HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 987 Age Restrictions on Tobacco and Nicotine Products
SPONSOR(S): Regulatory Reform Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Regulatory Reform Subcommittee		Brackett	Anstead

SUMMARY ANALYSIS

The Division of Alcoholic Beverages and Tobacco (Division) within the Department of Business and Professional Regulation (DBPR) is responsible for the regulation of tobacco products. “Tobacco products” are loose tobacco leaves, products made from tobacco leaves, and cigarette wrappers, which can be used for smoking, sniffing, or chewing. Retailers that sell or deal, at retail, in tobacco products are required to have a permit issued by the Division and are required to comply with certain provisions related to the sale of such products. The Division enforces the tobacco regulations, and may issue fines to permit holders or suspend or revoke such permits for violations.

Nicotine products and nicotine dispensing devices are not included in the definition of tobacco products. Retailers that sell only nicotine products and nicotine dispensing devices are not required to obtain a tobacco retailer permit or a permit from any other state agency. As such, these retailers are not subject to state regulatory oversight.

Current state law prohibits anyone under the age of 18 from purchasing or knowingly possessing tobacco products, nicotine products, and nicotine dispensing devices, unless the person falls under an exemption such as being in the military or handling tobacco products as a part of a person’s lawful employment. However, federal law was amended in 2019 to raise the minimum age to 21.

The bill:

- Increases the minimum age to lawfully purchase and knowingly possess tobacco products, nicotine products, and nicotine dispensing devices in Florida from 18 to 21 years of age.
- Prohibits the sale, delivery, bartering, furnishing, shipping, or giving tobacco products, nicotine products, or electronic nicotine dispensing devices to persons under the age of 21 years.
- Creates regulations for the sale and delivery of nicotine products and nicotine dispensing devices through the mail and over the Internet, which are similar to the regulations for tobacco products.
- Preempts the establishment of the minimum age to possess or purchase nicotine dispensing devices, nicotine products, and tobacco products and the marketing of such products to the state.
- Modifies current exceptions to the minimum age requirements to purchase or knowingly possess tobacco products and applies the same exceptions to nicotine products and nicotine dispensing devices.

The bill creates a retail nicotine products permit, which must be obtained from the Division to sell nicotine products. This establishes state regulatory oversight for retailers of nicotine products and nicotine dispensing devices. The regulations for the sale of nicotine products and nicotine dispensing devices mirror the regulations for the sale of tobacco products; however, the bill does not impose a tax or licensing fee similar to tobacco products.

The bill authorizes a holder of a tobacco retail permit to sell nicotine products in addition to tobacco products.

The bill has a significant, indeterminate, negative fiscal impact on DBPR.

The bill provides an effective date of October 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Federal Regulation of Tobacco Products

The Family Smoking Prevention and Tobacco Control Act of 2009 (Tobacco Control Act) gives the U.S. Food and Drug Administration (FDA) authority to regulate the manufacture, distribution, and marketing of tobacco products to protect the public health. The Tobacco Control Act provides advertising and labeling guidelines, provides standards for tobacco products, and requires face-to-face transactions for tobacco sales with certain exceptions.[1]

On August 8, 2016, the FDA extended the definition of "tobacco product[s]" regulated under the Act to include electronic nicotine delivery systems (ENDS). ENDS include e-cigarettes, e-cigars, e-hookah, vape pens, personal vaporizers and electronic pipes. Additionally, the definition of tobacco products includes components and parts such as e-liquids, tanks, cartridges, pods, wicks, and atomizers.

Federal law requires that a retailer may sell cigarettes and smokeless tobacco only in "direct, face-to-face exchanges between the retailer and the customer." This language explicitly prohibits vending machines and self-service displays.[2] This language is referred to in the industry as the "behind the counter" language; however, this does not specifically require that a retailer place cigarettes or smokeless tobacco behind the counter. A locked display case would likely meet the self-service display prohibition. Facilities that prohibit minors under the age of 21 are exempt from this federal requirement. Retailers are also required to check a purchaser's ID unless the purchaser is over the age of 30.[3]

Federal law preempts states from providing additional or different requirements for tobacco products in regards to "standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." However, federal law explicitly preserves the right of states, or any political subdivision of a state, to enact laws, rules, regulations or other measures related to prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of tobacco products which are more stringent than federal requirements.[4]

Tobacco 21

In 2013, the FDA contracted with the Institute of Medicine (IOM) to conduct a study to better understand the potential health benefits of raising the minimum age to purchase tobacco. In 2015, the IOM published their report and it was submitted to Congress, which concluded that raising the minimum age to purchase tobacco to 21:[5]

- Would most likely lead to substantial reduction in smoking related mortality, and
- Could result in significant health benefits for those born between 2000 and 2018, including:
    - approximately 249,000 fewer premature deaths,
    - 45,000 fewer deaths from lung cancer; and
    - 4.2 million fewer years of life lost.

The report also concluded that the age group most affected by increasing the minimum age to purchase tobacco products to 21 would be those who are age 15 to 17 years old. Because 21 year olds are less likely than 18 year olds to be in the same social circles of 15-17 year olds, increasing the

[1] Federal Food, Drug, and Cosmetic Act, 21 USC § 351 et seq; 15 U.S.C. s. 1333, s. 1335; 21 U.S.C. s. 387g, s. 387f.
[2] 21 C.F.R. § 1140.14.
[3] *Id.*
[4] 21 U.S.C. § 387p.
[5] Institute of Medicine, *Public Health Implications Raising the Minimum Age of Legal Access to Tobacco Products Report Brief*, (Jul. 23, 2015) https://www.ncbi.nlm.nih.gov/books/NBK310401/ (last visited on Mar. 15, 2021).

minimum age would likely result in 15 to 17 year olds having less access to tobacco products and delaying the age that a person is first exposed to tobacco.[6]

According to the report, delaying the date a person uses a tobacco product is critical because the adolescent brain is uniquely vulnerable to nicotine and adolescents are particularly susceptible to peer pressure. Delaying the age a person is first exposed to tobacco will likely decrease the prevalence of tobacco users.[7]

The FDA also reports that between 2011 and 2014, the number of high school students who had used an e-cigarette in the last 30 days increased nearly 800 percent, with 13.4 percent of high school students reporting usage in 2014.[8] In 2018, over 4.9 million middle and high school students were current users of e-cigarettes.[9] As of 2018, more than one in four high school seniors and one in ten middle school students used e-cigarettes.[10] In 2020, among middle and high school students, 3.6 million were current users of e-cigarettes.[11]

In order to decrease youth usage of ENDS, the FDA has begun a Youth Tobacco Prevention Plan. The plan has three main components: preventing youth access to tobacco products, ending marketing aimed at youth, educating youth about the dangers of using tobacco and educating retailers about their role in preventing underage usage of tobacco.[12]

Federal Minimum Age to Purchase Tobacco Products

On December 20, 2019, the Tobacco Control Act was amended to raise the federal minimum age of the sale of tobacco products, including ENDS, from 18 to 21 years.[13] The law was also changed to require retailers to check a purchaser's ID unless the purchaser is 30 years or older, instead of if the purchaser is over 26. The law became effective on January 15, 2020, with the FDA announcing that retailers may no longer sell tobacco products to anyone under the age of 21.[14] Prior to the enactment of this amendment the FDA used minors to ensure that retailers were complying with the law. However, the FDA has begun using persons under the age of 21 for compliance checks.[15]

The federal government does not require states to enforce the federal minimum age, but states that do not demonstrate that their retailers are complying with the federal minimum age are subject to a possible reduction in funding for Substance Abuse Prevention and Treatment Block Grants.[16] Substance Abuse Prevention and Treatment Block Grants are administered by the U.S. Department of Health and Human Services (USDHHS), and are federal funds provided to the states to prevent substance abuse.[17]

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[6] *Id.*
[7] *Id.*
[8] FDA, 81 C.F.R. 28973, https://www.federalregister.gov/d/2016-10685/p-635 (last visited Mar. 16, 2021).
[9] FDA, *Statement from FDA Commissioner Scott Gottlieb, M.D., on new data demonstrating rising youth use of tobacco products and the agency's ongoing actions to confront the epidemic of youth e-cigarette use,* https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-data-demonstrating-rising-youth-use-tobacco (last visited Mar. 16, 2021).
[10] *Id.*
[11] FDA, *Vaporizers, E-Cigarettes, and other Electronic Nicotine Delivery Systems (ENDS),* https://www.fda.gov/tobacco-products/products-ingredients-components/vaporizers-e-cigarettes-and-other-electronic-nicotine-delivery-systems-ends (last visited Mar. 16, 2021).
[12] Food and Drug Administration, *FDA's Youth Tobacco Prevention Plan,* https://www.fda.gov/TobaccoProducts/PublicHealthEducation/ProtectingKidsfromTobacco/ucm608433.htm (last visited Mar. 16, 2021).
[13] *Newly Signed Legislation Raises Federal Minimum Age of Sale of Tobacco Products to 21*, United States Food and Drug Administration, (Jan. 15, 2020) https://www.fda.gov/tobacco-products/ctp-newsroom/newly-signed-legislation-raises-federal-minimum-age-sale-tobacco-products-21 (last visited Mar. 16, 2021).
[14] *Id.* H.R. 1865 Further Consolidated Appropriations Act, 2020, 116th Congress (2019-2020).
[15] FDA, *Tobacco 21*, (Fe. 12, 2020) https://www.fda.gov/tobacco-products/retail-sales-tobacco-products/tobacco-21 (last visited Mar. 16, 2021).
[16] H.R. 1865 Further Consolidated Appropriations Act, 2020, 116th Congress (2019-2020).; 42. U.S.C. § 300x-26.
[17] USDHHS, Substance Abuse Prevention and Treatment Block Grant, https://www.samhsa.gov/grants/block-grants/sabg (last visited Mar. 16, 2021).

Failure to demonstrate a state's retailers are complying with the federal minimum age could lead to a reduction of a block grant by up to 10% for the fiscal year. The federal government will not reduce a block grant for failing to enforce the federal minimum wage for three years in order to give the states a chance to make any necessary changes.[18]

According to the USDHHS, in the fiscal year 2020, Florida received a Substance Abuse and Prevention and Treatment Block Grant of $111,385,315.[19]

The federal government considers a state to be failing the requirement that its retailers are complying with the federal minimum age if its retail violation rate is more than 20 percent. A violation is defined as the fraction (or percentage) of tobacco-selling outlets in a state that are accessible to and sell tobacco to persons under the age of 21.[20]

States are required to conduct annual surveys to determine their compliance rate. In conducting their surveys, states must:[21]

- Develop a sampling frame that includes both over-the-counter and vending machine locations accessible to youth and young adults under the age of 21
- Ensure that the sampling frame includes, at a minimum, 80% of the tobacco outlets in the state (CSAP requires states that use a list frame to conduct and report the results of a coverage study designed to assess the completeness of the sampling frame.)
- Design a sampling methodology and implementation plan that are based on sound survey sampling methodology
- Sample a large enough number of outlets to meet USDHHS's precision requirement (one-sided 95% confidence interval)
- Obtain a completion rate of 90% or better
- Record the actual steps of the survey process in the field and keep records of all sources of sample attrition in the field
- Weight the results of the Synar survey to account for unequal probabilities of selection, differences in percentages of eligible outlets between strata or clusters, and other deviations from the intended design

The latest date for each state's retail violation rate is 2018. In 2018, Florida's retail violation rate was 9.2%. However, that was before the federal government raised the minimum age to purchase tobacco products to 21.[22]

Additionally, according to news reports, the recent increase in the federal minimum age is causing confusion among retailers in states where the minimum age is still 18 years of age. Retailers are not sure which law they are required to follow, which may lead to one retailer enforcing the state minimum age and another retailer enforcing the federal minimum age.[23]

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[18] H.R. 1865 Further Consolidated Appropriations Act, 2020, 116th Congress (2019-2020).; 42. U.S.C. § 300x-26; Substance Abuse and Mental Health Services Administration, *Revision to Guidance*, (June 12, 2020) https://www.samhsa.gov/sites/default/files/synar-guidance-tobacco-21.pdf (last visited Mar. 18, 2021).
[19] USDHHS, *Florida Summaries FY 2020*, https://www.samhsa.gov/grants-awards-by-state/FL/2020 (last visited Mar. 18, 2021).
[20] Substance Abuse and Mental Health Services Administration, *Revision to Guidance*, (June 12, 2020) https://www.samhsa.gov/sites/default/files/synar-guidance-tobacco-21.pdf (last visited Mar. 18, 2021).
[21] Substance Abuse and Mental Health Services Administration, *Programmatic Requirements for the Synar Program*, https://www.samhsa.gov/synar/requirements (last visited Mar. 18, 2021).
[22] Substance Abuse and Mental Health Services Administration, *State Target and Reported Retailer Violation Rates*, https://www.samhsa.gov/sites/default/files/synar_program_rvr_table_1997-2018_dec_11_2018.pdf (last visited Mar. 18, 2021).
[23] Adam Kurtz, *New Tobacco 21 law causes confusion about enforcement, start date*, Grand Forks Herald (Jan. 10, 2020) https://www.grandforksherald.com/business/retail/4853919-New-Tobacco-21-law-causes-confusion-about-enforcement-start-date (last visited Mar. 18, 2021); Naomi Kowles, *Some local confusion after federal passage of new minimum age for tobacco purchases*, WSAW-TV (Jan. 16, 2020) https://www.wsaw.com/content/news/Some-local-confusion-after-federal-passage-of-new-minimum-age-for-tobacco-purchases-567056371.html (last visited Mar. 18, 2021).

Jurisdictions that Raised the Minimum Age from 18 to 21

Thirty states, and the U.S. Territory of Guam, have passed legislation raising the minimum age for a person to lawfully possess or purchase tobacco products and nicotine products to 21 years of age:[24]

• Arkansas	• New Mexico
• California	• New Jersey
• Colorado	• New York
• Connecticut	• Ohio
• Delaware	• Oklahoma
• Hawaii	• Oregon
• Illinois	• Pennsylvania
• Indiana	• South Dakota
• Iowa	• Tennessee
• Kentucky	• Texas
• Maine	• Utah
• Maryland	• Vermont
• Massachusetts	• Virginia
• Minnesota	• Washington
• Mississippi	• Wyoming

At least 530 localities, including New York City, Chicago, San Francisco, San Antonio, Boston, Cincinnati, Cleveland, Columbus, and Kansas City (in Kansas and Missouri), plus Washington, D.C., have also raised the minimum age to 21.[25]

In January of 2019, Alachua County became the first local government in Florida to raise the minimum legal age to purchase tobacco to 21 years of age. The Alachua County ordinance applies to tobacco products, nicotine products, and nicotine dispensing devices. Municipalities in the county are authorized to opt out of the ordinance if they choose. In addition, retailers are required to purchase and maintain a special license to sell tobacco, nicotine products, and nicotine dispensing devices. Businesses located within 1,000 feet of a public school are prohibited from licensure; however, businesses previously licensed to sell tobacco products by the state prior to the adoption of the ordinance are not required to give up their license. Penalties for violations include license suspensions ranging from seven days up to losing the license permanently for four violations in a 24-month period.[26]

In September of 2019, Fort Lauderdale became the second local government in Florida to raise the minimum age to purchase tobacco to 21. The Fort Lauderdale ordinance applies to tobacco products, nicotine products, and nicotine dispensing devices. Penalties for violations include warnings and civil citations ranging from $500 to $1,000.[27]

Private Sector

[24] *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/what-we-do/us/sale-age-21 (last visited Mar. 16, 2021).
[25] *Id.*
[26] Alachua County Ord. No. 2019-04.
[27] City of Fort Lauderdale Ord. No C-19-21.

Recently, members of the nicotine product manufacturing industry indicated support for increasing the minimum age to purchase tobacco products, including nicotine products, and nicotine dispensing devices, from 18 to 21. Juul Labs, the largest e-cigarette company, stated that they support raising the minimum age to purchase tobacco products, nicotine products, and nicotine dispensing devices from 18 to 21. One of Juul Labs' ads states:[28]

> "It's time to raise the legal age to purchase tobacco products, including vapor, from 18 to 21. Because when youth never start smoking and vaping, they never have to stop."

E-Cigarette, or Vaping, Product Use-Associated Lung Injury (EVALI)

As of February 18, 2020, there have been 2,807 cases of EVALI and 68 deaths in the United States. 119 of the cases and two of the deaths have been in Florida. According to the Centers for Disease Control (CDC), tetrahydrocannabinol (THC) and Vitamin E acetate are strongly linked to the outbreak of EVALI. The CDC and FDA recommend that people not use THC-containing vaping products, particularly products from informal sources like friends, family, or in-person or online dealers.[29]

Symptoms of the lung injury include:[30]

- Cough, shortness of breath, or chest pain;
- Nausea, vomiting, or diarrhea; and
- Fatigue, fever, or abdominal pain.

The CDC has the following data on the age and sex of 2,668 of the cases:[31]

- 66% of the patients are male;
- The median age of patients is 24 years old and ranges from 13-85 years. However, 76% of the patients are under 35 years old;
- By age group category:
  - 15% of patients are under 18 years old;
  - 37% of patients are 18 to 24 years old;
  - 24% of patients are 25 to 34 years old; and
  - 24% of patients are 35 years or older.

Effect of Smoking and Vaping on COVID-19

According to the CDC, being a current or former smoker increases a person's risk to develop a severe illness from COVID-19. According to the Massachusetts General Hospital, a person who smokes and tests positive for COVID-19, is twice as likely to develop a severe case of COVID-19 than a person with no smoking history, and is more likely to be admitted to an Intensive Care Unit, placed on a ventilator, or die from the illness.[32]

According to a study led by researchers at the Stanford University School of Medicine, teens and young adults who vaped were five to seven times more likely to be infected with COVID-19 than those who did

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[28] Juul Labs, *Our Support For T21 Laws,* https://newsroom.juul.com/t21/ (last visited Mar. 16, 2021).
[29] CDC, *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html#latest-outbreak-information (last visited Mar. 16, 2021).Florida Department of Health, *Lung Injury Associated with E-Cigarette Use, or Vaping- Florida*, Florida Department of Health http://www.flhealthcharts.com/ChartsReports/rdPage.aspx?rdReport=ChartsProfiles.LungInjuryE-CigaretteUse (last visited Mar. 16, 2021).
[30] CDC, *For the Public,* https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease/need-to-know/index.html (last visited Mar. 18, 2021).
[31] CDC *supra*, note 29.
[32] CDC, People with Certain Medical Conditions, (Mar. 15, 2021) https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#smoking (last visited Mar. 18, 2021); Massachusetts General Hospital, Smoking, Vaping and COVID-19: About the Connection and How to Quit, https://www.massgeneral.org/assets/MGH/pdf/children/adolescent-medicine-smoking-and-covid19.pdf (last visited Mar. 18, 2021).

not use e-cigarettes.[33] Also, according to Massachusetts General Hospital, people who smoke or vape have a higher risk of developing chronic obstructive pulmonary disease (COPD), which is a long-term lung disease that affects airflow through the lungs, which according to the CDC, puts users at a higher risk of developing a severe case of COVID-19.[34]

Regulation of Tobacco Products in Florida

The Division of Alcoholic Beverages and Tobacco (Division) within the Department of Business and Professional Regulation (DBPR) is the state agency responsible for the regulation and enforcement of the tobacco products under ch. 569, F.S. "Tobacco products" 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.[35]

Section 210.25(11), F.S., relating to the tax on tobacco products other than cigarettes or cigars, defines the term "tobacco products" differently as "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."

"Tobacco products" in either definition does not include nicotine products or nicotine dispensing devices.

Cigarette and Tobacco Products Wholesalers, Distributors, and Manufacturers

A person must obtain a permit from the Division in order to distribute tobacco products, not including cigarettes or cigars. A person must obtain a permit for each place of business. The fee for such permit is $25. There is no minimum age requirement to obtain a permit to distribute tobacco products.[36]

A person must obtain a cigarette permit from the Division in order to import, export, manufacture, deal at wholesale, or distribute cigarettes in the state. A person must obtain a permit for each place of business in the state or its principal place of business if the person does not have a business in this state. The fee for such permit is $100. The Division may only issue permits to persons who are 18 years or older or corporations with officers who are 18 years or older.[37]

Tobacco Products Retailers

A person must obtain a retail tobacco products dealer permit from the Division for each place of business or the premises where tobacco products are sold to be eligible to sell retail tobacco products, or operate a tobacco products vending machine in Florida. The fee for such permit is $50.[38] The Division may only issue permits to persons who are 18 years or older or corporations with officers who are 18 years or older.[39]

Anyone who deals in tobacco products at retail or allows a vending machine on the premises without a permit is subject to a $500 fine.[40]

The place or premises covered by a permit is subject to inspection and search without a search warrant by the Division or its authorized assistants, and by sheriffs, deputy sheriffs, or police officers, to determine compliance with requirements for tobacco sales and dealing.[41]

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[33] Erin Digitale, *Vaping linked to COVID-19 risk in teens and young adults*, Stanford Medicine, News Center (Aug. 11, 2020) https://med.stanford.edu/news/all-news/2020/08/vaping-linked-to-covid-19-risk-in-teens-and-young-adults.html (last visited Mar. 18, 2021).
[34] CDC *supra* note 32.
[35] S. 569.002(6), F.S.
[36] S. 210.40, F.S.
[37] S. 210.15, F.S.
[38] S. 569.003, F.S.
[39] S. 569.003, F.S.
[40] S. 569.005, F.S.
[41] S. 569.004, F.S.

DBPR is required to submit an annual report to the Governor and Legislature regarding the enforcement of tobacco products, including:[42]

- The number and results of compliance visits by the Division;
- The number of violations for failure of a retailer to hold a valid license;
- The number of violations for selling tobacco products to anyone under the age of 18 and the results of administrative hearings on such violations; and
- The number of people under the age of 18 cited, including sanctions imposed as a result of such citation, for misrepresenting their age, purchasing tobacco products underage, and misrepresenting military service for the purpose of obtaining tobacco products underage.

Florida also has an excise tax and surcharge on cigarettes and other tobacco products, not including cigars. The tax and surcharge for cigarettes is $0.1695 to $0.42375 per pack and a surcharge of $0.50 to $1.25 per pack depending on the number of cigarettes in the pack. The excise tax for tobacco products is 25% of the wholesale price and the surcharge is 60% of the wholesale price. There is no excise tax or surcharge for nicotine products or nicotine dispensing devices.[43]

Requirements for Tobacco Products Retailers

Retail tobacco products 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 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.[44]

The sale or delivery of tobacco products is prohibited, except when those products are under the direct control or line of sight of the retailer or the retailer's agent or employee in order to prevent persons under 18 years of age from purchasing or receiving tobacco products.

If a tobacco product is sold from a vending machine, the vending machine must have:

- An operational lockout device which is under the control of the retailer or the retailer's agent or employee who directly regulates the sale of items through the machine by triggering the lockout device to allow the dispensing of one tobacco product;
- A mechanism on the lockout device to prevent the machine from functioning if the power source for the lockout device fails or if the lockout device is disabled;
- A mechanism to ensure that only one tobacco product is dispensed at a time.[45]

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.[46]

If the Division determines a tobacco product retailer or a tobacco product retailer's employee violated the regulations for tobacco product retailers, the Division can suspend or revoke the retailer's permit or assess a fine up to $1,000 for each violation.[47]

If the Division discovers a tobacco product retailer's employee illegally sold tobacco products to a person under 18 years of age, the Division may mitigate penalties, if:

[42] S. 569.19, F.S.
[43] Ss. 210.011, 210.02, 210.276, and 210.30, F.S.; DBPR, Alcholic Beverages & Tobacco – Tax & Reporting Information For Licensees, http://www.myfloridalicense.com/DBPR/alcoholic-beverages-and-tobacco/tax-and-reporting-information-for-licensees/#1510753842753-25986d10-086f (last visited Mar. 16, 2021).
[44] S. 569.14, F.S.
[45] S. 569.007(1), F.S.
[46] S. 569.007(2) and (3), F.S.
[47] S. 569.006, F.S.

- The retailer is qualified as a responsible retailer by establishing and implementing specified practices designed to ensure that the retailer's employees comply with ch. 569, F.S., such as employee training.
- The retailer 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.[48]

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

Section 210.095, F.S., provides requirements for the delivery of mail order, Internet, and other remote sales of tobacco products and cigarettes, referred to as "delivery sales." Each person who mails, ships, or otherwise delivers tobacco products or cigarettes in connection with an order for a delivery sale to a consumer 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 or cigarettes by this state with respect to the delivery sale.

Before the first delivery to a consumer, the person mailing, shipping, or delivering the tobacco products or cigarettes must also:[49]

- Obtain a certification from the person accepting delivery that includes reliable confirmation that the person accepting delivery is an adult, and a written statement under penalty of perjury providing the person's date of birth, address, and confirmation that the person wants to accept the delivery;
- Make a good faith effort to verify the information in the certification by checking the information against a commercially available database or obtaining a photocopy of the person's ID;
- Provides the person accepting the delivery a notice stating tobacco products are illegal for underage youths and tobacco products are taxable;
- Impose a two-carton minimum on each order of cigarettes;
- Submit to the credit card company necessary information so that the words "tobacco product" appear on the person's credit card statement when a purchase is made using a credit card;
- Make a phone call to the individual who made the order to confirm the order before shipping the order; and
- Receive payment by a credit card or debit card in the name of the person accepting delivery or a personal or company check in the name of the person, if the order is made in accordance with an advertisement on the Internet.

A person who accepts a purchase order for a delivery sale and delivers the tobacco products or cigarettes without using a delivery service must comply with all of the delivery service requirements.[50]

[48] See s. 569.008(3), F.S.
[49] *Id.*
[50] S. 210.095, F.S.

Section 210.095(8), F.S., currently provides that the penalty for the following violations of the delivery sale requirements is a misdemeanor of the third degree:[51]

- A delivery of tobacco products, on behalf of a delivery service, to an individual who is under 18 years of age.
- A person under the age of 18 who knowingly violates any of the provisions of the mail order or internet sales requirements.

These provisions do not apply to nicotine products and nicotine dispensing devices. However, it is illegal for a person to deliver nicotine products or nicotine dispensing devices to persons under 18 years of age.[52]

Tobacco Products and Minors

The sale, delivery, bartering, furnishing or giving of tobacco products or giving sample to products to persons under the age of 18 is prohibited.[53] A violation of this prohibition is a second degree misdemeanor.[54] A second or subsequent violation within one year of the first violation is a first degree misdemeanor.[55]

It is a complete defense to a person charged with such a violation 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 identification upon which the person relied upon in good faith.[56]

Persons under the age of 18 years are prohibited from knowingly possessing, directly or indirectly, any tobacco products, or misrepresenting their age or military service for obtaining such products. Persons who violate this noncriminal violation are punishable as follows:[57]

- 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 violation within 12 weeks of the first violation is punishable with a $25 fine.
- A court may suspend or withhold issuance of a driver license for persons under 18 years of age who fail to complete the noncriminal penalties for knowingly possessing or misrepresenting their age in order to purchase tobacco products.
    - A court may suspend or withhold issuance of a drivers' license for 30 days for a first violation, and for 45 days for a second violation within 12 weeks of the first violation.

However, this does not include any person under the age of 18 who:[58]

- 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

[51] Section 775.082, F.S., does not provide a third degree misdemeanor. Section 775.082, F.S., provides that a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S., does not provide a third degree misdemeanor. Section 775.083, F.S., provides that a misdemeanor of the second degree is punishable by a fine not to exceed $500.
[52] S. 877.112(2), F.S.
[53] Ss. 569.0075 and 569.101, F.S.
[54] S. 775.082, F.S., provides that the penalty for a misdemeanor of the second degree is punishable by a term of imprisonment not exceeding 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.
[55] S. 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.
[56] S. 569.101(3), F.S.
[57] S. 569.11, F.S.
[58] S. 569.002(7), F.S.

- 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.

The Division and any law enforcement officer may enforce these provisions. A local government may also designate certain employees or agents as tobacco product enforcement officers. A tobacco enforcement officer or a correctional probation officer may issue a citation to a person under the age of 18, whom the officer has reasonable cause to believe an underage person is knowingly possessing tobacco products or is lying about their age or military service in order to obtain such products.[59]

Eighty percent of all civil penalties received from violating prohibitions related to the possession or sale of tobacco products by a county court 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 by children.[60] 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.[61]

Nicotine Products Regulation in Florida

Section 877.112, F.S., provides for the regulation of nicotine products and nicotine dispensing devices, 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 products and nicotine dispensing devices to and by persons under 18 years of age.

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.[62] 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.[63]

A "nicotine dispensing device" is any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.[64]

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.[65] 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 be 18 years of age or older, and the person carefully checked, and relied on, the driver license or identification card of the recipient.[66]

Persons under the age of 18 years are prohibited from knowingly possessing, directly or indirectly, any nicotine products or nicotine dispensing devices, or misrepresenting their age or military service for obtaining such products. Persons who violate this noncriminal violation are punishable as follows:[67]

- 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 and nicotine program, if locally available.

[59] S. 569.12, F.S.
[60] S. 569.11(6), F.S.
[61] *Id.*
[62] S. 877.112(1)(b), F.S.
[63] *Id.*
[64] S. 877.112(1)(a), F.S.
[65] Section 775.082, F.S., provides that 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 a misdemeanor of the second degree is punishable by a fine not to exceed $500.
[66] S. 877.112(5), F.S.
[67] Ss. 877.112(6), and (7), F.S.

- A second violation within 12 weeks of the first violation is punishable with a $25 fine.
- A court may suspend or withhold issuance of a driver license for persons under 18 years of age who fail to satisfies the penalties for knowingly possessing or misrepresenting their age in order to purchase tobacco products.
    - A court may suspend or withhold issuance of a drivers' license for 30 days for a first violation, and for 45 days for a second violation within 12 weeks of the first violation.

Eighty percent of civil penalties related to the unlawful possession or sale of nicotine products 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.[68] 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.[69]

Retail dealers of nicotine products and nicotine dispensing devices are required to post signs indicating that the sale of nicotine products and nicotine dispensing devices to persons under 18 years of age is prohibited and that proof of age is required for purchase. Retailers must also 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 nicotine product or nicotine dispensing device.[70]

Retail Sale of Nicotine Products and Nicotine Dispensing Devices

The sale or delivery of nicotine products and nicotine dispensing devices are prohibited, except when those products are under the direct control or line of sight of the retailer or the retailer's agent or employee in order to prevent persons under 18 years of age from purchasing or receiving such products.[71]

Nicotine products or nicotine dispensing devices may not be sold or displayed by means of self-service merchandising.[72] Self-service merchandising means the open display of nicotine products or nicotine dispensing devices for direct customer access and handling before the purchase of such product without the assistance of the retailer or the retailer's employee.

If a nicotine product or nicotine dispensing device is sold from a vending machine, the vending machine must have:[73]

- An operational lockout device which is under the control of the retailer or the retailer's agent or employee who directly regulates the sale of items through the machine by triggering the lockout device to allow the dispensing of one nicotine product or nicotine dispensing device;
- A mechanism on the lockout device to prevent the machine from functioning if the power source for the lockout device fails or if the lockout device is disabled;
- A mechanism to ensure that only one nicotine product or nicotine dispensing device is dispensed at a time.

However, this does not apply to establishments that prohibit persons under the age of 18 on the premises.[74]

Laws related to nicotine products and nicotine dispensing devices are different from tobacco laws in the following ways:

- Nicotine retailers are not required to obtain a retail tobacco products dealer permit from the Division.
- Nicotine retailers are not subject to inspection without a search warrant.

[68] S. 877.112(9), F.S.
[69] *Id.*
[70] S. 877.112(10), F.S
[71] Ss. 877.112(11) and (12), F.S.
[72] *Id.*
[73] *Id.*
[74] *Id.*; S. 877.112(1), F.S.

- The Division does not have authority to discipline a nicotine retailer for violating any of the regulations relating to the retail sale of nicotine products and nicotine dispensing devices.
- The requirements for internet and remote sales of tobacco products do not apply to nicotine products or nicotine dispensing devices.
- There are no exemptions for the prohibition of the purchase and possession of nicotine products and nicotine dispensing devices by persons under 18 years old, such as military service or possession of such products as part of a person's lawful scope employment.

Florida Clean Indoor Air ACT (FCIAA)

The FCIAA, implements Article X, Section 20 of the Florida Constitution, which prohibits a person from smoking tobacco or using a nicotine dispensing device, vaping, in an enclosed indoor workplace, with certain exceptions.

The FCIAA also prohibits any person under the age of 18 from smoking tobacco or vaping within 1,000 feet of a public or private elementary, middle, or secondary school between the hours of 6 a.m. and midnight. 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.[75]

Senate Bill 810, Use of Tobacco Products and Nicotine Products – 2020 Legislative Session

In 2020, Governor DeSantis vetoed Senate Bill 810 of the 2020 Legislative Session, the bill included the following:

- Increased the minimum age from 18 years of age to 21 years of age to lawfully purchase and possess tobacco products, nicotine products, and nicotine dispensing devices.
- Prohibited smoking and vaping by any person under 21 years of age on or near school property.
- Increased the age from 18 years of age to 21 years of age to obtain a cigarette permit required to be a cigarette wholesaler, cigarette distributor, or a cigarette manufacturer.
- Authorized DBPR to regulate nicotine products and nicotine dispensing devices in the same manner as they do for tobacco products.
- Required retailers of nicotine products and nicotine dispensing devices to obtain a permit from DBPR.

Senate Bill 810 also included a provision, **which is not in this bill**, that prohibited the sale of flavored liquid nicotine products (other than tobacco or menthol flavors), unless such products had a marketing order from the FDA to permit the product to be sold.[76]

Governor DeSantis stated his reasons for vetoing Senate Bill 810 were:[77]

> "While originally conceived as a bill to raise the legal age to buy tobacco to 21, (which is superfluous given this is already mandated by federal law) CS/CS/CS/SB 810 effectively bans tobacco free vaping flavors used by hundreds of thousands of Floridians as a reduced-risk alternative to cigarettes, which are more dangerous.
>
> This legislation would almost assuredly lead more people to resume smoking cigarettes, and it would drive others to the hazardous black market. The latter consequence is especially significant because the much-publicized cases of lung injury associated with vaping in

[75] S. 386.212, F.S.

[76] The Tobacco Control Act requires any manufacturer wishing to market a new tobacco product, including ENDS, that was not commercially marketed on or before February 1, 2007, to obtain a marketing order from the FDA or an exemption from the marketing order requirement from the FDA. The Tobacco Control Act contains a grandfather exemption from the marketing order requirement for certain tobacco products. Manufacturers of tobacco products on the market on or before February 15, 2007, are not required to have a marketing order for such products. Manufacturers of tobacco products that were on the market on or before August 8, 2016, must have applied for a marketing order for such products by September 2020. 21 U.S.C. § 387j.

[77] Veto letter of Ron DeSantis, Governor (Sept. 8, 2020) https://www.flgov.com/wp-content/uploads/2020/09/Transmittal-Letter-09.08.2020.pdf (last visited Mar. 17, 2021).

recent years have been traced to illegal, or black market, vape cartridges containing THC, not to the types of legal vaping products that this bill (CS/CS/CS/SB 810) would abolish.

Reducing the use of all nicotine-related products, including vaping, among our youth is an important goal, but this will not be achieved by eliminating legal products for adults and by devastating the small businesses who provide these adults with reduced risk alternatives to cigarettes."

Local Government Authority

The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.[78] Those counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by vote of the electors.[79]

Likewise, municipalities[80] have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law.[81]

Preemption

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. A local government enactment may be inconsistent with state law if (1) the Legislature "has preempted a particular subject area" or (2) the local enactment conflicts with a state statute. Where state preemption applies, it precludes a local government from exercising authority in that particular area.[82]

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.[83] Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.[84] In cases where the Legislature expressly or specifically preempts an area, the intent of the Legislature is readily ascertained.[85] In cases determining the validity of ordinances enacted in the face of state preemption, the effect has been to find such ordinances null and void.[86]

Effect of Proposed Changes

Tobacco 21

The bill increases the minimum age to lawfully purchase and knowingly possess tobacco products in Florida from 18 years old to 21 years old, unless a person falls under a current law exemption to the minimum age requirement.

Specifically the bill:

[78] Art. VIII, s. 1(f), Fla. Const.
[79] Art. VIII, s. 1(g), Fla. Const.
[80] A municipality is a local government entity created to perform functions and provide services for the particular benefit of the population within the municipality, in addition to those provided by the county. The term "municipality" may be used interchangeably with the terms "town," "city," and "village."
[81] Art. VIII, s. 2(b), Fla. Const. *See also* s. 166.021(1), F.S.
[82] Wolf, The Effectiveness of Home Rule: A Preemption and Conflict Analysis, 83 Fla. B.J. 92 (June 2009), available at https://www.floridabar.org/the-florida-bar-journal/the-effectiveness-of-home-rule-a-preemption-and-conflict-analysis/ (last visited Mar. 22, 2021).
[83] See *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309 (Fla. 2008).
[84] Mulligan, 934 So. 2d at 1243.
[85] *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).
[86] See, e.g., *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

- Prohibits the sale, delivery, bartering, furnishing, shipping, or giving tobacco products to persons under the age of 21.
- Provides that anyone under the age of 21 commits a noncriminal penalty for knowingly possessing tobacco products.
- Provides that anyone under the age of 21 who is cited for knowingly possessing tobacco products must attend a school approved anti-tobacco program.
- Provides that anyone over the age of 21 who delivers tobacco products to a person under age of 21 or a person under the age of 21 who knowingly violates any of the requirements for remote sales of tobacco products and cigarettes commits a second degree misdemeanor instead of a third degree misdemeanor, which is not provided for in current law.
- Removes the following exemptions to the minimum age requirements that allow certain persons under the minimum age to possess or purchase tobacco products:
    - A person who has had his or her disability of nonage removed under ch. 743, F.S; and
    - A person who is emancipated by a court of competent jurisdiction and released from parental care and responsibility.
- Provides that retailers must require proof of age from a purchaser of tobacco products unless the purchaser appears to be 30 years of age or older, and similarly requires a delivery person to require proof of age in similar circumstances.

Nicotine Products Regulation in Florida

The bill increases the minimum age to lawfully purchase and knowingly possess nicotine products and nicotine dispensing devices in Florida from 18 years old to 21 years old, unless a person falls under an exemption to the minimum age requirement including being in the military or acting in the scope of lawful employment.

The bill also establishes state regulatory oversight for retailers of nicotine products and nicotine dispensing devices. The regulations for the sale of nicotine products and nicotine dispensing devices mirror the regulations for the sale of tobacco products. However, the bill **does not impose** a tax or permit fee similar to tobacco products.

The bill includes regulations for the sale and delivery of nicotine products and nicotine dispensing devices through the mail and over the Internet, which are similar to the regulations for tobacco products, to ensure sales and deliveries are not to persons under age.

The bill creates a retail nicotine products dealer permit, which must be obtained from DBPR to be able to sell nicotine products and nicotine dispensing devices, at retail, in this state. This permit however does not allow for the sale of tobacco products. However, the bill does allow a tobacco products dealer permit holder to sell nicotine products and nicotine dispensing devices, in addition to tobacco products.

The bill requires a person to obtain a retail nicotine products dealer permit for each place of business or the premises where nicotine products or nicotine dispensing devices are to be sold face-to-face or through a vending machine. The bill also requires a person who owns, leases, furnishes, or operates vending machines that dispense nicotine products or nicotine dispensing devices to obtain a permit. **There is no fee for the permit.**

The Division may only issue permits to persons who are 18 years of age or older or corporations with officers who are 18 years of age or older.[87] The bill allows the place or premises covered by a permit to be subject to inspection and search without a search warrant by the Division or its authorized assistants, and by sheriffs, deputy sheriffs, or police officers, to determine compliance with requirements for nicotine sales and dealing.

Anyone who deals nicotine products or nicotine dispensing devices at retail or allows a vending machine on the premises without a permit is subject to a $500 fine.

[87] S. 569.003, F.S.

The bill repeals s. 877.112, F.S., which currently regulates nicotine products in this state.

Requirements for Retail Nicotine Products Dealers

The bill requires nicotine product retailers to post a clear and conspicuous sign that the sale of nicotine products is prohibited to persons under the age of 21 and that proof of age is required for purchase. The Division is required to make the signs available to nicotine product retailers. Nicotine product retailers must also 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 nicotine product.

Any person who fails to post a clear and conspicuous sign commits a second degree misdemeanor.

The bill prohibits the sale or delivery of nicotine products except when those products are under the direct control or line of sight of the nicotine product retailer or the nicotine product retailer's agent or employee. The bill permits nicotine products to be sold from a vending machine if the vending machine has:

- An operational lockout device which is under the control of the nicotine product retailer or the nicotine product retailer's agent or employee who directly controls the sale of items through the machine by triggering the lockout device to allow the dispensing of one nicotine product;
- A mechanism on the lockout device to prevent the machine from functioning if the power source for the lockout device fails or if the lockout device is disabled; and
- A mechanism to ensure that only one nicotine product is dispensed at a time.

The bill also prohibits nicotine products from being sold or displayed by means of self-service merchandising. Self-service merchandising means the open display of nicotine products or nicotine dispensing devices for direct customer access and handling before the purchase of such product without the assistance of the retailer or the retailer's employee.[88]

The bill exempts establishments that prohibit people under the age of 21 on premises from such sales requirements.

The bill requires retailers to require proof of age from a purchaser of a nicotine product or a nicotine dispensing device unless the purchaser appears to be 30 years of age or older.

Mitigating Penalties for Underage Sales

If the Division determines a nicotine product retailer or a nicotine product retailer's employee violated the regulations for nicotine product and nicotine dispensing device retailers, the Division can suspend or revoke the retailer's permit or assess a fine up to $1,000 for each violation.

If the Division discovers a nicotine product retailer's employee illegally sold tobacco products to a person under 21, the bill allows the Division to mitigate penalties if:

- The nicotine product retailer is qualified as a responsible retailer by establishing and implementing specified practices designed to ensure that the nicotine product retailer's employees comply with Florida laws regulating the sale of nicotine products and nicotine dispensing devices, such as employee training;
- The nicotine product retailer had no knowledge of that employee's violation at the time of the violation and did not direct, approve, or participate in the violation; and
- If the sale was made through a vending machine, the machine was equipped with an operational lock-out device.

Nicotine Products and Persons under 21 Years of Age

[88] S. 877.112(1), F.S.

The bill prohibits the sale, delivery, bartering, furnishing or giving of nicotine products or giving sample to products to anyone under the age of 21. A violation of this prohibition is a second degree misdemeanor. A second or subsequent violation within one year of the first violation is a first degree misdemeanor.

A person charged with such a violation to have a complete defense if:

- The buyer falsely represented that he or she was 21 years of age or older;
- The appearance of the buyer would indicate, to a prudent person, that the buyer was 18 years of age or older; and
- The buyer presented false identification upon which the person relied upon in good faith.

The bill prohibits persons under the age of 21 from knowingly possessing, directly or indirectly, any nicotine products, or misrepresenting their age or military service for the purpose of obtaining such products. Any person who violates such prohibition commits a non-criminal violation, punishable as follows:

- A first violation carries a penalty of 16 hours of community service or a $25 fine, and attendance at a school-approved anti-tobacco and anti-nicotine program, if locally available.
- A second violation within 12 weeks of the first violation is punishable with a $25 fine.
- A court may suspend or withhold issuance of a driver's license for anyone who has failed to complete the community service, pay the fine, or attend the school-approved anti-tobacco and anti-nicotine program.
    - A court may suspend or withhold issuance of a drivers' license for 30 days for a first violation, and for 45 days for a second violation within 12 weeks of the first violation.

However, this does not include any person under the age of 21 who:

- Is in the military reserve or on active duty in the Armed Forces of the United States; or
- Is acting in his or her scope of lawful employment.

The bill requires 80 percent of all civil penalties received from violating prohibitions related to the possession or sale of nicotine products by a county court to 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 nicotine products and or nicotine products by children. The remaining 20 percent of civil penalties received by a county court is required to remain with the clerk of the county court to cover administrative costs.

The bill authorizes the Division and any law enforcement officer to enforce these provisions. A local government may also designate certain employees or agents as tobacco and nicotine product enforcement officers. A tobacco and nicotine product enforcement officer or a correctional probation officer may issue a citation to a person under the age of 21, whom the officer has reasonable cause to believe is knowingly possessing tobacco products, nicotine products, or nicotine dispensing devices, or is lying about their age or military service in order to obtain such products.[89]

Mail Order, Internet, and Other Remote Sales of Nicotine Products in Florida

The bill creates requirements for the delivery of mail order, Internet, and other remote sales of nicotine products and nicotine dispensing devices to consumers, referred to as "delivery sales." Each person who mails, ships, or otherwise delivers nicotine products or nicotine dispensing devices in connection with an order for a delivery sale to a consumer must:

- Include, as part of the shipping documents, in a clear and conspicuous manner, the following statement: "Nicotine Products: Florida law prohibits shipping to individuals under 21 years of age."

[89] S. 569.12, F.S.

- Use a method of mailing, shipping, or delivery which obligates the delivery service to:
    - Require the signature of a person 21 years of age or older 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 30 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.

Before the first delivery to a consumer, the bill requires the person mailing, shipping, or delivering the nicotine products to:

- Obtain a certification from the person accepting delivery that includes reliable confirmation that the person accepting the delivery is 21 years of age or older, and a written statement under penalty of perjury providing the person's date of birth, address, and confirmation that the person wants to accept the delivery;
- Make a good faith effort to verify the information in the certification by checking the information against a commercially available database or obtaining a photocopy of the person's ID;
- Provide the person accepting the delivery a notice stating nicotine products are illegal for underage persons and sales of such products are restricted to individuals who provide verifiable proof of legal age to purchase;
- Receive payment by a credit card or debit card in the name of the person accepting the delivery or a personal or company check of the person accepting the delivery, if the order is made in accordance with an advertisement on the Internet;
- Submit to the credit card company necessary information so that the words "nicotine product" appear on the person's credit card statement when a purchase is made using a credit card; and
- Make a phone call to the person accepting the delivery to confirm the order before shipping the order.

The bill requires a person who accepts a purchase order for a delivery sale and delivers the nicotine products or nicotine dispensing devices without using a delivery service to comply with all of the delivery service requirements.

The bill imposes a penalty for any person, who is 21 years or older, who knowingly violates the delivery sale's requirements as a misdemeanor of the second degree.

The bill requires the Division to submit an annual report, by December 31st, to the Governor and Legislature on the progress of implementing and enforcing the above requirements, including:

- The number and results of compliance visits by the Division;
- The number of violations for failure of a retailer to hold a valid permit;
- The number of violations for selling nicotine products and nicotine dispensing devices to anyone under the age of 21 and the results of administrative hearings on such violations; and
- The number of people under the age of 21 cited, including sanctions imposed as a result of such citation, for misrepresenting their age, purchasing nicotine products or nicotine dispensing devices underage, and misrepresenting military service for the purpose of obtaining such products underage.

The bill changes the title of ch. 569, F.S., from "Tobacco Products" to "Tobacco and Nicotine Products." The bill directs the Division of Law Revision to create parts I and II of ch. 569, F.S., entitled "Tobacco Products" and "Nicotine Products," respectively.

Preemption

The bill preempts to the state the establishment of the minimum age for the sale and delivery of tobacco products, nicotine products, and nicotine dispensing devices, and the regulation of the marketing of such products. However, the preemption does not prohibit a local government's ability to

require licensure for the retail sale of tobacco products, nicotine products, and nicotine dispensing devices.

B. SECTION DIRECTORY:

Section 1. Amending s. 210.095, F.S., increasing the age of a person who may receive tobacco products that have been shipped and violations thereof.

Section 2. Amending s. 386.212, F.S., increasing the age of person who may smoke or vape within a certain distance of a school.

Section 3. Renames ch. 569, F.S., as "Tobacco and Nicotine Products."

Section 4. Directs the Division of Law Revision to create part I of ch. 569, F.S., entitled “Tobacco Products” and to create part II of ch. 569, F.S., entitled “Nicotine Products.”

Section 5. Amending s. 569.002, F.S., relating to definitions.

Section 6. Amending s. 569.003, F.S., relating to tobacco products dealer permits.

Section 7. Amending s. 569.004, F.S., relating to consent to inspection and search without warrant.

Section 8. Amending s. 569.006, F.S., relating to retail tobacco products dealers; administrative penalties.

Section 9. Amending s. 569.007, F.S., relating to the sale or delivery of tobacco products.

Section 10. Amending s. 569.0075, F.S., relating to the prohibition of giving samples of tobacco products.

Section 11. Amending s. 569.008, F.S., relating to responsible retail tobacco products dealers.

Section 12. Amending s. 569.009, F.S., relating to rulemaking authority.

Section 13. Amending s. 569.101, F.S., increasing the age of a person who may purchase tobacco products.

Section 14. Amending s. 569.11, F.S., increasing the age of a person who may possess tobacco products.

Section 15. Amending s. 569.12, F.S., relating to jurisdiction; tobacco product enforcement officers or agents; enforcement.

Section 16. Amending s. 569.14, F.S., relating to posting of a sign stating that the sale of tobacco products to persons under 18 years of age is unlawful; enforcement; penalty.

Section 17. Amending s. 569.19, F.S., relating to annual report.

Section 18. Creating s. 569.24, F.S., preempting the establishment of the minimum age for the sale and delivery of tobacco and nicotine products and the marketing of such products to the state.

Section 19. Creating s. 569.31, F.S., relating to definitions.

Section 20. Creating s. 569.32, F.S., requiring retailers of nicotine products to obtain a retail nicotine products dealer permits.

Section 21. Creating s. 569.33, F.S., requiring retail nicotine products dealer permit holders to consent to certain inspections.

Section 22. Creating s. 569.34, F.S., creating penalties for operating without a retail nicotine products dealer permit.

Section 23. Creating s. 569.35, F.S., creating administrative penalties for retail nicotine products dealers.

Section 24. Creating s. 569.37, F.S., creating regulations for the retail sale of nicotine products.

Section 25. Creating s. 569.38, F.S., creating prohibitions for giving samples of nicotine products.

Section 26. Creating s. 569.381, F.S., creating responsible retail nicotine products dealer qualifications.

Section 27. Creating s. 569.39, F.S., granting rulemaking authority to DBPR.

Section 28. Creating s. 569.41, F.S., providing penalties for the sale of nicotine products to underage persons.

Section 29. Creating s. 569.42, F.S., providing penalties for underage persons possessing nicotine products.

Section 30. Creating s. 569.43, F.S., requiring nicotine product retailers to post certain signs.

Section 31. Creating s. 569.44, F.S., requiring DBPR to perform an annual report.

Section 32. Creating s. 569.45, F.S., creating regulations for the delivery of nicotine products and penalties for violations of such regulations.

Section 33. Repeals s. 877.112, F.S.

Section 34. Provides an effective date of October 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

On April 12, 2019, the Revenue Estimating Impact Conference reviewed HB 7119 of the 2019 Florida Legislative Session. HB 7119 also increased the minimum age to purchase tobacco and nicotine products to 21 years of age. The Revenue Estimating Impact Conference estimated it will result in a reduction in Tobacco Tax and Surcharge collections. The following chart shows the impact over the 2019-20 through 2023-24 fiscal years (in millions):[90]

[90] Office of Economic & Demographic Research, April 12, 2019 Revenue Estimating Conference (http://edr.state.fl.us/Content/conferences/revenueimpact/archives/2019/_pdf/Impact0412.pdf). (last visited Mar. 19, 2021). Note: There is a possible negative impact on sales tax collected on nicotine dispensing devices. The EDR analysis only focuses on the impact on Tobacco Tax and Surcharge.

Fiscal Year	General Revenue	Trust Fund	Total
2019-20	$ (0.4)	$ (1.1)	$ (1.6)
2020-21	$ (0.6)	$ (1.7)	$ (2.3)
2021-22	$ (0.9)	$ (2.2)	$ (3.1)
2022-23	$ (1.1)	$ (2.8)	$ (3.9)
2023-24	$ (1.1)	$ (2.8)	$ (3.9)

The Department of Revenue (DOR) may see an increase in revenue as the bill allows 80 percent of civil penalties received by a county court relating to enforcement of underage possession and purchasing of nicotine products to be remitted to DOR. The impact is indeterminate.

There may be an indeterminate positive fiscal impact on the state due to a possible reduction in treatment of smoking and vaping related diseases and illnesses if these persons received services from a state program (e.g., Medicaid).

2. Expenditures:

The bill has a significant, indeterminate, negative fiscal impact on DBPR. The bill creates new duties of the Division relating to the regulation and enforcement of nicotine products and sales which will increase current workload on Division employees. The impact is indeterminate because the number of current retailers who sell nicotine products is unknown as they are not currently regulated by any state agency.

The bill requires the Division to create a new application for a retail nicotine products dealer permit, and issue such permits, the cost of which may be able to be absorbed within current resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The clerk of the county court may see an increase in revenue as the bill allows twenty percent of civil penalties received by a county court relating to enforcement of underage possession and purchasing of nicotine products to remain with the clerk. The impact is indeterminate.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill provides sufficient rule-making authority for DBPR to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES