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Senate Bill 106 (Substitute S-1 as reported)
Senate Bill 155 (Substitute S-1 as reported)
Sponsor: Senator Rick Outman (S.B. 106)
Senator Marshall Bullock II (S.B. 155)
Committee: Regulatory Reform

Date Completed: 5-9-19

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. While the U.S. Food and Drug Administration (FDA) regulates vapor products and prohibits their sale to minors, Michigan law does not prohibit the sale of vapor products to minors, or the possession or use of those products by minors. To address these concerns, and to allow for local enforcement, 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 106 (S-1) would amend the Youth Tobacco Act to do the following:

- **Prohibit a person from selling or giving a vapor product or alternative nicotine product to a minor.**
- **Increase the monetary penalty for selling, giving, or furnishing a tobacco, vapor, or alternative nicotine product to a minor.**
- **Require signs posted by retailers to indicate that the purchase of vapor or alternative nicotine products by minors was illegal.**
- **Require a person to verify that an individual was at least 18 before selling or furnishing a tobacco, vapor, or alternative nicotine product to him or her.**
- **Extend the affirmative defense of having and enforcing a preventative written policy to a charge of selling a vapor or alternative nicotine product to a minor.**
- **Prohibit a minor from possessing or using a vapor product or alternative nicotine product.**

Senate Bill 155 (S-1) would amend the Youth Tobacco Act to do the following:

- **Prohibit a person from selling a liquid nicotine container in Michigan unless it met Federal child-resistant effectiveness standards.**
- **Prohibit a person selling vapor products or alternative nicotine products at retail from displaying for sale in Michigan a vapor product unless it was stored behind a counter in an area only accessible by employees or a locked case.**

Each bill would take effect 90 days after its enactment. The bills are tie-barred.

Senate Bill 106 (S-1)

Selling, Giving, or Furnishing Vapor or Alternative Nicotine Product to a Minor

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. Under the bill, the fine would be modified to the following, and also would apply to a violation of the proposed prohibition described above:

- For a first offense, not more than \$100.
- For a second offense, not more than \$500.
- For a third or subsequent offense, not more than \$2,500.

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, food, or a product regulated as a drug or device by the United States Food and Drug Administration (FDA).

"Vapor product" would mean a noncombustible product 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 or any other substance, and the use or inhalation of which simulates smoking. 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 or other substance 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.

Required Retail Sign

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 also requires the Department of Community Health (now the Department of Health and Human Services) to produce the signs, and distribute them free of charge to people who sell tobacco products at retail. The bill would extend the sign requirement to a person who sells vapor products or alternative nicotine products at retail, and would modify the sign's statement to include those products.

"Person who sells vapor products or alternative nicotine products at retail" would mean a person whose ordinary course of business consists, in whole or in part, of the retail sale of vapor products or alternative nicotine products.

Age Verification Requirement

The bill would require a person to verify that an individual was at least 18 years old before selling, offering to sell, giving, or furnishing a tobacco, 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 sales 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.

A person who violated the age-verification requirement would be guilty of a misdemeanor, and would be subject to a fine as follows:

- For a first offense, not more than \$100.
- For a second offense, not more than \$500.
- For a third or subsequent offense, not more than \$2,500.

Affirmative Defense & Employment Exemption

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.

Purchase, Possession, or Use of Tobacco, Vapor, or Alternative Nicotine Products

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. An individual who is ordered to participate in a health promotion and risk reduction assessment program is responsible for the costs of participating in the program. The Act also allows a court to order a violator to perform a certain number of hours of community service in a hospice, nursing home, or long-term care facility.

The bill would eliminate the requirement for any ordered community service to be conducted in a hospice, nursing home, or long-term care facility. In addition, the bill would extend the prohibitions and penalties listed above to activities involving vapor products or alternative nicotine products, although for an individual's first and second violation regarding vapor products or alternative nicotine products, he or she would be responsible for a State civil infraction, instead of a misdemeanor.

Currently, the tobacco prohibitions do not apply to a minor participating in an undercover law enforcement operation or compliance check. The bill would refer to a vapor product or alternative nicotine product, as well as a tobacco product, in this provision.

Senate Bill 155 (S-1)

The bill would prohibit a person from selling a liquid nicotine container in Michigan unless it met the child-resistant effectiveness standards found under 16 CFR 1700.15(b) (which requires child-resistant effectiveness of not less than 85% without a demonstration and not less than 80% after a demonstration of the proper means of opening special packaging).

"Liquid nicotine" would mean a liquid or other substance containing nicotine in any concentration that is sold, marketed, or intended for use in a noncombustible product 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 or any other substance, and the use or inhalation of which simulates smoking. "Liquid nicotine container" would mean a bottle or other container holding liquid nicotine in any concentration but would not include

a cartridge containing liquid nicotine if it were prefilled and sealed by its manufacturer and was not intended to be opened by the consumer.

A person who violated the proposed prohibition would be guilty of a misdemeanor punishable by a fine of not more than \$50 for each violation.

In addition, a person who sold vapor products or alternative nicotine products at retail could not display for sale in Michigan a vapor product unless it was stored for sale behind a counter in an area accessible only to employees or within a locked case so that a customer wanting access to the vapor product would have to ask an employee for assistance. A person who violated this provision would be responsible for a State civil infraction and would have to be fined not more than \$500.

MCL 722.641 et al. (S.B. 106)

Proposed MCL 722.642 & 722.642c (S.B. 155)

BACKGROUND

Introduction

E-cigarettes, and similar devices, are a type of 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

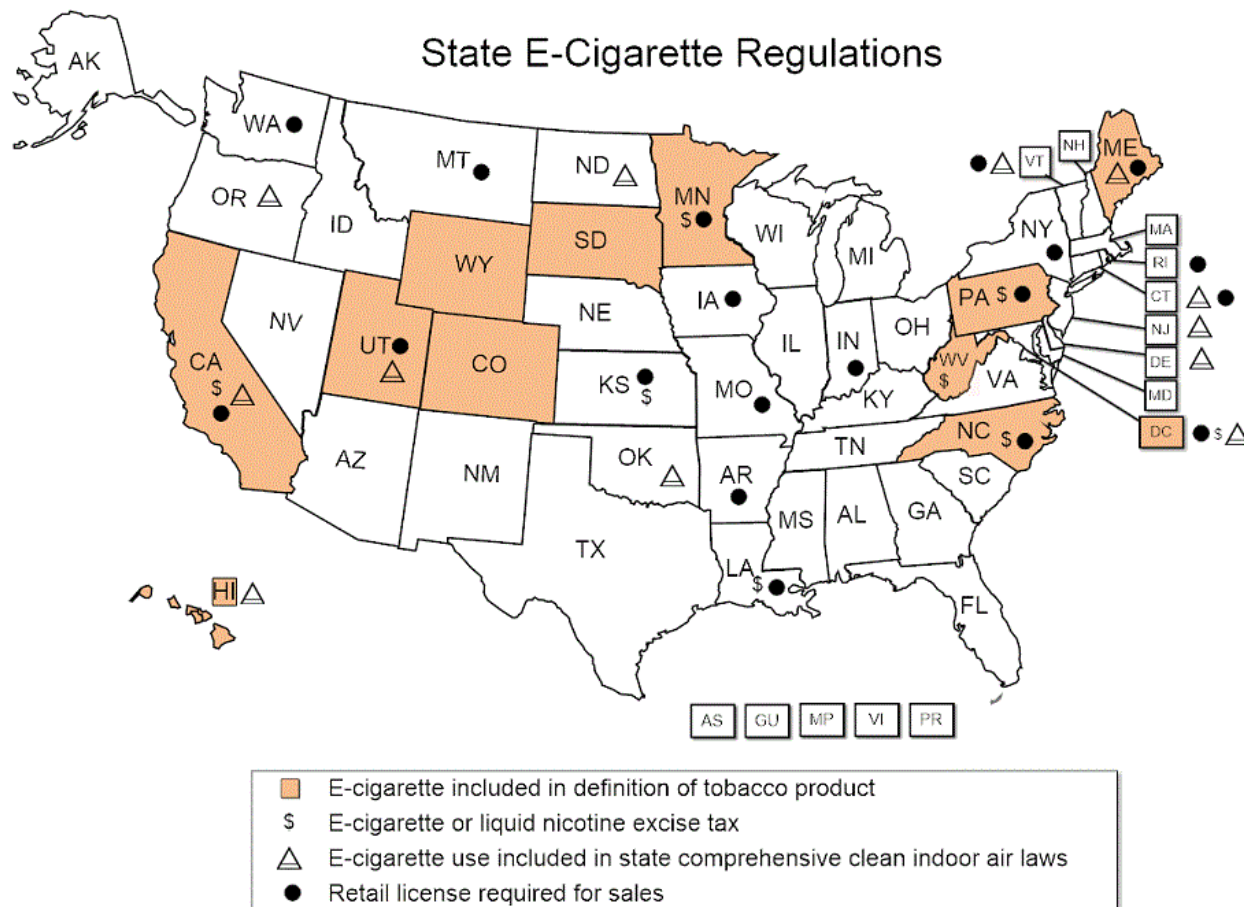
The Food and Drug Administration regulates tobacco products through the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), unless a product is marketed for therapeutic purposes, in which case it is regulated by the drugs and devices provisions of the Federal Food, Drug, and Cosmetic Act (FDCA). In 2010, the FDA attempted to use its regulatory power under the FDCA to block shipments of e-cigarettes 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.

Accordingly, in April 2014, the FDA issued a Notice of Proposed Rulemaking (NPRM) and announced its proposed rules on regulating the advertising, ingredients, and sale of e-cigarettes and like devices.¹ Final action on the rules was expected in June 2015. One rule, which took effect on August 8, 2016, extended the FDA's regulatory authority to all tobacco products, including e-cigarettes, and restricted youth access to newly regulated tobacco products by not allowing products to be sold to those younger than 18 years old.²

¹ "Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products", 79 Federal Register 23141, April 25, 2014; "FDA proposes to extend its tobacco authority to additional tobacco products, including e-cigarettes", FDA Press Release, 4-24-14.

² "Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products; Final Rule," 81 Federal Register 28973, May 10, 2016, "FDA's New Regulations for E-Cigarettes, Cigars, and All Other Tobacco Products", FDA.

State regulation of e-cigarettes has taken a variety of approaches. A majority of states have enacted legislation banning the sale e-cigarettes to minors, according to the National Conference of State Legislatures. Some jurisdictions (e.g., New York City and New Jersey) have chosen to regulate vapor products in the same ways as their tobacco product counterparts.³ As of early 2017, the National Conference of State Legislatures had compiled a list of states that had taken some regulatory action addressing e-cigarettes to some degree, as seen in the figure below.⁴



Source: National Conference of State Legislatures

Health Impacts

Little is known about the long-term health impact of vapor products, mainly because of their relatively short existence. The research conducted to-date has yielded mixed results from a public health perspective. For example, some older studies have shown that smokers who use e-cigarettes for smoking cessation are more likely to report continued abstinence.⁵ A recent study conducted at vapor product shops in Belgium found that one out of five regular smokers who had started using vapor products was able to quit smoking completely by switching to vaping.⁶ Other work suggests that e-cigarette vapors may have an effect similar to cigarette smoke in COPD-emphysema pathogenesis, or rejects manufacturer's claims that e-cigarettes are a safer method

³ Morgan Windsor, "Bloomberg signs his last 22 bills; one regulates e-cigarette use", *CNN*, 12-31-13; "Awaiting FDA, states pursue their own e-cigarette rules", *Washington Post GovBeat*, 10-29-13.

⁴ "State E-Cigarette Regulations Postcard", www.ncsl.com. Retrieved on 4-11-2019.

⁵ See, e.g., Jamie Brown, et al., "Real-world effectiveness of e-cigarettes when used to aid smoking cessation: a cross-sectional population study", *Research Report, Addiction*, vol. 109: 1531-1540 (2014).

⁶ Adriaens, Karolien, et al., "About One in Five Novice Vapers Buying Their First E-Cigarette in a Vape Shop Are Smoking Abstinent after Six Months", *International Journal of Environmental Research and Public Health*, 2018.

of smoking or function as an effective smoking cessation method.⁷ One article published in the *European Respiratory Review* in 2018 analyzed available articles and research in order to compile and provide information regarding e-cigarette safety, and concluded, among other things, that knowledge about e-cigarette affects is still limited, particularly when it comes to the full health impacts of e-cigarette use (although some reports suggest that e-cigarette use might pose a risk to the cardiovascular system, and that "it is more apparent that there are considerable pulmonary health risks associated with continued e-cig usage").⁸

On the other hand, 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 cardiovascular function.⁹ 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.¹⁰ Exposure to some higher-concentration vapor product solutions could lead to systemic poisoning and death, simply through skin contact, or accidental ingestion. This concern is heightened in the case of children, who generally have less tolerance to nicotine. 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, 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 the Georgetown University School of Medicine and the Schroeder Institute for Tobacco Research and Policy Studies, in addition to testing by the FDA, indicated that nicotine concentrations for e-cigarettes vary based on manufacturers, devices, and liquids, as well as "puff-to-puff".¹¹ The tests also indicated the presence of various irritants, solvents, genotoxins, and carcinogens. The report noted that the presence of these substances 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 bill is needed to create and enforce State prohibitions against minors' purchasing vapor products, such as e-cigarettes, and alternative nicotine products. Many states have passed laws preventing the sale of e-cigarettes and like products to minors. E-cigarette manufacturers develop fruit and other sweet flavorings that appeal to youths. Some retailers use cartoon characters in their marketing, or have developed "skins" for their e-cigarettes with designs featuring bright colors or games that are often marketed to minors, such as Fortnite.

Additionally, estimates by the Centers for Disease Control and Prevention (CDC) show that e-cigarette use among students in middle and high school is increasing. Specifically, current (past 30 day) use of e-cigarettes increased among middle and high school students from 2011 to 2018.

⁷ See, respectively, Shivalingappa, Prashanth, et al., "Airway Exposure of E-Cigarette Vapors Impairs Autophagy and Induces Aggresome Formation", *Antioxidants and Redox Signaling*, 2016; Grana, Rachel, et al., "E-Cigarettes: A Scientific Review", *Circulation*, 2014.

⁸ Gagandeep, Kaur, et al., "Immunological and toxicological risk assessment of e-cigarettes", *European Respiratory Review*, 2018.

⁹ U.S. Surgeon General, U.S. Department of Health and Human Services, *The Health Consequences of Smoking: Nicotine Addiction* (1988).

¹⁰ See n.9.

¹¹ Nathan K. Cobb, et al., "Novel Nicotine Delivery Systems and Public Health: The Rise of the 'E-Cigarette'", *American Journal of Public Health* 2010; U.S. Food and Drug Administration, "Evaluation of e-cigarettes", 2009.

In 2018, nearly one of every 20 middle school students (4.9%) reported that they used e-cigarettes in the past 30 days (an increase from 0.6% in 2011), and nearly one of every five high school students (20.8%) reported that they used e-cigarettes in the past 30 days, an increase from 1.5% in 2011.¹² The 2018 National Youth Tobacco Survey showed that there was a 78% increase of e-cigarette use among high school students between 2017 and 2018. According to the Michigan Department of Health and Human Services, 4,400 Michigan youth become regular daily smokers annually, 10.4% of Michigan high schoolers currently smoke conventional cigarettes, and, in 2017, 15% of Michigan high schoolers used electronic cigarettes.

This is of concern 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. The small profile of many e-cigarette or vapor devices allow them to be concealed and used on buses, in classrooms, and in school bathrooms. Young e-cigarette smokers also may shift to traditional tobacco product use.

Opposing Argument

The bill would not go far enough, in that it would categorize vapor products and alternative nicotine products separately from tobacco products. Previously, Governor Snyder vetoed bills from the 2013-2014 session that proposed regulations similar to Senate Bill 106 (S-1). According to the Governor's veto message, "Michigan 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. To do so will unnecessarily sow confusion, send a mixed health message to the public on a subject that is already complex and confusing to many and effectively conflict with the Sottera ruling issued in 2010 by the Federal Court of Appeals for the District of Columbia at the request of the e-cigarette industry itself."

With the current FDA regulation that treats vapor products as tobacco products, the bill's provisions would deviate from Federal law. The differing categorization of these products could cause youths and other consumers to view vapor products and alternative nicotine products as being fundamentally different from tobacco products. The State should include e-cigarettes and other nicotine-containing vapor products in the existing definition of tobacco products, making it clear that they would be subject to the same restrictions and regulated similarly to tobacco products. Furthermore, this designation would allow the State to tax those items as tobacco products.

Response: Michigan is one of the few states that has not passed legislation to prevent minors from purchasing e-cigarettes and similar devices. This legislation would be a good first step for statewide regulation of vapor products, and would enable local law enforcement to enforce the prohibitions against the sale of vapor products to minors and the possession of those products by minors.

Opposing Argument

There is little evidence suggesting that penalizing the use and possession of tobacco products by minors reduces youth tobacco use. One could assume that this would remain true for penalizing the use and possession of e-cigarettes and vapor products. The penalties proposed by the bill could create additional problems for those already addicted to nicotine, and open the door for inequitable enforcement against racial minorities.

Legislative Analyst: Drew Krogulecki

¹² "Youth and Tobacco Use", www.cdc.gov. Retrieved on 4-11-2019.

FISCAL IMPACT

Senate Bill 106 (S-1)

The bill would have no fiscal impact on the State and could have a small negative fiscal impact on local government. A violation of the bill would be a civil infraction for the first two violations and a misdemeanor on the third or subsequent violation, each of which would be subject to a \$50 maximum fine. Any increase in misdemeanor arrests and convictions could increase resource demands on law enforcement, court systems, and community supervision. Any associated increase in fine revenue would increase funding to public libraries.

Senate Bill 155 (S-1)

The bill would have no fiscal impact on the State and could have a small negative fiscal impact on local government. A violation of the bill for selling liquid nicotine containers that were not child resistant would be a misdemeanor subject to a \$50 maximum fine. Additionally, a violation of the bill for selling vapor products that were not stored behind a locked case would be a State civil infraction subject to a \$500 maximum fine. Any increase in misdemeanor arrests and convictions could increase resource demands on law enforcement, court systems, and community supervision. Any associated increase in fine revenue would increase funding to public libraries.

Fiscal Analyst: Ellyn Ackerman
Joe Carrasco

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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.