



Senate Fiscal Agency
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BILL ANALYSIS



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Senate Bill 667 (Substitute S-2 as passed by the Senate)
Senate Bill 668 (Substitute S-4 as passed by the Senate)
Sponsor: Senator Glenn S. Anderson (S.B. 667)
Senator Rick Jones (S.B. 668)
Committee: Regulatory Reform

Date Completed: 3-6-14

RATIONALE

The Youth Tobacco Act prohibits a retailer from selling or furnishing tobacco products to minors (individuals under 18 years old), and makes it illegal for a minor to purchase or possess tobacco products in all but a few limited circumstances. The Act also prescribes penalties associated with the possession of tobacco products by minors and the sale of tobacco products to minors. The Act applies only to tobacco products, however. Concerns have been raised by health advocates and others about the use of vapor products (e.g., electronic, or e-cigarettes) and alternative nicotine products by minors. Likewise, people are concerned because businesses and individuals can legally sell these products to minors. To address these concerns, it has been suggested that the sale of vapor products and alternative nicotine products to minors, and the possession and use of these products by minors, should be prohibited.

CONTENT

Senate Bill 667 (S-2) would amend the Youth Tobacco Act to prohibit a minor from possessing or using a vapor product or alternative nicotine product.

Senate Bill 668 (S-4) would amend the Act to do the following:

- Prohibit a person from selling or giving a vapor product or alternative nicotine product to a minor.
- Require a person to verify that an individual was at least 18 before selling or furnishing a vapor product or alternative nicotine product to him or her.
- Require signs posted by retailers to indicate that the purchase of vapor or alternative nicotine products by minors was illegal.

The bills are tie-barred and would take effect 60 days after their enactment.

Senate Bill 667 (S-2)

The Act prohibits a minor from purchasing or attempting to purchase a tobacco product, possessing or attempting to possess a tobacco product, or using a tobacco product in a public place. It also prohibits a minor from presenting or offering to an individual a purported proof of age that is false, fraudulent, or not actually his or her own proof of age, for the purpose of purchasing, possessing, or attempting to purchase or possess a tobacco product. A violation is a misdemeanor punishable by a maximum fine of \$50 for each violation. Pursuant to a probation order, the court also may require a violator to participate in a health promotion and risk reduction assessment program, if available. The Act also allows a court to order a violator to perform community service in a hospice, nursing home, or long-term care facility.

Under the bill, the prohibitions would apply to activities involving tobacco products, vapor products, or alternative nicotine products.

The prohibitions do not apply to a minor participating in an undercover law enforcement operation or compliance check. They also do not apply to the handling or transportation of a tobacco product by a minor under the terms of his or her employment. The bill would refer to a vapor product or alternative nicotine product, as well as a tobacco product, in those provisions.

Senate Bill 668 (S-4)

The bill would prohibit a person from selling, giving, or furnishing a vapor product or alternative nicotine product to a minor, including through a vending machine or other means. Currently, it is a misdemeanor to sell, give, or furnish a tobacco product to a minor, and a violator is subject to a maximum \$50 fine for each violation. The bill would extend this penalty to the proposed prohibition.

The bill would define "alternative nicotine product" as "a noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means". The term would not include a tobacco product, a vapor product, or a product regulated as a drug or device by the U.S. Food and Drug Administration (FDA). The bill would define "vapor product" as "a noncombustible product containing nicotine that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor from nicotine in a solution or other form". The term would include an electronic cigarette, electronic cigar, electronic pipe, or similar product or device and a vapor cartridge or other container of nicotine in a solution or other form that is intended to be used with or in such a product or device. It would not include a product regulated as a drug or device by the FDA.

The Act requires a person who sells tobacco products at retail to post a conspicuous sign in a place close to the point of sale. The sign must include a specific statement about the illegality of the purchase of tobacco products by a minor. The Act requires the Department of Community Health to produce the signs, and distribute them free of charge to people who sell tobacco products at retail. The bill would extend these requirements to a person who sells vapor products or alternative nicotine products at retail, and would modify the sign's statement to include those products.

In addition, the bill would require a person to verify that an individual was at least 18 before selling, offering to sell, giving, or furnishing a vapor or alternative nicotine product to the individual. If the individual appeared to be under 27 years old, the person would have to examine a government-issued photographic identification that established that the individual was at least 18 years old. If the sale were made by the internet or another remote method, the person would have to perform an age verification through an independent, third-party age verification service that compared information from a commercially available database, or aggregate of databases, that was regularly used by government agencies and businesses for the purpose of verifying age and identity, to the personal information entered by the individual when ordering, that established that the individual was at least 18 years old.

Currently, it is an affirmative defense to a charge of selling a tobacco product to a minor that the defendant had in force at the time of arrest and continues to have in force a written policy to prevent the sale of tobacco products to minors and that the defendant enforced and continues to enforce the policy. The bill would extend this affirmative defense to a charge of selling vapor products or alternative nicotine products to minors.

The Act's prohibition against giving or furnishing a tobacco product to a minor does not apply to the handling or transportation of the product by a minor under the terms of his or her employment. Under the bill, this also would apply to a minor's handling or transportation of a vapor product or alternative nicotine product.

BACKGROUND

Introduction

E-cigarettes, and similar devices, are a relatively new nicotine delivery system. While devices vary in their appearance and specific method of operation, they have a few basic elements in common. A solution of water, dissolved nicotine, and other ingredients (usually flavoring) is heated with a heating element (usually battery-powered). This vaporizes the nicotine solution, which passes into a mouthpiece and is inhaled in a manner similar to cigarette smoking. Often, glycerol or propylene glycol is added to the solution to give the appearance of smoke when the solution is vaporized. The concentration of nicotine contained in the solution can be customized by the retailer to the buyer's specifications, and many manufacturers make nicotine-free solutions.

Regulation of E-Cigarettes

The Food and Drug Administration regulates tobacco products through the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), unless a product is marketed for therapeutic purposes, in which case, it is regulated by the Federal Food, Drug, and Cosmetic Act (FDCA). In 2010, the FDA attempted to use its regulatory power under the FDCA to block shipments of e-cigarettes (marketed and labeled for "smoking pleasure") into the U.S., asserting that the e-cigarettes were adulterated, misbranded, or unapproved drug-device combinations regulated by the FDCA. The U.S. Court of Appeals for the District of Columbia Circuit, in *Sottera, Inc. v Food & Drug Administration*, 627 F.3d 891 (2010), held that the proper authority to regulate e-cigarettes arises out of the Tobacco Control Act, unless the device is marketed for therapeutic purposes.

The FDA has signaled that it intends to act along the jurisdictional boundaries set by the *Sottera* decision and regulate e-cigarettes and similar devices in accordance with the Tobacco Control Act. However, despite a self-imposed deadline of October 31, 2013, the FDA has yet to promulgate rules regulating the advertising, ingredients, and sale of e-cigarettes and like devices.

State regulation of e-cigarettes is varied. A majority of states have enacted legislation banning the sale e-cigarettes to minors, or are in the process of enacting such legislation.¹ Some jurisdictions (e.g., New York City, New Jersey) have chosen to regulate vapor products in the same ways as their tobacco product counterparts.² In Michigan, there are no laws or regulations banning the possession and use of e-cigarettes or similar devices by minors, or the sale of these devices to minors.

Health Impacts

Little is known about the health impact of vapor products, as few studies have been done to determine the effectiveness of e-cigarettes as nicotine delivery devices, or their impact on public health. The effects of nicotine on the human body are well documented. In concentrations found in cigarettes, nicotine is a pharmacological agent that has a marked effect on brain and

¹ Briana Bierschbach, "E-cigarettes take off in Minnesota—and so does fight over regulating them", *MinnPost*, 2-14-14, retrieved 2-19-14, available at: <http://www.minnpost.com/politics-policy/2014/02/e-cigarettes-take-minnesota-and-so-does-fight-over-regulating-them>.

² Morgan Windsor, "Bloomberg signs his last 22 bills; one regulates e-cigarette use", *CNN*, 12-31-13, retrieved 2-20-14, available at: <http://edition.cnn.com/2013/12/30/politics/mayor-bloomberg-last-bills/index.html>; Reid Wilson, "Awaiting FDA, states pursue their own e-cigarette rules", *Washington Post GovBeat*, 10-29-13, retrieved 2-20-14, available at: <http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/29/awaiting-fda-states-pursue-their-own-e-cigarette-rules>.

cardiovascular function.³ However, small doses of nicotine can be highly toxic and potentially fatal.

One concern with vapor products is accidental skin exposure to the nicotine solution used in e-cigarettes, as nicotine is readily absorbed through the skin.⁴ Exposure to some higher-concentration vapor product solutions could lead to systemic poisoning and death, simply through skin contact, or accidental ingestion.⁵ This concern is heightened in the case of children, who generally have less tolerance to nicotine.⁶ In addition, less is known about the impact of nicotine on adolescent development.

Other concerns deal with the operation of the devices themselves. Users and manufacturers of e-cigarettes have claimed that e-cigarettes may be a healthy alternative to smoking tobacco; however, much remains unknown about e-cigarette use. For instance, very little research has been done to determine the long-term effects of inhaling the vapor-causing components of the liquid (e.g., propylene glycol). Another issue is determining the actual concentration of nicotine delivered in the course of the product's use. A set of tests performed by Georgetown and the Schroeder Institute, in addition to testing by the FDA, indicated that nicotine concentrations for e-cigarettes vary based on manufacturer, devices, liquids, and even "puff-to-puff".⁷ The tests also indicated the presence of various irritants, solvents, genotoxins, and carcinogens.⁸ The report noted that the presence of these substance was "of unclear significance but needs further consideration".

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bills are needed to prevent minors from purchasing vapor products, such as e-cigarettes, and alternative nicotine products. At least 27 other states have passed laws preventing the sale of e-cigarettes and like products to minors, and other states (e.g., Ohio) are moving to ban the products from being sold to, and used by, minors.⁹ E-cigarette manufacturers develop fruit and other sweet flavorings that appeal to youths. Other retailers use cartoon characters in their marketing, or have developed "skins" for their e-cigarettes with designs featuring bright colors or games that are usually marketed to minors, such as Angry Birds.¹⁰

Additionally, surveys by the Centers for Disease Control and Prevention show that e-cigarette use among students in middle and high school is increasing. In 2011, the National Youth Tobacco Survey indicated that 4.7% of school students reported trying an e-cigarette in the past year.¹¹ By 2012, that percentage had increased to 10%.¹² An estimated 1.78 million students in

³ U.S. Surgeon General, U.S. Department of Health and Human Services, *The Health Consequences of Smoking: Nicotine Addiction* (1988), iv, available at: <http://profiles.nlm.nih.gov/ps/access/NNBBZD.pdf>.

⁴ U.S. Surgeon General, *The Health Consequences of Smoking: Nicotine Addiction*, 16, 31, and 593.

⁵ U.S. Surgeon General, *The Health Consequences of Smoking: Nicotine Addiction*, 607.

⁶ International Programme on Chemical Safety, "Nicotine", *Poison Information Monograph*, available at: <http://www.inchem.org/documents/pims/chemical/nicotine.htm#DivisionTitle:7.2.1.2%20Children>. See Section 7, on Toxicology.

⁷ Nathan K. Cobb, et al., "Novel Nicotine Delivery Systems and Public Health: The Rise of the 'E-Cigarette'", *American Journal of Public Health* 100 (2010), 2340-2342, doi: 10.2105/AJPH.2010.199281; U.S. Food and Drug Administration, "Evaluation of e-cigarettes", 2009, retrieved 2-20-14, available at: <http://www.fda.gov/downloads/Drugs/ScienceResearch/UCM173250.pdf>.

⁸ Cobb, et al., 2341.

⁹ Bierschbach, "E-cigarettes take off"; Ann Sanner, "Ohio Senate Oks ban on e-cigarette sales to kids", *Cincinnati.com*, 2-12-14, available at: <http://news.cincinnati.com/viewart/20140212 /NEWS010801/302120104/Ohio-Senate-OKs-ban-e-cigarette-sales-kids>.

¹⁰ See <http://www.whitecloudelroniccigarettes.com/accessories/vapor-jackets>.

¹¹ Catherine Corey, et al., "Notes from the Field: Electronic Cigarette Use Among Middle and High School Students—United States, 2011-2012", *Morbidity and Mortality Weekly Report* 62 (9-6-13), 729. Actual survey data and other information are available at: http://www.cdc.gov/tobacco/data_statistics/surveys/nyts.

¹² Corey, et al., 729.

middle and high school have reported using e-cigarettes.¹³ This is concerning because the effects of nicotine, and e-cigarette, use on adolescent development are not well understood and could have lasting implications for youths who use these products. Adult use of the products also is increasing and may continue to increase if minors continue to have access to these products and are able to develop an addiction to them when they are young. Young e-cigarette smokers also may shift to tobacco product use.

Opposing Argument

These bills would not go far enough, in that they would categorize vapor products and alternative nicotine products separately from tobacco products. The differing categorization of these products could cause youths and legal consumers of these products to view vapor products and alternative nicotine products as having a different status from tobacco products. Any attempt to define these products separately from tobacco products should come after more research has been done and the FDA has promulgated rules and standards for advertising, ingredients, and sale of these devices.

Response: The bills would prevent retailers from selling vapor products and alternative nicotine devices to minors, and prevent minors from buying or possessing these products. The legislation would be a good first step, and could be amended or supplemented once the FDA provides more guidance.

Legislative Analyst: Jeff Mann

FISCAL IMPACT

The bills would expand the Youth Tobacco Act to apply it to vapor products and alternative nicotine products. This would result in a marginal increase in misdemeanor penalties associated with violations of the Act; these misdemeanors are punishable by a fine of up to \$50, the revenue from which benefits public libraries. For youths violating the Act, additional punishments may include community service and participation in health risk reduction programming. The bills would not have a significant impact on State and local criminal justice costs.

Fiscal Analyst: John Maxwell

¹³ Corey, *et al.*, 729.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.