in 2011 to 12.1 percent in 2013.<sup>27</sup>

### Local Regulation of Electronic Cigarettes

Several counties and cities within Florida have passed local regulations of e-cigarettes. Clay County passed an ordinance in 2013 to regulate the sale, marketing, and restrict the public use of electronic cigarettes within the county where tobacco products are currently banned. Alachua County, Indian River County, and Marion County passed similar ordinances in 2013.

These ordinances banned the sale of electronic cigarettes to minors under the age of 18, required that vendors who sold electronic cigarettes kept the products behind the counter, and limited the use of electronic cigarettes in the same manner that the Florida Clean Indoor Air Act does for tobacco products. Several municipalities have passed similar ordinances, including the City of Green Cove Springs, the City of Sebastian, the City of Vero Beach, the City of Stuart, and the Town of Orange Park.

The University of Florida, Florida State University, the Seminole County School District, and the Bay County School Board, among others, have enacted policies banning the use of e-cigarettes on their campuses and properties.

### **Effect of the Bill**

This bill makes amendments to ch. 569, F.S., and creates s. 877.112, F.S., to prohibit selling or giving of “nicotine products” or “nicotine dispensing devices,” which include e-cigarettes, to persons under the age of 18.

### Definitions of “Nicotine Dispensing Device” and “Nicotine Product”

The bill creates s. 877.112(1)(a), F.S., to define a “nicotine dispensing device” as:

[A]ny 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 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

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<sup>25</sup> National Association of Attorneys General, Letter to The Honorable Margaret Hamburg, Commissioner of the U.S. Food and Drug Administration (Oct. 23, 2013) *available at* [http://www.naag.org/assets/files/pdf/signons/E Cigarette Final Letter w Florida.pdf](http://www.naag.org/assets/files/pdf/signons/E%20Cigarette%20Final%20Letter%20w%20Florida.pdf) (Last visited Jan. 24, 2014).

<sup>26</sup> See Centers for Disease Control & Prevention, Press Release, E-cigarette use more than doubles among U.S. middle and high school students from 2011-2012, (Sept. 5, 2012), *available at* <http://www.cdc.gov/media/releases/2013/p0905-ecigarette-use.html> (Last visited Jan. 24, 2013).

<sup>27</sup> See Florida Department of Health, Press Release, New CDC Report: E-Cigarette Use Among Teens in the U.S. Doubles, *available at* <http://newsroom.doh.state.fl.us/wp-content/uploads/newsroom/2013/05/090613-E-Cigarette-Use-Among-Teens-Doubles.pdf> (Last visited Jan. 24, 2014).

an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.

The bill creates s. 877.112(1)(b), F.S., to define a “nicotine product” as:

[A]ny product that contains nicotine, including liquid nicotine, that is intended for human consumption, whether inhaled, chewed, absorbed, dissolved or ingested by any means, but does not include a:

1. Tobacco product, as defined in s. 569.002;
2. Product regulated as a drug or device by the United States Food and Drug Administration under Chapter V of the Food, Drug and Cosmetic Act; or,
3. Product that contains incidental nicotine.

#### Sale or Sample of Nicotine Products or Nicotine Dispensing Devices and Penalties

The bill creates s. 877.112(2), F.S., to make it unlawful to sell, deliver, barter, furnish, or give, directly or indirectly, to any person who is under 18 years of age, any nicotine product or a nicotine dispensing device.

The bill creates s. 877.112(3), F.S., to prohibit a retailer, or employee of a retailer, from gifting a sample nicotine product or nicotine dispensing device to any person under the age of 18.

The bill creates s. 877.112(4), F.S., to provide that a person who violates the above restrictions on selling or gifting nicotine products or nicotine dispensing devices to a person under the age of 18 commits a second degree misdemeanor. The bill increases the penalties of second or subsequent violations within one year of the first violation to a misdemeanor of the first degree.

The bill creates s. 877.112(5), F.S., to allow a person who is charged with a violation of the above restrictions a complete affirmative defense if, at the time the nicotine product or nicotine dispensing device is sold, delivered, bartered, furnished, or given, the buyer falsely evidenced he or she was 18 years of age or older, a prudent person would believe the buyer was 18 years of age or older, and such person being charged with a violation carefully checked the buyer’s acceptable identification.

#### Minor’s Possession of Nicotine Products or Nicotine Dispensing Device and Misrepresentation of Age

The bill creates s. 877.112(6) and (7), F.S., to prohibit minors under the age of 18 from possessing a nicotine product or a nicotine dispensing device, and makes it unlawful for a minor to misrepresent his or her age to a retailer in order to induce the retailer, or an agent or employee of the retailer, into selling the minor a nicotine product or nicotine dispensing device.

The bill creates s. 877.112(8), F.S., to provide for the administration of the noncriminal penalties for minors that violate subsections (6) and (7). A minor charged with a violation of subsections (6) and (7) shall comply with the requirements of this subsection, appear before the county court, must attend a school-approved anti-tobacco and nicotine program, and pay any fines found by the county court.

The bill creates s. 877.112(9), F.S., to provide that 80 percent of all civil penalties received for violations of s. 877.112(6) and (7), F.S., by county courts shall be remitted to the Department of Revenue for transfer to the Department of Education to be used to provide 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 shall remain with the clerk of the county court to cover administrative costs.

#### Signage Requirements

The bill creates s. 877.112(10), F.S., to require all retailers that sell “nicotine products” or “nicotine dispensing devices” to post a sign substantially stating the following:

THE SALE OF NICOTINE PRODUCTS OR NICOTINE DISPENSING DEVICES TO PERSONS UNDER THE AGE OF 18 IS AGAINST FLORIDA LAW. PROOF OF AGE IS REQUIRED FOR PURCHASE.

The bill also requires retailers to provide point of sale materials to assist in determining whether a person is of legal age to purchase nicotine products or nicotine dispensing devices that state:

IF YOU WERE NOT BORN BEFORE THIS DATE  
(insert date and applicable year)  
YOU CANNOT BUY NICOTINE PRODUCTS OR NICOTINE DISPENSING DEVICES.

The bill amends s. 569.14, F.S., to allow retailers that sell both tobacco products and nicotine products or nicotine dispensing devices to meet the requirements of both ss. 569.14 and 877.112(10), F.S., if they post a sign which substantially states the following:

THE SALE OF TOBACCO PRODUCTS, NICOTINE PRODUCTS, OR NICOTINE DISPENSING DEVICES TO PERSONS UNDER THE AGE OF 18 IS AGAINST FLORIDA LAW. PROOF OF AGE IS REQUIRED FOR PURCHASE.

The bill also allows DBPR to make available this alternative sign to dealers of tobacco products instead of other signs that are required by s. 569.14(1), F.S.

#### Direct Control of Nicotine Products and Nicotine Dispensing Devices

The bill prohibits the sale of nicotine products or nicotine dispensing devices unless a retailer places such products under direct control, or line of sight where effective control may be reasonably maintained, of the retailer or their agent or employee. Establishments where minors under the age of 18 are prohibited from the premises and vending machines are excepted from this requirement.

#### Preemption of the Regulation of the Sale of Tobacco Products, Nicotine Products, and Nicotine Dispensing Devices

The bill creates s. 569.24, F.S., and creates s. 877.112(12), F.S., to preempt regulation of the sale of products, covered by ch. 569, and s. 877.112, F.S., to the state and to supersede any municipal or county ordinance on the sale of these products. The preemptions would be prohibit local governments from enacting new laws, ordinances or regulations of the sale of such products covered by ch. 569, F.S., or s. 877.112, F.S., and nullify existing local laws, ordinances, or regulations of such products.

These preemptions would also appear to invalidate some or all of the restrictions created by Alachua County, Clay County, Indian River County, and Marion County to regulate the sale of "nicotine products" or "nicotine dispensing devices," including retailer requirements related to placement of these products behind the counter or advertising restrictions.

#### B. SECTION DIRECTORY:

**Section 1** amends s. 569.14, F.S., allowing retailers that sell tobacco products and nicotine products or nicotine dispensing devices to use signs that would meet the requirements of both this section and s. 877.112(10), F.S.

**Section 2** creates s. 569.24, F.S., to preempt the regulation of the sale of all products covered by ch. 569, F.S.

**Section 3** creates s. 877.112, F.S., defining the terms "nicotine dispensing devices" and "nicotine products"; prohibiting the selling, delivering, bartering, furnishing, or giving of nicotine products or nicotine dispensing devices to persons under 18 years of age; prohibiting the gift of sample nicotine products or nicotine dispensing devices to persons under 18 years of age; providing penalties; prohibiting a person under 18 years of age from possessing, purchasing, or misrepresenting his or her age or military service to purchase nicotine products or nicotine dispensing devices; requiring certain signage where a retailer sells nicotine products or nicotine dispensing devices; requires retailers keep

direct control over nicotine products and nicotine dispensing devices; creates a state preemption for the regulation of the sale of products covered by s. 877.112, F.S.

**Section 4** provides an effective date of July 1, 2014.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Indeterminate. Retailers of nicotine products and nicotine dispensing devices will be required to purchase or create signs that meet the requirements of s. 877.112(10), F.S.

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

### **B. RULE-MAKING AUTHORITY:**

None.

### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

## **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On February 18, 2014, the Business & Professional Regulation Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute.

The strike-all amendment made the following changes to the filed version of the bill:

- Changed references from “alternative nicotine products” to “nicotine dispensing devices.”

- Removed the definition of “electronic cigarette,” and merged the products it covered into “nicotine dispensing devices.”
- Requires DBPR provide the number of violations of the bill in its annual report.

On March 11, 2014, the Government Operations Appropriations Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute.

The strike-all amendment made the following changes to the bill:

- Moved most of the substantive changes of the bill out of the Tobacco Products Section (ch. 569, F.S.) and to the Miscellaneous Crimes Section (ch. 877, F.S.).
- Adjusted the signage requirements for tobacco products so that DBPR may produce a sign that would meet the requirements of both s. 569.14, F.S., and the newly created s. 877.112, F.S.
- Created a preemption of all regulation for products or activities covered by Tobacco Products of ch. 569, F.S., within s. 569.14, F.S., and all products or activities covered by s. 877.112, F.S.

On March 27, 2014, the Regulatory Affairs Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute.

The strike-all amendment made the following changes to the bill:

- Reduces the preemption to the state of the regulation of tobacco products, nicotine products, and nicotine dispensing devices and makes a technical correction on the statutory placement of the tobacco products preemption. Instead of total preemption, the preemptions are limited to regulation of the sale of products.
- Clarifies the definition of Nicotine Products and Nicotine Dispensing Devices to include all intended products, devices and substances.
- Requires retailers of nicotine products or nicotine dispensing devices to maintain direct control over the products or devices.
- Modifies the title to reflect the substance of the strike-all amendment.

The analysis is drafted to the committee substitute that incorporates the strike-all amendment.