

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7027 PCB HQS 19-02 Vaping
SPONSOR(S): Health Quality Subcommittee, Beltran, Mike
TIED BILLS: **IDEN./SIM. BILLS:** SB 7012

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health Quality Subcommittee	14 Y, 0 N	Gilani	McElroy
1) Government Operations & Technology Appropriations Subcommittee	10 Y, 0 N	Helpling	Topp
2) Health & Human Services Committee			

SUMMARY ANALYSIS

Chapter 386, Part II, F.S., the Florida Clean Indoor Air Act (FCIAA), protects people from the health hazards of secondhand tobacco smoke and implements Article X, Section 20 of the Florida Constitution. The FCIAA prohibits a person from smoking tobacco in an enclosed indoor workplace, with certain exceptions. The Department of Health (DOH) and the Department of Business and Professional Regulation (DBPR) enforce the FCIAA.

In the general election of November 2018, Floridians passed Amendment No. 9, which, in part, amends Article X, Section 20 of the Florida Constitution. The Amendment bans the use of vapor-generating electronic devices, or vaping, consistent with the current prohibition of tobacco smoking in enclosed indoor workplaces. The amendment further requires the Legislature to adopt legislation to implement these changes by July 1, 2019.

The bill amends the FCIAA to implement Amendment No. 9 by prohibiting vaping in enclosed indoor workplaces consistent with the current prohibition on indoor smoking. Specifically, the bill:

- Provides exceptions for vaping in enclosed indoor workplaces consistent with the current exceptions for smoking;
- Creates a new exception for vapor-generating electronic device retailers consistent with the current exception for retail tobacco shops;
- Creates penalties for vaping-related violations consistent with the current penalties for smoking-related violations;
- Clarifies that counties and municipalities may adopt local ordinances that impose more restrictive regulations on vaping;
- Requires public announcements in mass transportation terminals to include statements on the vaping prohibition;
- Prohibits anyone under the age of 18 years old from vaping in, on, or within 1,000 feet of school property;
- Grants DOH and DBPR sufficient rulemaking authority to implement and enforce the changes in the bill; and
- Makes various conforming and technical changes.

The bill has an insignificant, negative fiscal impact on state government.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

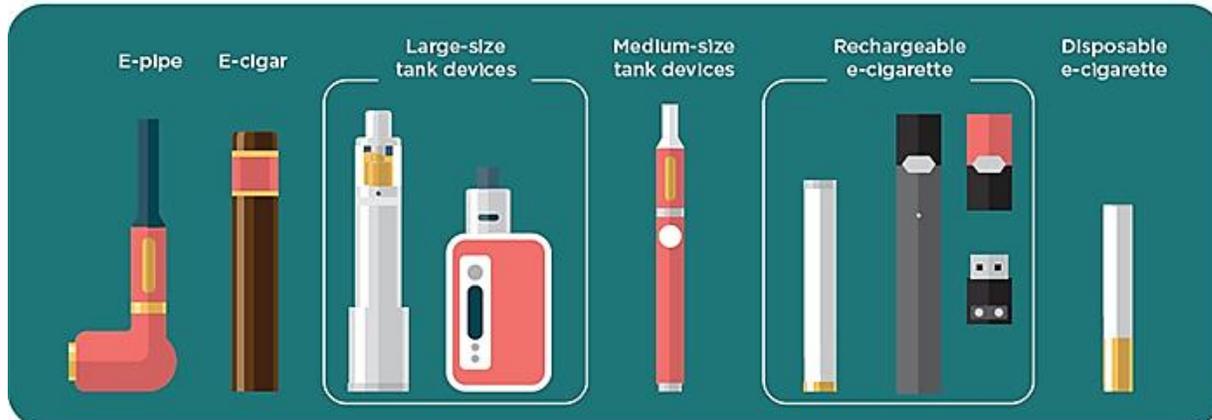
A. EFFECT OF PROPOSED CHANGES:

Background

Vaping

Vaping is the act of inhaling and exhaling an aerosol, or vapor, created from a liquid heated up inside of a battery-operated electronic device.¹ There are various types of liquids and electronic devices used in vaping. Examples of vaping devices include vape pens, e-cigarettes, e-hookahs, electronic nicotine delivery devices, tank systems, and mods, all of which generally consist of a mouthpiece, a battery, a cartridge for containing the liquid, and a heating component which turns the liquid into an aerosol.² Some devices are made to look like regular cigarettes, cigars, or pipes, while some are made to resemble pens, USB sticks, or other everyday items. The liquids used in vaping devices are generally combinations of propylene glycol or a glycerin-based liquid, nicotine,³ and flavoring chemicals.⁴

Types of Vaping Devices⁵



Vaping devices were first introduced in the U.S. market in 2007 and have been promoted as a less-harmful alternative to smoking, often used in smoking cessation programs.⁶ In the past decade, the use of vaping devices has increased rapidly. However, research on vaping is still relatively new and the potential long-term health effects are not as widely known by users or the general public.⁷

¹ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, *Electronic Cigarettes, What's the Bottom Line?*, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/pdfs/Electronic-Cigarettes-Infographic-508.pdf (last visited Feb. 8, 2019).

² U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, *About Electronic Cigarettes (E-Cigarettes)*, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/about-e-cigarettes.html (last visited Feb. 8, 2019).

³ Nicotine is the addictive drug contained in regular cigarettes, cigars, and other tobacco products.

⁴ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, *A Report of the Surgeon General: E-Cigarette Use Among Youth and Young Adults (2016)*, https://www.cdc.gov/tobacco/data_statistics/sgr/e-cigarettes/pdfs/2016_sgr_entire_report_508.pdf (last visited Feb. 8, 2019).

⁵ *Supra* note 2.

⁶ *Supra* note 1. See also, Ralph S. Caraballo, Ph.D., et al, *Quit Methods Used by US Adult Cigarette Smokers, 2014–2016*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, Apr. 13, 2017, available at: https://www.cdc.gov/pcd/issues/2017/16_0600.htm (last visited Feb. 8, 2019).

⁷ *Supra* note 1.

Vaping does not use tobacco; however, the aerosol still contains harmful and potentially harmful substances, including nicotine, flavoring chemicals linked to serious lung disease, volatile organic compounds, cancer-causing chemicals, and heavy metals such as nickel, tin, and lead.⁸ Therefore, it is still not considered safe for children, young adults, pregnant women, or those who do not already use tobacco products.⁹

Youth Vaping

Introduced into the market in 2015, JUUL has become an increasingly popular vaping device. Shaped like an easily concealable USB flash drive and available in various kid-appealing flavors, such as fruit or candy, these devices are particularly popular among young people.¹⁰ A typical JUUL cartridge contains approximately the same amount of nicotine as a pack of 20 regular cigarettes, however approximately two-thirds of 15 to 24 year-olds who use JUUL are unaware that it contains nicotine.¹¹

While the U.S. Food and Drug Administration (FDA) regulates the manufacturing, distribution, and marketing of tobacco products, it did not regulate vaping products until 2016, when the FDA amended its rules regulating tobacco products to include the regulation of vaping products and prohibit their sale to minors.¹² However, retailers continued to illegally sell vaping products like JUUL to minors.¹³

Teen tobacco use had declined in the past few decades, however this trend has been reversed with the introduction of vaping.¹⁴ The 2018 National Youth Tobacco Survey found that from 2017 to 2018 alone, there was a 78 percent increase in vaping among high school students and a 48 percent increase among middle school students, meaning 1.5 million more students were vaping in the span of one year, bringing the total number to 3.6 million students who vape.¹⁵

⁸ Id.

⁹ *Supra* note 2.

¹⁰ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, *E-cigarettes Shaped Like USB Flash Drives: Information for Parents, Educators, and Health Care Providers*, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/factsheet/index.html (last visited Feb. 8, 2019).

¹¹ U.S. Surgeon General's Advisory on E-Cigarette Use Among Youth, Dec. 18, 2018, available at: <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>

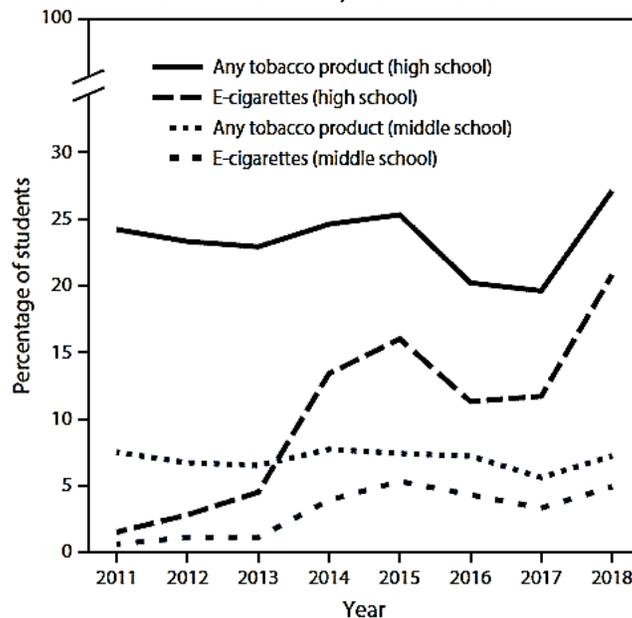
¹² U.S. FOOD & DRUG ADMINISTRATION, *The Facts on the FDA's New Tobacco Rule*, <https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm506676.htm> (last visited Feb. 8, 2019). In Florida, s. 877.112, F.S., prohibits the sale of "nicotine products" and "nicotine dispensing devices" to minors, the definitions of which describe vaping products containing nicotine but distinguishes them from tobacco products.

¹³ U.S. FOOD & DRUG ADMINISTRATION, *Warning Letters and Civil Money Penalties Issued to Retailers for Selling JUUL and Other E-Cigarettes to Minors*, <https://www.fda.gov/TobaccoProducts/NewsEvents/ucm605278.htm> (last visited Feb. 8, 2019).

¹⁴ Forty percent of 15 to 24 year-olds who currently vape had never been regular cigarette smokers, *Supra* note 1.

¹⁵ Karen A. Cullen, Ph.D., et. al, *Notes from the Field: Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students – United States, 2011-2018*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, Nov. 16, 2018, available at: https://www.cdc.gov/mmwr/volumes/67/wr/mm6745a5.htm?s_cid=mm6745a5_w (last visited Feb. 8, 2019). As of 2018, approximately 21% of high school students and 5% of middle school students vape.

Percentage of middle and high school students who currently use e-cigarettes and any tobacco product — National Youth Tobacco Survey, United States, 2011–2018¹⁶



In response to these statistics, the U.S. Surgeon General has declared youth vaping an epidemic¹⁷ and the FDA is taking extra measures to combat its prevalence, including increased enforcement against retailers selling vaping products to minors, a partnership with the Federal Trade Commission to target manufacturers who use misleading and kid-appealing imagery in their advertising, and the launch of awareness campaigns for teens.¹⁸

Smoking Regulation in Florida

While the FDA regulates the manufacture, distribution, and marketing of tobacco and vaping products, it does not regulate smoking or vaping in public places – leaving that to the states.

In 1985, the Florida Legislature enacted the Florida Clean Indoor Air Act (FCIAA)¹⁹ to protect the public health, comfort, and environment by creating areas in public places and at public meetings that were reasonably free from tobacco smoke. The FCIAA originally prohibited smoking in certain indoor public places (e.g. government buildings, elevators, public transportation, hospitals, day care centers) or common areas of an indoor public place (e.g. lobby, hallway, stairwell, restrooms), but did permit designated smoking areas of specified indoor public places such as places of employment, retail stores, indoor arenas, and restaurants.

¹⁶ Id.
¹⁷ *Supra* note 11.
¹⁸ U.S. FOOD & DRUG ADMINISTRATION, *FDA News Release: FDA Takes New Steps to Address Epidemic of Youth E-Cigarette Use, Including a Historic Action Against More Than 1,300 Retailers and 5 Major Manufacturers for Their Roles Perpetuating Youth Access*, September 12, 2018, available at: <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm620184.htm> (last visited Jan. 21, 2019). See also, U.S. FOOD & DRUG ADMINISTRATION, *FDA Press Release: 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*, November 18, 2018, available at: <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm625884.htm> (last visited Feb. 8, 2019).

¹⁹ Ch. 386, Part II, F.S.; ch. 85-257, Laws of Fla.
STORAGE NAME: h7027a.GOT
DATE: 3/7/2019

Article X, Section 20 of the Florida Constitution

In the November 2002, General Election, Floridians voted to create Article X, Section 20 of the Florida Constitution, titled "Workplaces without tobacco smoke," which further restricted smoking indoors.²⁰ The purpose of this citizens' initiative was to protect people from the health hazards of secondhand tobacco smoke by prohibiting smoking in enclosed indoor workplaces, which are defined as:

Any place where one or more persons engage in work,²¹ and which place is predominantly or totally bounded on all sides and above by physical barriers, regardless of whether such barriers consist of or include uncovered openings, screened or otherwise partially covered openings; or open or closed windows, жалousies, doors, or the like.²²

The provision also provided various other definitions and exceptions to the smoking ban, and required the Legislature to implement the section in law by the following legislative session. Accordingly, in 2003, the Legislature amended the FCIAA to conform existing law and implement the constitutional provision in a manner consistent with its broad purpose and stated terms.²³

Currently, the FCIAA prohibits smoking in an enclosed indoor workplace, unless it is a:²⁴

- Private residence that is not being used commercially to provide child care, adult care, or health care, or any combination thereof;
- Retail tobacco shop;
- Designated smoking guest room in a public lodging establishment;
- Stand-alone bar;²⁵
- Smoking cessation program or medical or scientific research; or
- Customs smoking room in an airport.

However, an owner, lessee, or a person otherwise in control of an enclosed indoor workplace may further prohibit or limit smoking therein.²⁶

Additionally, no one under the age of 18 years old may smoke tobacco in, on, or within 1,000 feet of a public or private grade school between 6 a.m. and midnight.²⁷ Violators of this provision are subject to a citation from a law enforcement officer.²⁸

²⁰ Text available at: <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/34548-1.pdf> (last visited Dec. 8, 2018). The constitutional provision does not preclude the Legislature from enacting more restrictive regulation of tobacco smoking.

²¹ "Work" is defined as "any persons providing any employment or employment-type service for or at the request of another individual or individuals or any public or private entity, whether for compensation or not, whether full or part-time, whether legally or not." FLA. CONST., art. X, s. 20. "Work" includes, without limitation, any such service performed by an employee, independent contractor, agent, partner, proprietor, manager, officer, director, apprentice, trainee, associate, servant, volunteer, and the like. The term does not include noncommercial activities performed by members of a membership association. S. 386.203(12), F.S.

²² The smoking ban applies to all enclosed indoor workplaces regardless of whether work is occurring at any given time, FLA. CONST., art. X, s. 20.

²³ Ch. 2003-398, Laws of Fla.

²⁴ Ss. 386.204 and 386.2045, F.S. Additionally, s. 386.203(5)(c), F.S., by definition of an "enclosed indoor workplace," excludes any facility owned or leased by and used exclusively for noncommercial activities performed by the members and guests of a membership association, including social gatherings, meetings, dining, and dances, if no person or persons are engaged in work.

²⁵ A stand-alone bar is a licensed premises that predominantly or totally serves alcoholic beverages and in which serving food is merely incidental to the sale of alcohol. Also, it must not share a common entryway or indoor area with a business that predominantly serves food during the hours the stand-alone bar is operating its business, s. 386.203(11), F.S. See also s. 561.695, F.S.

²⁶ FLA. CONST., art X, sec. 20(b).

²⁷ S. 386.212(1), F.S.

²⁸ S. 386.212(2), F.S.

Persons in charge of enclosed indoor workplaces are required to develop and implement smoking prohibition policies in line with the FCIAA requirements.²⁹ Persons in charge of a smoking cessation program, medical or scientific research, or an airport terminal that includes a customs smoking room must all post signs clearly stating that smoking is only permitted in the designated areas.³⁰ Additionally, public transportation carriers in certain locations are required to make regular announcements regarding the smoking prohibition.³¹

The Department of Health (DOH) and the Department of Business and Professional Regulation (DBPR) are each responsible for the enforcement of the FCIAA as it relates to their respective areas of regulatory authority.³² If an enclosed indoor work place violates the FCIAA and does not correct the violation within 30 days, DOH or DBPR may impose fines against the owner and pursue compliance in circuit court, if necessary.³³ Additionally, any person who violates the FCIAA by smoking in an enclosed indoor work place commits a noncriminal violation and may be subject to a fine of up to \$100 for the first violation and up to \$500 for each subsequent violation.³⁴

Currently, Florida does not comprehensively regulate vaping in public places in the way that it does smoking.

Constitutional Amendment No. 9 (2018)

In the November 2018, General Election, Floridians passed Amendment No. 9 with 68.9% of the vote, which amends Article X, Section 20 of the Florida Constitution, banning the use of vapor-generating electronic devices, or vaping, in enclosed indoor workplaces consistent with the current prohibition on tobacco smoking.³⁵

The amendment defines a “vapor-generating electronic device” as any product that employs an electronic, a chemical, or a 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; or
- Any other container of a solution or other substance intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.

The amendment provides exceptions for the same enclosed indoor workplaces where smoking is currently permitted, and creates a new exception for vapor-generating electronic device retailers, or retail vape shops, which are 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.” This is consistent with the current exception for smoking in tobacco shops.

²⁹ S. 386.206(1), F.S.

³⁰ S. 386.206(2)-(3), F.S.

³¹ S. 386.211, F.S.

³² Ss. 386.207(1) and 561.695, F.S. DBPR enforces the FCIAA in restaurants, bowling centers, dog tracks, horse tracks, bars, billiards, bingo halls (with food service), and civic/fraternal organizations. DOH enforces the FCIAA in all facilities not regulated by DBPR. FLORIDA DEPARTMENT OF HEALTH, *Florida Clean Indoor Air Act, Enforcement*, <http://www.floridahealth.gov/environmental-health/indoor-air-quality/indoor-air-act/index.html> (last visited Jan. 3, 2019).

³³ S. 386.207(3), F.S.

³⁴ S 386.208, F.S.

³⁵ Text available here, at p. 26-30: <https://dos.myflorida.com/media/699824/constitutional-amendments-2018-general-election-english.pdf> (last visited Feb. 8, 2019). Note: Amendment No. 9 also amended article II, section 7 of the Florida Constitution to ban offshore oil and gas drilling.

The amendment requires the Legislature to implement these changes by July 1, 2019, including provisions for civil penalties for violations, administrative enforcement, and grant of rulemaking authority to agencies for implementation and enforcement.

Effect of the Bill

The bill amends the FCIAA to implement Amendment No. 9. Specifically, the bill:

- Prohibits vaping in enclosed indoor workplaces consistent with the current prohibition on indoor smoking;
- Provides exceptions for vaping in enclosed indoor workplaces consistent with the current exceptions for smoking;
- Creates a new exception for vapor-generating electronic device retailers;
- Creates penalties for vaping-related violations consistent with the current penalties for smoking-related violations;
- Clarifies that counties and municipalities may adopt local ordinances that impose more restrictive regulations on vaping;³⁶
- Requires public announcements in mass transportation terminals to include statements on the vaping prohibition;
- Prohibits anyone under the age of 18 years old from vaping in, on, or within 1,000 feet of school property;
- Renames the chapter in law to include vaping in addition to smoking;³⁷
- Adopts, without modification, the definitions of “vapor-generating electronic device” and “vapor-generating electronic device retailer” provided in the constitutional amendment;
- Creates definitions for “vapor”³⁸ and “vaping;”³⁹
- Grants DOH and DBPR sufficient rulemaking authority to implement and enforce the changes in the bill; and
- Makes various conforming and technical changes.

Under the bill, smoking and vaping are both prohibited in enclosed indoor workplaces, but both are permitted in private residences not in commercial use, retail tobacco shops, retail vape shops, designated guest rooms, stand-alone bars, Customs smoking rooms, smoking or vaping cessation programs, or medical or scientific research. However, an owner, lessee, or a person otherwise in control of an enclosed indoor workplace may still choose to further prohibit or limit smoking or vaping therein.⁴⁰

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

³⁶ Regulation of smoking is currently preempted to the state, with an exception for school district property. S. 386.209, F.S. Currently, there is no such state preemption for vaping and Amendment 9 clarifies that nothing in the language of the amendment precludes local governments from adopting more restrictive regulation on vaping.

³⁷ The bill renames ch. 386, part II, F.S., from “INDOOR AIR: TOBACCO SMOKE” to “INDOOR AIR: SMOKING AND VAPING.”

³⁸ The bill defines “vapor” as “aerosolized or vaporized nicotine or other aerosolized or vaporized substance produced by a vapor-generating electronic device or exhaled by the person using such device.

³⁹ The bill defines “vaping” as “to inhale or exhale vapor produced by a vapor-generating electronic device while that device is actively employing an electronic, a chemical, or a mechanical means designed to produce vapor or aerosol from a nicotine product or any other substance.”

⁴⁰ FLA. CONST., art X, sec. 20(b).

B. SECTION DIRECTORY:

- Section 1:** Renames ch. 386, Part II, F.S.
- Section 2:** Amends s. 386.202, F.S., relating to legislative intent.
- Section 3:** Amends s. 386.203, F.S., relating to definitions.
- Section 4:** Amends s. 386.204, F.S., relating to prohibitions.
- Section 5:** Amends s. 386.2045, F.S., relating to enclosed indoor workplaces; specific exceptions.
- Section 6:** Amends s. 386.205, F.S., relating to customs smoking rooms.
- Section 7:** Amends s. 386.206, F.S., relating to posting of signs and requiring policies.
- Section 8:** Amends s. 386.207, F.S., relating to administration, enforcement, and civil penalties.
- Section 9:** Reenacts s. 386.208, F.S., relating to penalties.
- Section 10:** Amends s. 386.209, F.S., relating to state preemption of the regulation of smoking.
- Section 11:** Amends s. 386.211, F.S., relating to public announcements in mass transportation terminals.
- Section 12:** Amends s. 386.212, F.S., relating to smoking prohibitions near school property and penalties.
- Section 13:** Amends s. 386.2125, F.S., relating to rulemaking.
- Section 14:** Amends s. 561.695, F.S., relating to stand-alone bar enforcement; qualification; penalties.
- Section 15:** Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

- 1. Revenues:
See Fiscal Comments.
- 2. Expenditures:
See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

- 1. Revenues:
None.
- 2. Expenditures:
None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that enclosed indoor workplaces will need to update their policies to reflect the changes to the FCIAA contained in this bill, employers will experience an indeterminate but likely insignificant, negative fiscal impact.

D. FISCAL COMMENTS:

To the extent that DOH or DBPR must increase enforcement activity for vaping-related provisions of the FCIAA, they may experience increased resource costs; however, they will also experience an increase in revenue to the extent that they impose fines as a result of such increased enforcement activity. To the extent that DOH or DBPR need to update their rules and technology systems to meet

the new enforcement requirements of the FCIAA, they will experience an insignificant, negative fiscal impact which can likely be absorbed within existing resources.⁴¹

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:

Constitutional Amendment No. 9, passed in November 2018, requires the Legislature to adopt legislation implementing the amendment no later than July 1 of the year following its approval, which is July 1, 2019.

B. RULE-MAKING AUTHORITY:

The bill appears to grant sufficient rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

⁴¹ Florida Department of Business and Professional Regulation, Agency Analysis of 2019 SPB 7012, p. 5-6 (Feb. 5, 2019).