

# Legislative Analysis



## PROHIBIT SALE OF E-CIGARETTES TO MINORS AND OTHER NEW NICOTINE REGULATIONS

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**Senate Bill 106 (S-1) as reported from House committee**  
**Sponsor: Sen. Rick Outman**

Analysis available at  
<http://www.legislature.mi.gov>

**Senate Bill 155 (S-1) as reported from House committee**  
**Sponsor: Sen. Marshall Bullock II**

*(Enacted as Public Acts 18 and 17 of 2019)*

**House Committee: Judiciary**  
**Senate Committee: Regulatory Reform**  
**Complete to 5-15-19**

**BRIEF SUMMARY:** Senate Bills 106 and 155 would amend the Youth Tobacco Act to prohibit selling or providing vapor products and alternative nicotine products (such as e-cigarettes) to minors. They would also implement new regulations on the retail sale of vapor products, alternative nicotine products, and liquid nicotine containers that are in line with those currently in place for traditional tobacco products. The bills are tie-barred to one another, which means that neither could take effect unless both were enacted. Each bill would take effect 90 days after its enactment.

**FISCAL IMPACT:** The bills would have an indeterminate fiscal impact on state and local units of government. (For a detailed discussion, see **Fiscal Information**, below.)

### **THE APPARENT PROBLEM:**

According to the 2018 Monitoring the Future survey (funded by the National Institute on Drug Abuse and conducted by researchers at the University of Michigan),<sup>1</sup> the number of teens using vaping devices increased significantly over the past year. In December 2018, the U.S. Surgeon General issued an advisory declaring e-cigarettes an epidemic among youth.<sup>2</sup> Also known as e-cigarettes, the devices often contain nicotine, a highly addictive substance that can disrupt brain development in adolescents. Reportedly, some of the chemicals used as flavorings are the same chemicals used in microwave popcorn products that have led to lung ailments in workers. In an effort to curb access to e-cigarettes by minors, a 2016 federal rule extended the regulatory authority of the Center for Tobacco Products in the Food and Drug Administration (FDA) to cover all tobacco products, including e-liquids, cartridges, and atomizers. Michigan is the only state that has not enacted some form of regulation restricting youth access to e-cigarettes. Some feel that, in light of the increased use of e-cigarettes by youth, and the potential negative health benefits associated with vaping, Michigan should restrict access to vaping devices by minors.

<sup>1</sup> <https://www.drugabuse.gov/related-topics/trends-statistics/monitoring-future>

<sup>2</sup> <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>

## ***THE CONTENT OF THE BILLS:***

### **Senate Bill 106**

#### **Prohibition of the sale of nicotine products to minors**

Senate Bill 106 would prohibit selling, giving, or furnishing *vapor products* or *alternative nicotine products* to anyone under the age of 18, including through vending machines. Violators would be guilty of a misdemeanor punishable by a fine of up to \$100 for a first offense, \$500 for a second offense, or \$2,500 for a third or subsequent offense.

*Vapor product* would mean a noncombustible product that employs a heating element or other means to produce vapor from nicotine or any other substance, and the use or inhalation of which stimulates smoking. A vapor product would include an e-cigarette, e-cigar, e-cigarillo, or e-pipe, and would include the cartridge or other container for the liquid or solution that is used in the product or device.

*Alternative nicotine product* would mean a noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means. The term would exclude food and any product defined under the act as a tobacco product or vapor product.

#### **Prohibition of the purchase of nicotine products by minors**

The bill would prohibit minors from:

- Purchasing or attempting to purchase a vapor or alternative nicotine product.
- Possessing or attempting to possess a vapor or alternative nicotine product.
- Using a vapor or alternative nicotine product in a public space.
- Using a false ID to do any of the above.

An individual who violated the above prohibitions would be responsible for a state civil infraction or found guilty of a misdemeanor, with the following penalties:

- For a first offense, the individual would be responsible for a state civil infraction and would have to pay a fine of up to \$50, and the court could choose to impose up to 16 hours of community service.
- For a second offense, the individual would be responsible for a state civil infraction and would have to pay a fine of up to \$50, and the court could choose to impose up to 32 hours of community service.
- For any subsequent offense, the individual would be guilty of a misdemeanor and would have to pay a fine of not more than \$50 per offense, and the court could choose to assign not more than 48 hours of community service.

In addition to these penalties, the court could require the individual to participate in a health promotion and risk assessment program, if such a program is available, pursuant to a probation order. In such a case, the individual would be responsible for paying the costs of participating in the program.

The bill clarifies that the above prohibitions would not apply to a minor participating in the following:

- An undercover operation in which the minor purchases or receives vapor or alternative nicotine products under the direction of the minor's employer and with the prior approval of the local prosecutor's office as part of an employer-sponsored internal enforcement action.
- An undercover operation in which the minor purchases or receives vapor or alternative nicotine products as part of state or local police operations, unless the initial or contemporaneous purchase or receipt of the product was not under the direction of said police.
- The handling or transportation of vapor or alternative nicotine products by a minor under the terms of the minor's employment.

#### Regulation of the sale of nicotine products

Under the bill, before selling, offering for sale, giving, or furnishing a tobacco, vapor, or alternative nicotine product to an individual, a person would need to verify that the individual is at least 18 years of age by doing either of the following:

- If the individual appears to be under 27 years of age, by examining a government-issued photographic ID that establishes that the individual is at least 18 years old.
- If the sale is made electronically or remotely, by performing an age verification through an independent, third-party age verification service that compares information from a commercially available database or aggregate of databases that are regularly used by government agencies and businesses for age identification purposes.

Currently, retail sellers of tobacco products are required to post, in a conspicuous location near the point of sale, a sign designed and produced by the Department of Health and Human Services that warns minors of the criminal penalties incurred by unlawfully purchasing tobacco products. Under the bill, the language of these signs would be amended to include mention of vapor products and alternative nicotine products as well, and the signs would also have to be posted by retail sellers of vapor and alternative nicotine products.

#### Defense against charges of sale to minors

Under the bill, a defendant who is charged with selling vapor or alternative nicotine products to minors, but who had been enforcing a written policy to prevent the sale of such products to minors at his or her retail location, may use the policy and its enforcement as an affirmative defense against the charges by providing a written notice of the defense to the court and the prosecuting attorney no later than 14 days before the date set for the trial. If the prosecuting attorney wishes to rebut this affirmative defense, he or she may do so by serving a notice of rebuttal in writing to the court and to the defendant no later than 7 days before the date set for the trial. (These affirmative defense provisions currently apply to sellers of tobacco products under the act.)

MCL 722.641 et seq.

## **Senate Bill 155**

### **Regulation of the sale of liquid nicotine containers**

Senate Bill 155 would prohibit the sale of liquid nicotine containers unless the containers met the child-resistant effectiveness standards required by the U.S. Consumer Product Safety Commission. Anyone who violated this prohibition would be guilty of a misdemeanor punishable by a fine of up to \$50 for each infraction.

### **Display of products for sale**

In addition, the bill would prohibit the display for sale of vapor products or alternative nicotine products unless they are stored behind a counter in an area accessible only to employees or within a locked case so that customers must ask an employee for access. Those who violate this prohibition would be responsible for a state civil infraction and fined up to \$500.

Proposed MCL 722.642b and 722.642c

### ***HOUSE COMMITTEE ACTION:***

The House Judiciary Committee reported the Senate-passed version of the bills without amendment.

### ***BACKGROUND INFORMATION:***

The substantive provisions of Senate Bills 106 (S-1) and 155 (S-1), taken together, are identical to those of House Bill 4164 (H-4) as it was referred to the House Committee on Judiciary by the House Committee on Regulatory Reform on March 19, 2019.

Similar legislation in the 2013-14 legislative session was passed by both the House of Representatives and Senate and ordered enrolled, but was vetoed by the governor. In his veto message regarding House Bill 4997 and Senate Bills 667 and 668,<sup>3</sup> Governor Snyder wrote that the state “should not enact new state law that is not consistent with a legally-mandated approach proposed by the U.S. FDA, which is to regulate e-cigarettes as tobacco products.” He continued by saying, among other things, that to do so would add confusion and send a mixed health message to the public.

Further, Governor Snyder wrote that the bills did not “ensure that e-cigarettes are regulated in the interest of public health,” as a separate definition would establish the principle that such products are fundamentally different from other tobacco products for purposes of future proposed public health measures. Lastly, he pointed out that the legislation went against the position taken by 40 state attorneys general, including Michigan’s attorney general, who believed that the FDA should regulate e-cigarettes pursuant to its tobacco product authority.

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<sup>3</sup> [https://www.michigan.gov/documents/snyder/HB\\_4997\\_SBs\\_667\\_668\\_Veto\\_Letter\\_479249\\_7.pdf](https://www.michigan.gov/documents/snyder/HB_4997_SBs_667_668_Veto_Letter_479249_7.pdf)

## ***FISCAL INFORMATION:***

The bills would have an indeterminate fiscal impact on the state and on local units of government. Costs could be incurred by the judiciary and local court systems. Costs would depend on how provisions of the bills affect caseloads and related administrative costs. Revenues could be increased under the bills, as new misdemeanor fines and civil infractions would be established, and a number of current misdemeanor fines would be increased. Any increase in penal fine revenue would increase funding for local libraries, which are the constitutionally designated recipients of those revenues. Revenue collected from payment of civil infraction penalties is deposited into the state Justice System Fund, which supports various justice-related endeavors in the judicial and legislative branches of government and the Departments of State Police, Corrections, Health and Human Services, and Treasury.

The bills would have modest cost implications for the Department of Health and Human Services (DHHS) to modify signs made available to wholesalers and retailers, to modify related training and instructional materials, and to support related outreach and training to those entities. Signs and training materials are currently made available through a DHHS publications clearinghouse as downloadable pdfs and PowerPoints.

## ***ARGUMENTS:***

### ***For:***

The bills would address the growing concern raised by the increased use of e-cigarettes by adolescents. Though present in e-cigarettes in lower amounts than tobacco products, many vaping products contain nicotine and could contain other chemicals reported to be harmful to health. Often promoted as being less harmful than tobacco products, and with flavors some say are geared to attracting youthful users, recent surveys and testimonials by school administrators report a dramatic increase in the use of e-cigarettes by teenagers. Their small size and similarity to flash drives make them particularly difficult for school administrators to identify and confiscate on school grounds. Further, there is evidence that teens are using vaping devices to inhale other substances, including marijuana and over-the-counter drugs such as Benadryl.

Though the bills would extend regulations on a statewide level that are similar to the 2016 federal rule that extended the FDA's regulatory authority over tobacco products and e-cigarettes, the bills do not classify e-cigarettes as tobacco. Instead, the bills focus on prohibiting access to the vaping devices and products. Further, to protect young children from accidental ingestion of liquids containing nicotine, liquid nicotine containers would have to have child-resistant caps similar to prescription medications. Though the federal rules prohibit sales of e-cigarettes to minors, the lack of a state law and penalties has led to lax regulation and enforcement. Supporters say enactment of the bills is the quickest way to get vaping devices out of the hands of Michigan's youth. Some argue that if needed, future legislation could deal with the intricacies of regulation but the bills provide an important first step.

***Response:***

As some adults have disabilities or decreased strength or functionality of their hands that could make access to vaping products with a childproof cap difficult, a question has been raised as to whether it would be prudent to include an exception similar to what is in place for pharmaceuticals.

***Against:***

Opponents argue that classifying vaping products as tobacco is key to stopping the spread of the practice. Now that tobacco use is acknowledged to have health consequences, they say, associating a product with tobacco signals to the user—even an unsophisticated user, such as those typically drawn to vaping—that use may be worthy of additional scrutiny. Critics say that any other classification allows vaping companies to distinguish themselves from tobacco usage by promoting vaping as a safe alternative and offering products in special colors, flavors, and scents. In short, they posit that the legislation would separate e-cigarettes from the stigma associated with tobacco use.

Moreover, it is argued that classifying e-cigarettes as a tobacco product, thereby bringing them under any regulations concerning tobacco without having to rewrite large portions of statute, would be the true quickest and most efficient move.

***POSITIONS:***

The following entities indicated support for the bills (4-30-19):

- Michigan Association of Superintendents and Administrators
- Michigan Association of Intermediate School Administrators
- JUUL
- Prosecuting Attorneys Association of Michigan

The Michigan Department of Health and Human Services indicated opposition to the bills. (4-30-19)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.