

**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 1288

INTRODUCER: Senators Simmons and Steube

SUBJECT: Tobacco Products

DATE: February 9, 2018

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	McSwain	RI	<b>Pre-meeting</b>
2.	_____	_____	CM	_____
3.	_____	_____	RC	_____

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**I. Summary:**

SB 1288 increases the minimum age to lawfully possess tobacco products from 18 to 21 years of age. The provisions of the bill may be cited as the “Tobacco 21 Act”.

The bill defines “tobacco products” to include electronic smoking devices, such as electronic cigarettes. The sale of tobacco products through a vending machine is also prohibited by the bill.

The bill decriminalizes the penalties for any person who sells, delivers, barter, furnishes, or gives tobacco products to a person under the age of 21. Instead of criminal penalties, the bill provides a noncriminal penalty of a fine of no more than \$500 for the first offense, and a fine of no more than \$1,000 for a second or subsequent offense within one year of the first violation.

Additionally, the bill repeals the current prohibitions against the possession of tobacco products by persons under the minimum age of lawful possession. However, the bill maintains the current prohibition against any person who misrepresents his or her age for the purpose of inducing a retail tobacco dealer, or an agent or employee of the dealer, to sell any tobacco product or to attempt to purchase any tobacco product from a person or vending machine, and provides a noncriminal penalty of 20 hours of community service for a first offense and at least 40 hours of community service for subsequent offenses within one year of the first violation.

The effective date of the bill is October 1, 2018.

SB 1288 may have an indeterminate fiscal impact on state government, the courts, and the clerks of county courts.<sup>1</sup> See Section V, Fiscal Impact Statement.

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<sup>1</sup> Pursuant to s. 34.031, F.S., the clerk of the circuit court is the clerk of the county court, unless otherwise provided by law.

## II. Present Situation:

### Tobacco Products Regulation in Florida

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

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(11), F.S., relating to the tax on tobacco products other than cigarettes or cigars, defines the term “tobacco products” to mean:

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.

### Tobacco Products and Minors

Section 569.0075, F.S., prohibits the giving of sample tobacco products to persons 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>2</sup> A second or subsequent violation within one year of the first violation is a first degree misdemeanor.<sup>3</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>2</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 exceeding 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.

<sup>3</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>4</sup> upon which the person relied upon in good faith.<sup>5</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 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 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.<sup>6</sup>

However, a person "under the age of 18" does not include any person under the age of 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.<sup>7</sup>

Eighty percent of all civil penalties received by a county court 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>8</sup>

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>9</sup>

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<sup>4</sup> Identification includes carefully checking "driver's 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(2)(c), F.S.

<sup>5</sup> Section 569.101(3), F.S.

<sup>6</sup> Section 322.056, F.S., requires the mandatory revocation or suspension of, or delay of eligibility for, a driver license for persons under 18 years of age found guilty of certain alcohol, drug, tobacco or nicotine product and nicotine dispensing device offenses. Penalties range from a 30-day suspension to a two-year revocation of a driver license. However, a court may, in its discretion, order a restricted driver license for business or employment purposes.

<sup>7</sup> Section 569.002(7), F.S.

<sup>8</sup> Section 569.11(6), F.S.

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

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 lockout 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 lockout device to allow the dispensing of one tobacco product;
- A mechanism on the lockout device to prevent the machine from functioning if the power source for the lockout device fails or if the lockout device is disabled;
- A mechanism to ensure that only one tobacco product is dispensed at a time.<sup>10</sup>

These requirements for the sale of tobacco products do not apply to an establishment that prohibits persons under 18 years of age on premises and do not apply to the sale or delivery of cigars and pipe tobacco.<sup>11</sup>

Section 386.212, F.S., in the Florida Clean Indoor Air Act, 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 a.m. and midnight. 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.

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

Section 210.095(5), F.S., provides requirements for the delivery of mail order, Internet, and other remote sales of tobacco products, referred to as "delivery sales". 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 to obtain proof of the legal minimum purchase age of the individual accepting delivery is required, if the individual appears to be under 27 years of age.
  - 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>12</sup>

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<sup>10</sup> Section 569.007(1), F.S.

<sup>11</sup> Sections 569.007(2) and (3), F.S.

<sup>12</sup> Section 210.095(5), F.S.

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>13</sup>

Section 210.095(8), F.S., currently provides that the penalty for the following violations of the delivery sale requirements is a misdemeanor of the third degree.<sup>14</sup>

- A delivery sale of 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 penalties in s. 569.101, F.S., 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 products, apply to s. 210.095, F.S., related to the delivery of tobacco products to persons under the age of 18.

### **Nicotine Dispensing Devices**

Section 877.112, F.S., provides for the regulation of nicotine dispensing devices and nicotine products, 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 “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 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>15</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>16</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> Section 775.082, F.S., provides that 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 a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

<sup>15</sup> Section 877.112(1)(a), F.S.

<sup>16</sup> Section 877.112(1)(b), F.S.

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>17</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>18</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.<sup>19</sup> 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 violation within 12 weeks of the first violation requires a \$25 fine. A third violation within 12 weeks of the first violation requires the suspension or revocation of the person's driver license, as provided in s. 322.056, F.S.<sup>20</sup>

Eighty percent of civil penalties 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>21</sup>

Section 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.

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, or line of sight where effective control may be reasonably maintained by the retailer or their agent or employee.<sup>22</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 lockout device if the products are sold or delivered from a vending machine.

### **Responsible Retail Tobacco Products Dealers**

Section 569.008, F.S., provides a process for a retail tobacco product dealer to mitigate penalties imposed against a dealer because of an employee's illegal sale of a tobacco product to a person

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<sup>17</sup> Section 775.082, F.S., provides that 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 a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

<sup>18</sup> Section 877.112(5), F.S.

<sup>19</sup> Sections 877.112(6) and (7), F.S.

<sup>20</sup> Section 877.112(8), F.S.

<sup>21</sup> Section 877.112(9), F.S.

<sup>22</sup> Section 877.112(11), F.S.

under 18 years of age.<sup>23</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.
- The sale was made through a vending machine equipped with an operational lock-out device.<sup>24</sup>

### III. Effect of Proposed Changes:

#### “Tobacco 21 Act”

Section 1 of the bill provides that this act may be cited as the "Tobacco 21 Act."

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

The bills amends s. 210.095, F.S., to increase the minimum age to purchase tobacco products from 18 to 21 years of age. The bill revises the penalties in s. 210.095, F.S., by:

- Decriminalizing a violation for a person who omits the required disclaimer from the shipping documents.
- Reducing the penalty from a “third degree misdemeanor” to a noncriminal violation with a penalty for a first offense of at least 20 hours of community service, and a penalty for a second or subsequent violation within one year of the first violation of least 40 hours of community service.
- Providing a penalty of a second degree misdemeanor penalty (instead of the current “third degree misdemeanor”) for a person who, in connection with a delivery sale, delivers tobacco products on behalf of a delivery service to an individual who is not an adult.

#### Mandatory Driver License Penalties

The bill amends s. 322.056, F.S., to repeal the mandatory revocation or suspension of, or the delay of eligibility for, a driver license for persons under 18 years of found guilty of certain tobacco or nicotine product and nicotine dispensing device offenses.

#### Definitions

The bill creates s. 569.002(6), F.S., to define the term “electronic smoking device” as:

any device that can be used to deliver aerosolized or vaporized nicotine to the person inhaling from the device, including but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah. The term includes any component, part, or accessory of such a device, sold separately or with the

<sup>23</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>24</sup> See s. 569.008(3), F.S.

device, and includes any substance intended to be aerosolized or vaporized during the use of the device. The term 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.

The bill amends s. 569.002(7), F.S., and revises the definition of “tobacco products” to be any:

product that is made from or derived from tobacco or that contains nicotine and is intended for human consumption or is likely to be consumed, whether smoked, heated, chewed, absorbed, dissolved, inhaled, or ingested by any other means, including, but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus.

Under the bill, the term “tobacco products” includes electronic smoking devices and any component or accessory used in the consumption of a tobacco product, such as filters, rolling papers, pipes, and liquids used in electronic smoking devices, whether or not they contain nicotine. However, the term 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.

The bill repeals s. 877.122, F.S., which defines nicotine dispensing devices and nicotine products.

Retail sellers of electronic smoking devices are required by the bill to be licensed as retail tobacco products dealers because of the bill’s amended definition of tobacco products.

The bill does not revise the definition of “tobacco products” in ch. 210, F.S., which governs the excise tax and surcharge imposed and collected on cigarettes and other tobacco products. Consequently, the bill does not affect:

- The collection excise taxes and surcharge taxes on tobacco products; and
- The licensure, reporting, and recordkeeping of manufacturers and distributors of the additional nicotine delivery products.

### **Decriminalization and Penalties**

The bill amends s. 569.101, F.S., to decriminalize penalties for any person who sells, delivers, barter, furnishes, or gives tobacco products to a person under the age of 21. Under the bill, a violation of the prohibition on such acts is a noncriminal violation punishable by a fine of no more than \$500 for the first offense, and a fine of no more than \$1,000 for a second or subsequent offense within one year of the first violation.

Section 569.11, F.S., relating to prohibitions on the possession of tobacco products by persons under the minimum age of purchase, is amended by the bill to repeal the current prohibition on the possession of tobacco products by a person who is under the minimum age for lawful possession of tobacco products and the related penalties for violations of the prohibition.



In lieu of criminal penalties, a person misrepresenting his or her age for the purpose of inducing a dealer or an agent or employee of the dealer to sell any tobacco product, or attempts to purchase any tobacco product from a person or vending machine, is subject to a noncriminal penalty of 20 hours of community service for a first offense, and at least 40 hours of community service for a second or subsequent offense within one year of the first violation.

The bill requires a person accused of a violation of s. 561.11, F.S., to appear before the county court for a hearing. The bill removes the option in current law permitting the accused to pay the applicable fine without having to appear in county court.

The bill amends s. 569.002(7), F.S., which provides exclusions from the meaning of "any person under the age of 18". The bill does not provide comparable exclusions for persons under 21 years of age. The elimination of these exceptions to the minimum age, coupled with the increase of the minimum age to 21 years of age, requires active duty or reserve military personnel, otherwise exempt under current law, to be 21 to purchase or possess tobacco products, including electronic smoking devices.

The bill decreases the applicable penalties in s. 569.14(5), F.S., for a retail tobacco dealer who fails to post a clear and conspicuous sign stating that the sale of tobacco to a person under the legal age is prohibited under Florida law. A violation of this prohibition remains a second degree misdemeanor, punishable by a fine of no more than \$500, as provided in s. 775.083, F.S., but the bill repeals the criminal penalty of a maximum 60-day period of incarceration provided in s. 775.082, F.S.

### **Sales Restrictions**

The bill amends s. 569.007(1), F.S., and repeals s. 877.112, F.S., to eliminate the general restrictions on the sale or delivery of tobacco products, nicotine dispensing devices, and nicotine products. The bill requires that tobacco products and electronic smoking devices be sold from behind a counter where the products are required to be retrieved and hand delivered by an employee to the consumer. The bill repeals the current authorization for sales from a vending machine.

### **Responsible Retail Tobacco Products Dealers**

The bill amends s. 569.008, F.S., to remove the authority for the division to mitigate penalties based on a dealer's adherence to the responsible practices provided in this section. However, the bill retains the current conditions to qualify as a responsible retail tobacco products dealer.

### **Conforming Provisions**

The bill amends ss. 386.212, 569.12, 569.14, and 569.19, F.S., to increase the minimum age in these provisions from 18 to 21 years of age.

### **Effective Date**

The effective date of the bill is October 1, 2018.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

Persons who violate the current criminal prohibitions in ss. 569.101 and 569.11, F.S., will not incur costs related to the payment of criminal fines or costs related to incarceration.

Retail dealers of electronic smoking devices, such as electronic cigarettes, are required by the bill to obtain a retail tobacco products dealer permit, which has an annual license fee of \$50.<sup>25</sup>

## C. Government Sector Impact:

The Department of Business and Professional Regulation may incur indeterminate expenses related to personnel or modification of operational priorities needed to accommodate the additional licensure of dealers of electronic smoking devices.

Under current law, clerks of county courts may retain 20 percent of civil penalties received by a county court from penalties imposed for violations of the prohibitions in ss. 569.101 and 569.11, F.S., to cover administrative costs.<sup>26</sup> The bill repeals those penalties, which will eliminate this funding source.

The bill requires a person accused of a violation of s. 561.11, to appear before the county court for a hearing, and removes the option in current law permitting an accused person to pay the applicable fine without having to appear in county court. This may have an indeterminate impact on county courts due to the additional time and personnel required to schedule and hold these hearings.

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<sup>25</sup> See 569.003(1)(c), F.S.

<sup>26</sup> See ss. 569.11(6) and 877.112(9), F.S.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Five states have raised the minimum age for a person to lawfully possess or purchase tobacco products to 21 years of age: California, New Jersey, Oregon, Hawaii, and Maine. At least 285 localities, including New York City, Chicago, San Antonio, Boston, Cleveland, and Kansas City (in Kansas and Missouri) have also raised the minimum to 21 years of age.<sup>27</sup>

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 210.095, 322.056, 386.212, 569.002, 569.007, 569.0075, 569.008, 569.101, 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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<sup>27</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 February 12, 2018).