

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1125 Tobacco Products
SPONSOR(S): Business & Professions Subcommittee, Hill and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	13 Y, 0 N, As CS	Brackett	Anstead
2) Government Operations & Technology Appropriations Subcommittee	3 Y, 8 N	Helpling	Topp
3) Commerce Committee			

SUMMARY ANALYSIS

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. "Tobacco products" are loose tobacco leaves, products made from tobacco leaves, and cigarette wrappers, which can be used for smoking, sniffing, or chewing. Nicotine products and electronic nicotine dispensing devices are not included. Businesses which sell or deal in tobacco products are required to have a permit issued by the division.

It is a punishable offense to sell nicotine products and nicotine dispensing devices to minors, and for minors to use such products, but a business which sells such products does not need a permit from the division.

To prevent persons under 18 years of age from purchasing or receiving tobacco products and nicotine products, the sale or delivery of tobacco and nicotine products must be made under the direct control or line of sight of the dealer or the dealer's agent or employee. If a tobacco or nicotine product is sold from a vending machine, the vending machine must have a lockout device and only dispense one product at a time.

The bill:

- Changes the definition of "tobacco products" to include nicotine products, nicotine dispensing devices, and their components, e-liquid, and nicotine gel, which will require businesses which sell such products to obtain a permit from the division to be a tobacco dealer and pay a \$50 fee to operate.
- Requires that tobacco products must be sold in a direct, face-to-face exchange with the dealer or dealer's agent or employee and removes the ability to sell tobacco products through a vending device with a lockout device, unless:
 - such establishment prohibits persons under 18 years of age on the premises; or
 - it involves the sale of cigars, hookah and waterpipe tobacco, dissolvable tobacco, nicotine gel, and pipe tobacco.
- Removes the law specific to nicotine product use by and sales to minors. Such use and sales will be covered by tobacco sales, use requirements, and prohibitions.

The bill has an indeterminate positive fiscal impact on state government revenues and no fiscal impact on local governments.

The bill has an effective date of July 1, 2019.

The bill appears to implicate Article VII, s. 19 of the Florida Constitution. See Section III.A.2. of the analysis.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Federal Regulation of Tobacco Products

The Family Smoking Prevention and Tobacco Control Act of 2009 (Tobacco Control Act) 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, provides standards for tobacco products, and requires face-to-face transactions for tobacco sales with certain exceptions.¹

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.” This language explicitly prohibits vending machines and self-service displays.² 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.

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.” 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.³

Regulation of Tobacco Products in Florida

The Division of Alcoholic Beverage and Tobacco (division) within the Department of Business and Professional Regulation (DBPR) is the state agency responsible for the regulation and enforcement of the tobacco products under ch. 569, F.S. “Tobacco products” 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.⁴

Section 210.25(11), F.S., relating to the tax on tobacco products other than cigarettes or cigars, defines the term “tobacco products” differently as “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.”

“Tobacco products” in either definition does not include nicotine products and nicotine dispensing devices.

In order to deal retail tobacco products, or operate a tobacco products vending machine in Florida, a person, firm, association, or corporation must obtain a retail tobacco products dealer permit from the

¹ Federal Food, Drug, and Cosmetic Act, 21 USC s. 351 et seq; 15 U.S.C. s. 1333, s. 1335 (2017); 21 U.S.C. s. 387g, s. 387f (2017).

² 21 C.F.R. § 1140.14.

³ 21 U.S.C. s. 387p (2017).

⁴ S. 569.002(6), F.S.

division for each place of business or the premises where tobacco products are sold. The fee for such a permit is \$50.⁵

The place or premises covered by a permit is subject to inspection and search without a search warrant by the division or its authorized assistants, and by sheriffs, deputy sheriffs, or police officers, to determine compliance with requirements for tobacco sales and dealing.⁶

Tobacco Products and Minors

The sale, delivery, bartering, furnishing or giving of tobacco products or giving sample products to persons under the age of 18 is prohibited.⁷ A violation of this prohibition is a second degree misdemeanor.⁸ A second or subsequent violation within one year of the first violation is a first degree misdemeanor.⁹

It is a complete defense to a person charged with such a violation 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 upon which the person relied upon in good faith.¹⁰

Persons under the age of 18 years are prohibited from possessing, directly or indirectly, any tobacco products. Person who violate this noncriminal violation are punishable as follows:¹¹

- 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.¹²

However, a person "under the age of 18" does not include any person under the age of 18 who:¹³

- 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.

⁵ S. 569.003, F.S.

⁶ S. 569.004, F.S.

⁷ Ss. 569.0075, 101, F.S.

⁸ S. 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.

⁹ S. 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.

¹⁰ S. 569.101(3), F.S.

¹¹ S. 569.11, F.S.

¹² 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.

¹³ S. 569.002(7), F.S.

Eighty percent of all civil penalties received from violating prohibitions related to the possession or sale of tobacco products 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.¹⁴

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.¹⁵

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.¹⁶

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.¹⁷

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.¹⁸

Nicotine Products

Section 877.112, F.S., provides for the regulation of nicotine products and nicotine dispensing devices, 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 products and nicotine dispensing devices 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

¹⁴ S. 569.11(6), F.S.

¹⁵ S. 569.14, F.S.

¹⁶ S. 569.007(1), F.S.

¹⁷ Ss. 569.007(2) and (3), F.S.

¹⁸ S. 386.212, F.S.

an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.¹⁹

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.²⁰

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.²¹ 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 be 18 years of age or older, and the person carefully checked, and relied on, the driver license or identification card of the recipient.²²

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.²³ 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.²⁴

Eighty percent of civil penalties related to the unlawful possession or sale of nicotine products 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.²⁵

Retail dealers of nicotine products and nicotine dispensing devices are required to post signs that the sale of nicotine products and nicotine dispensing devices to persons under 18 years of age is prohibited.²⁶

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.²⁷

Electronic Nicotine Delivery Systems

Effective August 8, 2016, the FDA extended the definition of “tobacco product[s]” regulated under the Act to include electronic nicotine delivery systems (ENDS). ENDS include e-cigarettes, e-cigars, e-hookah, vape pens, personal vaporizers and electronic pipes. Additionally, the definition of tobacco products includes components and parts such as e-liquids, tanks, cartridges, pods, wicks, and atomizers. As such, retailers are prohibited from selling ENDS to individuals under the age of 18.²⁸

¹⁹ S. 877.112(1)(a), F.S.

²⁰ S. 877.112(1)(b), F.S.

²¹ 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.

²² S. 877.112(5), F.S.

²³ Ss. 877.112(6), (7), F.S.

²⁴ S. 877.112(8), F.S.

²⁵ S. 877.112(9), F.S.

²⁶ S. 877.112(10), F.S.

²⁷ S. 877.112(11), F.S.

²⁸ Food and Drug Administration, *Summary of Federal Rules for Tobacco Retailers*,

<https://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/Retail/ucm205021.htm> (last visited Mar. 22, 2019).

The FDA reports that between 2011 and 2014, the number of high school students who had used an e-cigarette in the last 30 days increased nearly 800 percent, with 13.4 percent of high school students reporting usage in 2014.²⁹ In 2018, over 4.9 million middle and high school students were current users of e-cigarettes.³⁰ As of 2018, more than one in four high school seniors and one in ten middle school students used e-cigarettes.³¹

In order to decrease youth usage of ENDS, the FDA has begun a Youth Tobacco Prevention Plan. The plan has three main components: preventing youth access to tobacco products, ending marketing aimed at youth, educating youth about the dangers of using tobacco and educating retailers about their role in preventing underage usage of tobacco.³²

The FDA has recently announced that it will review its policy on how flavored ENDS products are sold, to possibly require that such products be sold in age-restricted, in-person locations.³³

Effect of the Bill

The bill changes the definition of “tobacco products” in ch. 569, F.S., to mean “all recreational nicotine products, including, but not limited to, hookah and waterpipe tobacco, electronic nicotine delivery systems and their components, e-liquid, dissolvable tobacco, nicotine gel, smokeless tobacco, cigarettes, cigars, roll-your-own tobacco, pipe tobacco, loose tobacco leaves, products made from tobacco leaves, in whole or in part, and cigarette wrappers, which can be used for smoking, sniffing, or chewing.” The bill does not change the definition of “tobacco products” relating to the tax on tobacco products other than cigarettes or cigars in ch. 210, F.S., and therefore has no effect on such tax.

The new definition will require businesses which sell nicotine products and nicotine dispensing devices to obtain a permit from the division and pay a \$50 fee to continue to operate.

The bill requires that tobacco products must be sold in a direct, face-to-face exchange with the dealer or dealer’s agent or employee, and not through a vending device with a lockout device, unless:

- such establishment prohibits persons under 18 years of age on the premises; or
- it involves the sale of cigars, hookah and waterpipe tobacco, dissolvable tobacco, nicotine gel, and pipe tobacco.

The bill requires that ENDS or e-liquid may not be placed in an open display unit unless:

- such unit is located in an area which is inaccessible to customers, or
- the establishment prohibits persons under 18 years of age on the premises.

The bill removes the law specific to nicotine products and the use by and sales to minors. Such use and sales will be covered by current tobacco laws based on the changes to the definition of tobacco to include nicotine products in the bill. The bill also makes related conforming changes.

The bill provides an effective date of July 1, 2019.

²⁹ Food and Drug Administration, 81 C.F.R. 28973, <https://www.federalregister.gov/d/2016-10685/p-635> (last visited Mar. 22, 2019).

³⁰ Food and Drug Administration, *Statement from FDA Commissioner Scott Gottlieb, M.D., on new data demonstrating rising youth use of tobacco products and the agency’s ongoing actions to confront the epidemic of youth e-cigarette use*, <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm631112.htm> (last visited Mar. 22, 2019).

³¹ *Id.*

³² Food and Drug Administration, *FDA’s Youth Tobacco Prevention Plan*, <https://www.fda.gov/TobaccoProducts/PublicHealthEducation/ProtectingKidsfromTobacco/ucm608433.htm> (last visited Mar. 22, 2019).

³³ Food and Drug Administration, *Statement from FDA Commissioner Scott Gottlieb, M.D., on proposed new steps to protect youth by preventing access to flavored tobacco products and banning menthol in cigarettes*, <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm625884.htm> (last visited Mar. 23, 2019).

B. SECTION DIRECTORY:

- Section 1.** Amends s. 569.002, F.S., relating to definitions.
- Section 2.** Amends s. 569.007, F.S., relating to sale or delivery of tobacco products; restrictions.
- Section 3.** Repeals s. 877.112, F.S., relating to nicotine products and nicotine dispensing devices;
- Section 4.** Amends s. 322.056, F.S., relating to punishments for persons under age 18 found guilty of certain tobacco offenses.
- Section 5.** Amends s. 569.14, F.S., relating to posting of a sign stating that the sale of tobacco products to minors is unlawful.
- Section 6.** Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

There will be an indeterminate positive fiscal impact on revenue received by DBPR due to the modification of “tobacco products” in ch. 569, F.S. The amount will vary depending on how many vendors of specified tobacco products are required to obtain the \$50 permit to continue to sell tobacco products as defined in the bill. Vendors that already sell tobacco products that require a permit and sell tobacco products included in the bill, will not be required to get an additional permit.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Businesses that currently sell non-tobacco nicotine products will need to obtain a permit and be subject to inspections by the division to continue to operate.

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:

Article VII, s. 19 of the Florida Constitution requires the imposition, authorization, or raising of a state tax or fee be contained in a separate bill that contains no other subject and be approved by two-thirds of the membership of each house of the Legislature. As such, Art, VII, s. 19 of the Florida Constitution may apply if the fee provisions in the bill are interpreted to be a new state fee.

B. RULE-MAKING AUTHORITY:

DBPR will have to update rules regarding permit applications. There is sufficient rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 26, 2019, the Business & Professions Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment removed the prohibition on tobacco dealers from dealing in certain flavored tobacco products and on offering such products in a vending machine. The amendment also removed the \$500 fine associated with such violations.

This analysis is drafted to the committee substitute as passed by the Business & Professions subcommittee.