

**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 Appropriations

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BILL: CS/SB 1394

INTRODUCER: Innovation, Industry, and Technology Committee and Senator Simmons

SUBJECT: Fees/Tobacco Products

DATE: February 19, 2020

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>IT</u>	<u>Fav/CS</u>
2.	<u>Gross</u>	<u>Diez-Arguelles</u>	<u>FT</u>	<u>Favorable</u>
3.	<u>Gross</u>	<u>Kynoch</u>	<u>AP</u>	<u>Pre-meeting</u>

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1394 amends the definition of the term “tobacco products” in section 569.002, Florida Statutes, as amended by SB 810 or similar legislation during the 2020 Regular Session. The bill amends the term “tobacco products” to include vapor-generating electronic devices (vaping products) and any substances that may be aerosolized or vaporized by such devices, whether or not any of the substances contain nicotine.

By revising the definition of “tobacco products” to include vapor-generating electronic devices, the bill requires a retail dealer of vapor-generating electronic devices, such as electronic cigarettes, to pay an annual license fee of \$50 for a retail tobacco product dealer permit.

The bill takes effect on the same date that SB 810 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof. CS/CS/SB 810 provides an effective date of October 1, 2020, contingent upon the passage of CS/SB 1394 being adopted in the same legislative session or an extension thereof and becoming law.

Article VII, section 19 of the Florida Constitution requires that a tax or fee imposed by the Legislature must be contained in a separate bill that contains no other subject and must be approved by two-thirds of the membership of each house of the Legislature.

## II. Present Situation:

### CS/CS/SB 810

CS/CS/SB 810, relating to tobacco products, amends s. 569.002, F.S., which provides definitions related to the regulation of the retail sale of tobacco products, to redefine the term “tobacco products” to include:

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

Under the CS/CS/SB 810, the term “tobacco products” 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.

CS/CS/SB 810 increases the minimum age to lawfully purchase and possess tobacco products from 18 years of age to 21 years of age.

CS/CS/SB 810 provides an effective date of October 1, 2020, contingent upon the passage of CS/SB 1394 being adopted in the same legislative session or an extension thereof and becoming law.

CS/CS/SB 810 repeals s. 877.112, F.S., to eliminate the prohibition on the sale or delivery of tobacco products, nicotine dispensing devices, and nicotine products to persons under the age of 18. Many of these provisions are incorporated into the provisions of ch. 569, F.S., by CS/CS/SB 810 as amended by CS/SB 1394.

### Regulation of Vaping

During the 2019 legislative session, CS/SB 7012<sup>1</sup> was enacted to implement Amendment 9 to the Florida Constitution,<sup>2</sup> which was approved by the voters of Florida on November 6, 2018, to ban the use of vapor-generating electronic devices, such as electronic cigarettes (e-cigarettes), in enclosed indoor workplaces, as part of the Florida Clean Indoor Air Act. The use of e-cigarettes is commonly referred to as vaping.

The use of vapor-generating electronic devices is permitted in the enclosed indoor workplace of a “vapor-generating device retailer” or “retail vape shop,” which is defined as “any enclosed indoor workplace dedicated to or predominantly for the retail sale of vapor-generating electronic devices and components, parts, and accessories for such products, in which the sale of other products or services is merely incidental.” Vaping is permitted at the same locations authorized

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<sup>1</sup> See ch. 2019-14, Laws of Fla.

<sup>2</sup> FLA. CONST. art. X, s. 20.

to permit tobacco smoking, i.e., private residences whenever not being used for certain commercial purposes, stand-alone bars, designated rooms in hotels and other public lodging establishments, retail tobacco shops, facilities owned or leased by a membership association, smoking cessation program locations, medical or scientific research locations, and customs smoking rooms in airport in-transit lounges.

Local governments may adopt more restrictive local ordinances on the use of vapor-generating electronic devices.

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

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

### **Nicotine Dispensing Devices**

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

A “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>3</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>4</sup>

The sale or giving of nicotine products or nicotine dispensing devices to any person under 18 years of age is prohibited and punishable as a second degree misdemeanor.<sup>5</sup> It is a complete defense to a violation if an underage person falsely misrepresented his or her age, the underage

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<sup>3</sup> Section 877.112(1)(a), F.S.

<sup>4</sup> Section 877.112(1)(b), F.S.

<sup>5</sup> Section 775.082, F.S., provides that the penalty for a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S., provides that the penalty for a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

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>6</sup>

Persons under 18 years of age possessing, purchasing, or misrepresenting their age or military service to obtain nicotine products or nicotine dispensing devices commit a noncriminal violation. The penalty is 16 hours of community service or a \$25 fine for a first violation, and attendance at a school-approved anti-tobacco and nicotine program, if available. A second or subsequent violation within 12 weeks of the first violation requires a \$25 fine. Any second or subsequent violation not within the 12-week time period after the first violation is punishable as provided for a first violation.<sup>7</sup>

If a person under 18 years of age is found by the court to have committed such a noncriminal violation and that person has failed to complete community service, pay the required fine, or attend a school-approved anti-tobacco and nicotine program, if locally available, the court may direct the Department of Highway Safety and Motor Vehicles to withhold issuance of or suspend the driver license or driving privilege of that person for 30 or 45 consecutive days, depending on the infraction.<sup>8</sup>

Eighty percent of civil penalties specific to possession of nicotine products or nicotine dispensing devices by minors and misrepresenting age in making such purchases are remitted to the Department of Revenue for transfer to the Department of Education for teacher training and for research and evaluation to reduce and prevent the use of tobacco products, nicotine products, or nicotine dispensing devices by children. The remaining 20 percent of civil penalties received by a county court are retained by the clerk of the county court to cover administrative costs.<sup>9</sup>

Subsection 877.112(10), F.S., requires a retail dealer of nicotine products and nicotine dispensing devices to post signs that the sale of nicotine products and nicotine dispensing devices to persons under 18 years of age is prohibited.

Nicotine products or nicotine dispensing devices may not be sold or delivered by self-service merchandising, except when such products are under the direct control of, or in the line of sight where effective control may be reasonably maintained by, the retailer or their agent or employee.<sup>10</sup>

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

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<sup>6</sup> Section 877.112(5), F.S.

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

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

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

<sup>10</sup> Section 877.112(11), F.S.

## Rates of Youth Vaping

According to recent data from the federal Centers for Disease Control and Prevention (CDC), more than one in four high school students is an e-cigarette user.<sup>11</sup> That represents an increase from approximately one in five last year. At the same time, around 10 percent of middle school students reported using e-cigarettes in the month prior to being surveyed, up from around 5 percent last year. Nearly 70 percent of e-cigarette users reported using a flavored product, and the availability of flavors such as mint and chocolate was a reason that many students cited for trying e-cigarettes. The findings come a year after the U.S. Surgeon General declared the surge in youth vaping an epidemic.<sup>12</sup>

## Health Issues Relating to Vaping

The findings noted above regarding the increases in youth vaping come at the same time that the CDC is conducting an ongoing national investigation of vaping-related lung injuries. The CDC, the federal Food and Drug Administration (FDA), state and local health departments, and public health and clinical stakeholders have spent the past several months investigating and monitoring the nationwide illness outbreak. The condition has been labelled as E-cigarette, or Vaping, product use-Associated Lung Injury, or EVALI. The latest count from the CDC finds that 2,409 people have been hospitalized and 52 people have died across 25 states and Washington, D.C., as of December 10, 2019.<sup>13</sup> Two of the deaths have occurred in Florida, and 103 cases of vaping-related illness hospitalizations have been documented in Florida as of December 3, 2019.<sup>14</sup>

## National Minimum Age of Sale of Tobacco Products

As part of the federal budget revisions adopted in December 2019, and signed into law on December 20, 2019, the minimum age for the sale of tobacco products is now 21 years of age.<sup>15</sup> The specific tobacco provisions in the budget document amended section 906(d) of the Federal Food, Drug, and Cosmetic Act to increase the federal minimum age to purchase tobacco products from 18 to 21, and to add a provision that it is unlawful for any retailer to sell a tobacco product to any person younger than age 21. The provisions also require the FDA to update its applicable tobacco regulations within specified timelines.

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<sup>11</sup> See “Tobacco Product Use and Associated Factors Among Middle and High School Students — United States, 2019” Centers for Disease Control and Prevention- Morbidity and Mortality Weekly Report (MMWR), (December 6, 2019), available at <https://www.cdc.gov/mmwr/volumes/68/ss/ss6812a1.htm> (last visited Feb. 6, 2020).

<sup>12</sup> See “Surgeon General Warns Youth Vaping Is Now An ‘Epidemic,’” December 18, 2018, available at <https://www.npr.org/sections/health-shots/2018/12/18/677755266/surgeon-general-warns-youth-vaping-is-now-an-epidemic> (last visited Feb. 6, 2020).

<sup>13</sup> Mikosz CA, Danielson M, Anderson KN, et al. Characteristics of Patients Experiencing Rehospitalization or Death After Hospital Discharge in a Nationwide Outbreak of E-cigarette, or Vaping, Product Use–Associated Lung Injury — United States, 2019. CDC, *Morbidity & Mortality Weekly Report* 2020;68:1183-1188. (December 20, 2019), available at <http://dx.doi.org/10.15585/mmwr.mm685152e1> (last visited Feb. 6, 2020).

<sup>14</sup> See “Florida reports second vaping death” (December 11, 2019), available at <http://www.orlandosentinel.com/news/os-ne-florida-reports-second-vaping-death-20191211-dvz3tehxebvbkavhe2jdiepe-story.html> (last visited Feb. 6, 2020).

<sup>15</sup> See the “Further Consolidated Appropriations Act, 2020,” Rules Committee print 116-44, Text of the House Amendment to the Senate Amendment to H.R. 1865, December 16, 2019, beginning at page 1492 of 1773, available at <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116HR1865SA-RCP116-44.PDF> (last visited Feb. 6, 2020).

As part of this rule update process, the FDA is to update the relevant age verification requirements to require age verification for individuals under age 30 (as opposed to the current age verification threshold for individuals under age 27). This topic had been under consideration for some time, and adoption of the changes were the result of the recent increased vaping rates among youth as highlighted above, the recent EVALI cases as highlighted above, and the adoption of age 21 as the minimum age for purchase of tobacco products in multiple states as highlighted in the **Related Issues** portion of this analysis.

### **FDA Guidance Document**

On January 2, 2020, the FDA released “Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market without Premarket Authorization” (FDA Guidance Document) as a Guidance for Industry document.<sup>16</sup> (For all intents and purposes, the reference to ENDS products is a reference to vaping products.) The Guidance Document’s introduction describes how the FDA intends to prioritize its enforcement resources with regard to the marketing of certain deemed tobacco products that do not have premarket authorization.

The introduction further indicates that, as with FDA’s prior compliance policies on deemed new tobacco products that do not have premarket authorization, this guidance document does not apply to any deemed product that was not on the market on August 8, 2016.<sup>17</sup> For ENDS products marketed without the FDA’s authorization, the FDA intends to prioritize enforcement against:

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

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<sup>16</sup> See “Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market without Premarket Authorization: Guidance for Industry, released by the U.S. Department of Health and Human Services, Food and Drug Administration, Center for Tobacco Products, (January 2, 2020), *available at* <https://www.fda.gov/media/133880/download> (last visited Feb. 6, 2020). The document as released is a follow-up to a draft document that was released by the FDA in March 2019. Appendix A of the document, consisting of pages 32-52 of the 52 page document, reflects FDA’s response to comments received on the March 2019 draft document.

<sup>17</sup> A brief explanation of “deeming” is helpful in this context. The Family Smoking Prevention and Tobacco Control Act (2009) (the act) gave the FDA the authority to regulate tobacco products. The act broadly defined “tobacco products” as any product that is “made or derived from tobacco” that is “intended for human consumption.” However, the act, when passed, only immediately applied to a few specific products, namely cigarettes, cigarette tobacco, smokeless tobacco, and roll-your-own tobacco. To regulate any other tobacco products, the act requires the FDA to assert jurisdiction through regulation. In other words, for the FDA to start regulating cigars, e-cigarettes, hookah, and other products currently unregulated by the federal government, the FDA must create a rule through its formal notice-and-comment rulemaking process. A rule, or regulation, that extends the FDA’s jurisdiction to all tobacco products is often referred to as a Deeming Regulation because the language of the Tobacco Control Act states that the FDA can regulate additional tobacco products that it “deems to be subject” to the act. While this process exists and has been used, its use is infrequent. From *A Deeming Regulation: What is Possible Under the Law*, Tobacco Control Legal Consortium, *available at* <https://www.publichealthlawcenter.org/sites/default/files/resources/tclcf-fs-deeming-reg-what-is-possible-2014.pdf> (last visited Feb. 6, 2020).

The Guidance Document provides background details of the FDA’s statutory and regulatory history of tobacco related products, evidence of increasing youth use of vaping products, applicable definitions, enforcement priorities, strategies for avoiding use of “black market” products, and the FDA’s logic regarding enforcement and pre-market review for other deemed new tobacco products.

### III. Effect of Proposed Changes:

The bill amends the definition for the term “tobacco products” in s. 569.002, F.S., as amended by SB 810 or similar legislation during the 2020 Regular Session or an extension thereof. The bill amends the meaning of the term “tobacco products” to include vapor-generating electronic devices (vaping products) and any substances that may be aerosolized or vaporized by such device, whether or not any of the substance contains nicotine.

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

[A]ny product that employs an electronic, chemical, or mechanical means capable of producing vapor or aerosol from a nicotine product or any other substance, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product; any replacement cartridge for such device; and any other container of nicotine in a solution or other substance form intended to be used with or within an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, a vape pen, an electronic hookah, or other similar device or product. The term includes any component, part, or accessory of the device and also includes any substance intended to be aerosolized or vaporized during the use of the device, whether or not the substance contains nicotine.

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

By revising the definition of “tobacco products” to include vapor-generating electronic devices, the bill requires a retail dealer of vapor-generating electronic devices, such as electronic cigarettes, to pay an annual license fee of \$50 for a retail tobacco product dealer permit.<sup>18</sup>

The bill uses the same term, vapor-generating electronic device, used in the Florida Constitution and the Florida Clean Indoor Air Act (act) in prohibition against indoor vaping.<sup>19</sup> The definition for the term in the bill and in the Florida Constitution and the act are consistent.

The bill takes effect on the same date that SB 810 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof. CS/CS/SB 810

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<sup>18</sup> See s. 569.003(1)(c), F.S.

<sup>19</sup> See FLA. CONST. art. X, s. 20.

provides an effective date of October 1, 2020, contingent upon the passage of CS/SB 1394 being adopted in the same legislative session or an extension thereof and becoming law.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

The bill amends s. 569.002(7), F.S., to revise the definition of “tobacco products” to include vapor-generating electronic devices. By amending the definition, the bill requires retail dealers of vapor-generating electronic device, such as electronic cigarettes, to pay an annual license fee of \$50 for a retail tobacco product dealer permit.<sup>20</sup>

Article VII, Section 19 of the Florida Constitution requires a “state tax or fee imposed, authorized, or raised under this section must be contained in a separate bill that contains no other subject.” A “fee” is defined by the Florida Constitution to mean “any charge or payment required by law, including any fee for service, fee or cost for licenses, and charge for service.”<sup>21</sup>

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

E. Other Constitutional Issues:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

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<sup>20</sup> See s. 569.003(1)(c), F.S.

<sup>21</sup> FLA. CONST. art. VII, s. 19(d)(1)



**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The bill amends s. 569.002(6), F.S., to modify the definition of “tobacco products” in the context of the regulation of the retail sale of tobacco products.

Section 210.25(11), F.S., also defines the term “tobacco products” but does so to impose on those tobacco products an excise tax and surcharge and to require recordkeeping, licensure, and reporting by distributors. Because the bill does not revise this definition, the bill will not subject vapor-generating electronic devices, or substances aerosolized by such devices, to the excise tax or surcharge or require recordkeeping, licensure, and reporting by distributors.

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

It should be noted that the vaping devices that will be subject to enhanced enforcement by the federal FDA under its January 2, 2020, guidance document are those vaping devices that are cartridge-based.<sup>22</sup> This means that tank-based vaping devices will not be subject to enhanced federal FDA enforcement.

**VIII. Statutes Affected:**

This bill substantially amends section 569.002 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.)

**CS by Innovation, Industry, and Technology on February 3, 2020:**

The CS:

- Does not amend s. 210.25, F.S., to revise the definition of the term “tobacco products” to include nicotine dispensing devices and nicotine products as defined in s. 877.112, F.S.
- Does not republish ss. 210.276 and 210.30, F.S, to impose the surcharge tax and excise tax, respectively, on nicotine dispensing devices and nicotine products, and to

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<sup>22</sup> *Supra* note 16.

subject distributors of nicotine dispensing devices and nicotine products to tax reporting and recordkeeping requirements.

- Changes the title of the bill from an act relating to “taxes and fees” to an act relating to “fees.”
- Amends the term “tobacco products” in s. 569.002, F.S., as amended by SB 810 or similar legislation during the 2020 Regular Session or an extension thereof, to include vapor-generating electronic devices.
- Revises the effective date of the bill to provide that the bill takes effect on the same date that SB 810 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof.

**B. Amendments:**

None.