

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.)

Prepared By: The Professional Staff of the Committee on Health Policy

BILL: SB 810

INTRODUCER: Senator Simmons

SUBJECT: Tobacco and Nicotine Products

DATE: January 17, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Williams	Brown	HP	Pre-meeting
2.			IT	
3.			RC	

I. Summary:

SB 810 may be cited as the “Tobacco 21 Act.” The bill:

- Increases the minimum age to lawfully purchase and possess tobacco products from 18 years of age to 21 years of age.
- Repeals the exceptions permitting persons in the military and emancipated minors to possess or purchase tobacco products.
- Creates a definition for “electronic smoking device,” modifies the definition of “tobacco products” to include electronic smoking devices and products, and provides specific exclusions from the definitions.
- Prohibits smoking and vaping by anyone, regardless of age or hours of day, on or near school property.
- Subjects retail sellers of vaping products to regulation as retail tobacco product dealers, including the requirement for a permit, and provides for an exclusion from the fee for permits for retail vaping product dealers.
- Prohibits deliveries of tobacco products to consumers through remote sales.
- Decriminalizes related penalty provisions, while increasing monetary and non-monetary penalties.
- Repeals the current prohibitions against the possession of tobacco and vaping products by persons under the minimum age of lawful possession.
- Requires at least two unannounced compliance checks of retail establishments annually, with required follow-up for noncompliance.
- Incorporates conforming provisions.

The bill will have an indeterminate negative fiscal impact related to the regulatory responsibilities of the Department of Business and Professional Regulation.

The effective date of the bill is October 1, 2020.

II. Present Situation:

Regulation of Tobacco Products

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 tobacco products under ch. 569, F.S.

Section 569.002, F.S., provides definitions of terms in the context of the regulation of tobacco products under ch. 569, F.S. Subsection (6) 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.

Subsection (7) specifies that the term “any person under the age of 18” does not include any person under age 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.

Section 569.003, F.S., relates to retail tobacco products dealer permits, the permit application, qualifications, fees, renewals, and duplicates. Subsection (2) stipulates that permits may only be issued to persons who are 18 years of age or older or to corporations the officers of which are 18 years of age or older. The Division is authorized to refuse to issue a permit to any person, firm, association, or corporation the permit of which has been revoked, to any corporation an officer of which has had his or her permit revoked, or to any person who is or has been an officer of a corporation the permit of which has been revoked.

The fee for an annual permit is established in rule by the Division at an amount to cover the regulatory costs of the program, not to exceed \$50. The proceeds of the fee are deposited into the DBPR Alcoholic Beverage and Tobacco Trust Fund.

Section 569.005, F.S., specifies that it is unlawful for any person, firm, association, or corporation to deal, at retail, in tobacco products, in any manner, or to allow a tobacco product vending machine to be located on its premises, without having a retail tobacco products dealer permit as required by s. 569.003, F.S. A person who violates this section is guilty of a noncriminal violation, punishable by a fine of not more than \$500. This section provides the details relating to the citation process involving a violation of this requirement.

Section 569.006, F.S., authorizes the Division to suspend or revoke the permit of a dealer upon sufficient cause appearing of the violation of any of the provisions of this chapter, by a dealer or by a dealer’s agent or employee. The Division may also assess and accept administrative fines of up to \$1,000 against a dealer for each violation. Fines collected are to be deposited into the General Revenue Fund.

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, including age verification requirements, all of which is generally referred to as “delivery sales.” It also defines 10 relevant terms.

Specific notice and shipping requirements are provided for all delivery sales, whether in-state or out-of-state. 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 obtain proof of the legal minimum purchase age of the individual accepting delivery, if the individual appears to be under 27 years of age.
 - Require 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.¹

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.² Before making sales or shipping orders, entities must provide specific notice to the Division as to shipper and receiver, with monthly reporting.³ There are requirements specific to purchase orders.⁴

Section 210.095(8), F.S., provides that the penalty for the following violations of the delivery sale requirements is a misdemeanor of the third degree:⁵

- A delivery sale 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.

It should be noted that 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.,

¹ Section 210.095(5), F.S.

² *Id.*

³ Section 210.095(6), F.S.

⁴ Section 210.095(7), F.S.

⁵ 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.

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.

Tobacco Products and Minors

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 lock-out 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 lock-out device to allow the dispensing of one tobacco product;
- A mechanism on the lock-out device to prevent the machine from functioning if the power source for the lock-out device fails or if the lock-out device is disabled; and
- A mechanism to ensure that only one tobacco product is dispensed at a time.⁶

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.⁷

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

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 under 18 years of age.⁸ The process encourages retail tobacco product 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.⁹

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

⁶ Section 569.007(1), F.S.

⁷ Section 569.007(2) and (3), F.S.

⁸ 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.

⁹ Section 569.008(3), F.S.

misdemeanor.¹⁰ A second or subsequent violation within one year of the first violation is a first degree misdemeanor.¹¹

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 believe the buyer or recipient to be 18 years of age or older, and the buyer or recipient presented false identification¹² upon which the person relied in good faith.¹³

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 or subsequent violation within 12 weeks of the first violation is punishable with 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.¹⁴

Eighty percent of all civil penalties received by a county court under s. 569.11, F.S., 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.¹⁵

Section 569.12, F.S., provides enforcement authority to full-time, part-time, and auxiliary law enforcement officers for the provisions of ch. 569, F.S. The section also authorizes a county or municipality to designate certain of its employees or agents as tobacco product enforcement officers within specified guidelines. Such enforcement officers are authorized to issue a citation to a person under 18 years of age based on a reasonable cause to believe that a civil infraction has been committed. Similar authority is provided for correctional probation officers. Details are provided as to the required elements of the citation.

Retail tobacco product 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

¹⁰ *Supra* note 5.

¹¹ 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.

¹² Identification includes carefully checking “a driver 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(3)(c), F.S.

¹³ Section 569.101(3), F.S.

¹⁴ Section 569.11(1), F.S.

¹⁵ Section 569.11(6), F.S.

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.¹⁶

Section 569.19, F.S., requires the Division to annually provide to the Legislature and the Governor by December 31, a progress report on its enforcement actions specific to: number and results of compliance visits, number of violations for failure of a retailer to hold a valid license, number of violations of selling tobacco products to persons under age 18, and the results of administrative hearings on these issues, and the number of persons under age 18 cited for violations of underage purchases and sanctions imposed as a result of a citation.

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.¹⁷ 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

Administrative Penalties

A retail tobacco dealer permit-holder can be disciplined under the Division’s penalty guidelines. For a violation of the prohibition in s. 569.06, F.S., against the sale of tobacco products to persons under 18 years of age, the guidelines provide:

- 1st occurrence -- \$500 fine.
- 2nd occurrence -- \$1,000 fine.
- 3rd occurrence -- \$2,000 fine and a 20-day suspension of the dealer permit.
- 4th occurrence -- revocation of the dealer permit.

These penalties are based on a single violation in which the permit-holder committed or knew about the violation; or a pattern of at least three violations on different dates within a 12-week period by employees, independent contractors, agents, or patrons on the licensed premises or in the scope of employment in which the permit-holder did not participate; or violations which were occurring in an open and notorious manner on the licensed premises.¹⁹

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

¹⁶ Section 569.14, F.S.

¹⁷ Section 386.212(1), F.S.

¹⁸ Section 386.212(3), F.S.

¹⁹ Fla. Admin. Code R. 61A-2.022(1) (2019).

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.²⁰

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.²¹

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.²² 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.²³

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.²⁴

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.²⁵

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.²⁶

²⁰ Section 877.112(1)(a), F.S.

²¹ Section 877.112(1)(b), F.S.

²² *Supra* note 5.

²³ Section 877.112(5), F.S.

²⁴ Sections 877.112(6) and (7), F.S.

²⁵ Section 877.112(8), F.S.

²⁶ Section 877.112(9), F.S.

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.²⁷

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.

Regulation of Vaping

During the 2019 session, CS/SB 7012²⁸ was enacted to implement Amendment 9 to the Florida Constitution, 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 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

²⁷ Section 877.112(11), F.S.

²⁸ See Chapter 2019-14, L.O.F.

products in Florida are subject to specific taxation under ch. 210, F.S., vaping products are only subject to sales taxes.

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.²⁹ 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.³⁰

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, 2019.³¹ 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, 2019.³²

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.³³ 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

²⁹ 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 Jan. 16, 2020).

³⁰ 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 Dec. 12, 2019).

³¹ 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. MMWR Morb Mortal Wkly Rep 2020;68:1183-1188. DOI: <http://dx.doi.org/10.15585/mmwr.mm685152e1external icon> (last visited January 8, 2020).

³² 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 Dec. 12, 2019).

³³ 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 Jan. 8, 2020).

to any person younger than age 21. The provisions also require the FDA to update its applicable tobacco regulations within specified timelines.

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.

Federal Food and Drug Administration Enforcement Priorities for Electronic Nicotine Delivery Systems and Other Deemed Products on the Market without Premarket Authorization (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.³⁴ (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, 2016.³⁵ 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);

³⁴ 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 Jan. 8, 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.

³⁵ 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/tclc-fs-deeming-reg-what-is-possible-2014.pdf> (last visited January 8, 2020).

- 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.

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:

"Tobacco 21 Act"

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

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

Section 2 amends s. 210.095, F.S., relating to mail order, Internet, and remote sales of tobacco products, and age verification related to such sales. The applicable definitions are modified, most notably with the addition of a definition of "electronic smoking devices" and the modification of the definition of "tobacco products" to be the same meanings as in s. 569.002, F.S., as amended in Section 4 of the bill.

Under the bill, only licensed retailers, licensed wholesale dealers, licensed distributing agents, licensed distributors, licensed importers, and licensed exporters may accept delivery sales of tobacco products in this state. Delivery sales directly to unlicensed persons are prohibited. A person may not, with knowledge or reason to know of the violation, aid or assist another person in violation of this provision. All criminal penalty provisions are removed from this section, retaining fine amounts for first and second or multiple violations or including five times the retail value of products involved in the violation, whichever is greater.

Smoking and Vaping Prohibited Near School Property; Penalties

Section 3 amends s. 386.212, F.S., relating to smoking and vaping on or near school property and related penalties, to prohibit smoking and vaping by anyone, without regard to age or hours of day, on public or private school property or within 1,000 feet of such property. Under current law, that prohibition applies only to persons under 18 years of age between the hours of 6 a.m. and midnight. Current law and the bill provide an exception to this prohibition for any person occupying a moving vehicle or within a private residence.

Definitions of Primary Terms

Section 4 amends s. 569.002, F.S., which provides definitions specific to the regulation of tobacco products, to:

- Define the term “electronic smoking device” in subsection (4) as “any device that may be used to deliver any aerosolized or vaporized substance 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 the device, and includes any substance intended to be aerosolized or vaporized during the use of the device, whether or not the substance contains nicotine.” 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.
- Redefine the term “tobacco products” in subsection (8) as including:
 - (a) 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;
 - (b) Any electronic smoking devices and any substances that may be aerosolized or vaporized by such device, whether or not any of the substance contains nicotine; or
 - (c) Any component, part, or accessory of a product described in (a) or (b), whether or not any of these contain tobacco or nicotine, including but not limited to, filters, rolling papers, blunt or hemp wraps, and pipes.

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.
- Re-define the term “any person under the age of 18” as “any person under age 21” in subsection (1) and modify the term to exclude any person who is acting in his or her scope of lawful employment with an entity licensed under the provisions of ch. 210, F.S., or this chapter, or is participating in a compliance check as required by s. 569.12, F.S. Eliminated from exclusion under the definition are those who have had the disability of nonage removed under law, are reserve or active duty military, or are otherwise emancipated by a court of competent jurisdiction.

Regulation of Retail Tobacco Products

Section 5 amends s. 569.003, F.S., relating to retail tobacco products dealer permits, to increase the age limit specific to permit holders and corporate officers from 18 years of age to 21 years of age, and to stipulate that permits may not be issued to any person or entity who has had a permit suspended, in addition to those with a permit revoked as provided in current law.

A new subsection (5) is added to this section to specify that any entity that deals only in tobacco products that are electronic smoking devices; components, parts, or accessories of such devices; or substances that may be aerosolized or vaporized by such devices and that holds or is applying for a retail tobacco dealer permit is exempt from any fees relating to the permit.

Section 6 amends s. 569.005, F.S., relating to operating without a retail tobacco products dealer permit and related penalties, to modify the penalty language from “a fine of not more than \$500” to “a fine of at least \$500.” (This may create a delegation of authority issue. See **Constitutional Issues** for an elaboration.)

Section 7 amends s. 569.006, F.S., relating to retail tobacco products dealers and related administrative penalties, to stipulate that revenues generated from fines be used to offset the costs of licensing administration, education and training, retail inspection, and unannounced compliance checks, and that all fines collected be deposited into the DBPR Alcoholic Beverage and Tobacco Trust Fund, rather than into the General Revenue Fund.

Sales Restrictions

Section 8 amends s. 569.007(1), F.S., to modify the general restrictions on the sale or delivery of tobacco products. The bill requires tobacco products to be sold from behind a counter where the products are required to be retrieved and hand delivered by an employee to the consumer, who must be at least 21 years of age. Sales of tobacco products from a vending machine are prohibited except in any establishment that prohibits persons under age 21 on the licensed premises at all times. The bill amends subsection (3) to require, rather than permit, a dealer or a dealer's agent to require proof of age for the purchase of a tobacco product.

Section 16 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 to persons under the age of 18. Many of these provisions are incorporated into the provisions of ch. 569, F.S., by other portions of the bill, and comparable provisions of ch. 569, F.S., are made applicable to vaping devices and products via revised definitions.

Responsible Retail Tobacco Products Dealers

Section 10 amends s. 569.008, F.S., relating to responsible retail tobacco products dealers, to increase the minimum age of sales from 18 years of age to 21 years of age, and to remove the authority for the DBPR Division of Alcoholic Beverages and Tobacco to mitigate penalties based on a dealer's adherence to the responsible practices provided in this section. However, the look-back period for such review is increased from 180 days (or 6 months) to 36 months.

Decriminalization, Penalties, and Enforcement

Section 11 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. Subsection (1) of this section is modified to provide that a violation of the prohibition on such acts is a noncriminal violation punishable as follows:

- For the first offense, a fine of no more than \$500;
- For a second offense within a 36-month period, a minimum fine of \$750 plus a minimum of seven days when no tobacco products can be distributed;
- For a third offense within a 36-month period, a minimum fine of \$1,000 plus a period of one month when no tobacco products can be distributed; and
- For a fourth and any subsequent violation within a 36-month period, a minimum fine of \$1,000, plus a period of three years when no tobacco products can be distributed.

In addition to the above penalties, there are additional penalties provided as follows:

- Any person found to have violated the prohibition against the sale or delivery of tobacco products to a person under age 21 while acting as a non-management agent or employee of a

dealer is subject to noncriminal and monetary penalties, including, but not limited to, education classes, diversion programs, and community service.

- Any person 21 years of age or older who is not a dealer or a dealer's agent or employee and who violates the prohibition against the sale or delivery of tobacco products to a person under age 21 shall pay a fine of \$50.

Limits the defenses in subsection (5) for a person charged with a violation of the prohibition to a dealer or the non-management agent or employee of a dealer.

Section 12 amends s. 569.11, F.S., relating to prohibitions on the possession of tobacco products by persons under the minimum age of purchase, to delete 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 as specified in current law: six hours of community service or a \$25 fine and attendance at a school-approved anti-tobacco program for a first offense; for a second or subsequent offense within 12 weeks of the first violation, a \$25 fine; and a second or subsequent violation not within the 12-week period after the first violation, punishment as provided for a first violation.

Section 13 amends s. 569.12, F.S., relating to jurisdiction, tobacco product enforcement officers or agents, enforcement, and compliance checks, to delete the authority for a tobacco product enforcement officer or a correctional probation officer to issue specific citations based on age of purchase violations. A new requirement is added to this section to require that each dealer must have at least two unannounced compliance checks per year, using specified individuals. Unannounced follow-up compliance checks are required for non-compliant dealers within three months of any violation.

Conforming Provisions

Sections 9, 14, and 15 amend ss. 569.0075, 569.14 and 569.19, F.S., to incorporate conforming provisions to reflect the increase in the minimum age for the purchase or sale of tobacco and nicotine products in these provisions from 18 years of age to 21 years of age.

Effective Date

Section 17 provides for an effective date of October 1, 2020.

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:

None.

E. Other Constitutional Issues:

The bill amends s. 569.005, F.S., to authorize the Division to impose a fine of at least \$500 for failure to operate without a retail tobacco products dealer permit. The bill also amends s. 569.101(2), F.S., to provide minimum monetary fines and minimum periods for suspension of the tobacco products dealer permit for violations of the prohibition in this section. The bill does not provide maximum amounts for the fines or other penalties. The bill appears not to provide a clear delegation of authority regarding the Division's authority to impose the fine and may constitute an unconstitutional delegation of legislative authority.

An invalid delegation of authority violates the principal of separation of powers in Article II, section 3 of the Florida Constitution.³⁶ When assigning to an agency a regulatory responsibility, the Legislature must provide the agency with adequate standards and guidelines when delegating the duties.³⁷ The executive branch must be limited and guided by an appropriately detailed legislative statement of the standards and policies to be followed.³⁸ SB 810 may constitute an unconstitutional delegation of authority because it fails to provide the Division any standards by which to impose the maximum permissible fines or penalties.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Persons who violate s. 569.005, F.S., relating to operating without a retail tobacco products dealer permit, will be subject to a monetary penalty of a fine of at least \$500, rather than the existing penalty of a fine not more than \$500.

³⁶ *Gallagher v. Motors Insurance Corp.*, 605 So.2d 62 (Fla. 1992).

³⁷ *Askew v. Cross Key Waterways*, 372 So.2d. 913 (Fla. 1978); *Florida East Coast Industries, Inc. v. Dept. of Community Affairs*, 677 So.2d 357 (Fla. 1st DCA 1996).

³⁸ *Florida Home Builders Association v. Division of Labor*, 367 So. 219 (Fla. 1979).

Persons who violate the current criminal prohibitions in ss. 569.101 and 569.11, F.S., will no longer incur costs under SB 810 related to the payment of criminal fines or costs related to incarceration.

Persons who violate s. 569.101, F.S., relating to inappropriately selling, delivering, bartering, furnishing, or giving tobacco products to those under the age of 21 will incur specific monetary penalties. The Department of Business and Professional Regulation (DBPR) indicates that there were 599 first-time violations over the last 36 months.³⁹

Retail dealers of electronic smoking devices, such as electronic cigarettes, who would otherwise be required to obtain a retail tobacco product dealer permit, which has an annual license fee of \$50, are exempted from the fee by the bill.⁴⁰

C. Government Sector Impact:

The Department of Business and Professional Regulation may incur indeterminate expenses related to personnel costs or modification of operational priorities needed to accommodate the additional licensure of dealers of electronic smoking devices, and those activities will not be offset by a regulatory fee, since the otherwise applicable fee is waived.⁴¹ In addition, the bill requires at least two compliance checks for each permitted tobacco or vaping dealer each year, along with unannounced follow-up compliance checks for all non-compliant dealers within three months of any violation. This exceeds the current level of DBPR compliance activities, and will result in department-incurred costs.⁴² For compliance visits, or survey visits as referred to by DBPR, to current tobacco retail permittees, DBPR has estimated the need for 21 FTEs and expenditures of \$3,511,231, of which \$3,029,429 is recurring.⁴³

Under current law, 80 percent of civil penalties received by a county court from penalties imposed for violations of the prohibitions in ss. 569.11 and 877.112, F.S., are remitted by the clerks of the county courts to the Department of Revenue for transfer to the Department of Education to provide for teacher training and for research and evaluation to reduce and prevent the use of tobacco products, nicotine products, or nicotine dispensing devices by children. Clerks of county courts retain the remaining 20 percent of these civil penalties to cover administrative costs.⁴⁴ The bill repeals those penalties, which will eliminate these funding sources.

The bill requires a person accused of a violation of s. 561.11, F.S., 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

³⁹ Department of Business and Professional Regulation, *Senate Bill 810 Analysis* (December 9, 2019) (on file with the Senate Committee on Health Policy).

⁴⁰ See newly created subsection (4) of s. 569.003, F.S., at lines 412-417 of the bill as filed.

⁴¹ *Id.*

⁴² See newly created subsection (4) of s. 569.12, F.S., at lines 721-728 of the bill as filed.

⁴³ *Supra* note 39.

⁴⁴ See ss. 569.11(6) and 877.112(9), F.S.

an indeterminate impact on county courts due to the additional time and personnel required to schedule and hold these hearings.

Under current law, fines collected under s. 569.006, F.S., relating to retail products dealers, are deposited into the General Revenue Fund for use for specified DBPR regulatory functions. Under the bill, this fine revenue will be deposited into the DBPR Alcoholic Beverage and Tobacco Trust Fund for use for those same functions.

The DBPR indicates that the bill will require modifications to the department's regulatory data system and related devices used by inspection staff. The department indicates that these modifications can be implemented using existing resources.⁴⁵

VI. Technical Deficiencies:

Section 2 amends s. 210.095, F.S., relating to mail order, Internet, and remote sales of tobacco, and age verification as part of this process. As amended, the remaining provisions do not include age verification requirements, as those are addressed in other sections of the bill. As a result, the title for s. 210.095, F.S., should be modified to remove reference to "age verification."

In its analysis of the bill, the DBPR raised a question as to whether the compliance visits as specified in the bill are inspections or surveys under current department nomenclature.⁴⁶ This issue needs to be clarified for purposes of DBPR enforcement of the bill's provisions.

VII. Related Issues:

Taxation of Tobacco Products

As previously indicated, Section 4 amends s. 569.002(6), F.S., to modify the definition of "tobacco products." Existing language in s. 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), F.S., or cigars.

By not revising 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, the bill does not affect:

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

⁴⁵ *Supra* note 39.

⁴⁶ *Id.*

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.⁴⁷ This means that tank-based vaping devices will not be subject to enhanced federal FDA enforcement. Given this bifurcated approach at the federal level, it is not completely clear if the state’s efforts in regulation of *all* vaping devices could face added scrutiny.

Age Verification for Purchase of Tobacco Products

As previously referenced in the **Present Situation** portion of this analysis, the recent federal law change adopted as part of the federal budget requires that the federal FDA as part of its rule update process should include an update to the relevant age verification requirements for tobacco product purchase to require age verification for individuals under age 30 as opposed to the current verification requirement set at age 27.⁴⁸ The bill as filed only addresses this issue as part of the deletion from statute of s. 210.095(5)(a)(1), F.S., in the context of delivery sales of tobacco products.

Exemptions from the Definition of Underage

Section 4 amends s. 569.002(7), F.S. This subsection presently provides specific 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, other than those related to employment and compliance check participation. The elimination of these exceptions to the minimum age to purchase tobacco products, coupled with the increase of the minimum age to 21 years of age, may, for instance, require active duty or reserve military personnel to be 21 years of age to purchase or possess tobacco products, including electronic smoking devices.

Age of Tobacco Purchase in Other States

As of September 18, 2019, 18 states have raised the tobacco purchase age to 21 years of age, along with Washington, DC, and over 500 localities.⁴⁹ Some of the localities are in states that subsequently enacted statewide laws. Collectively, these laws now cover over half of the U.S. population. The strength of state and local laws, such as their enforcement and penalties, varies substantially.

Those states and the effective date of their adoption of the restrictive provisions are as follow:

State and Effective Date	State and Effective Date
Hawaii (effective 1/1/16)	Arkansas (effective 9/1/19)
California (effective 6/9/16)	Texas (effective 9/1/19)

⁴⁷ *Supra* note 34.

⁴⁸ *Supra* note 33.

⁴⁹ 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 (Last visited Nov. 26, 2019).

New Jersey (effective 11/1/17)	Vermont (effective 9/1/19)
Oregon (effective 1/1/18)	Connecticut (effective 10/1/19)
Maine (effective 7/1/18)	Maryland (effective 10/1/19)
Massachusetts (effective 12/31/18)	Ohio (effective 10/17/19)
Illinois (effective 7/1/19)	New York (effective 11/13/19)
Virginia (effective 7/1/19)	Washington (effective 1/1/20)
Delaware (effective 7/16/19)	Utah (effective 7/1/21)

The following are among the localities that have raised their age for sale of tobacco products to the minimum to 21 years of age: New York City, Chicago, San Francisco, San Antonio, Boston, Cincinnati, Cleveland, Columbus, and Kansas City (in Kansas and Missouri), plus Washington, D.C. In Florida, Alachua County and the city of Fort Lauderdale have raised their minimum age for purchase of tobacco products to 21 years of age.

Age Restrictions on Youth Access to Electronic Cigarettes in Other States

As of September 15, 2019, all states and the District of Columbia (with the exception of Pennsylvania) have laws that restrict youth access to electronic cigarettes, or e-cigarettes. In this context, *e-cigarette* broadly refers to any product, and its component parts and accessories, that contains nicotine and/or other substances intended for use in the form of an aerosol, often referred to as vapor. In 18 states, the restriction is set at age 21. In four states the restriction is set at age 19. In 28 states, the restriction is set at age 18. At least one state (Utah) is on a path to increase the age restriction one year at a time to age 21 over a few years. There are certain exceptions and exemptions that are applicable within any given state.⁵⁰

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 210.095, 386.212, 569.002, 569.003, 569.005, 569.006, 569.007, 569.0075, 569.008, 569.101, 569.11, 569.12, 569.14, and 569.19.

This bill repeals the following section of the Florida Statutes: 877.112.

This bill creates one non-statutory section of the Laws of Florida.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

⁵⁰ See “Youth Access to E-Cigarettes, States with Laws Restricting Youth Access to E-Cigarettes, Enacted as of September 15, 2019,” Public Health Law Center at Mitchell Hamline School of Law, *available at* <https://www.publichealthlawcenter.org/sites/default/files/States-with-Laws-Restricting-Youth-Access-to-ECigarettes-September152019.pdf> (last visited Jan. 8, 2019).

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
