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BILL ANALYSIS



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Senate Bills 651 and 652 (as introduced 11-9-23)

Sponsor: Senator Sam Singh

Committee: Regulatory Affairs

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INTRODUCTION

Senate Bill 651 would establish licensure requirements for nicotine and tobacco retailers. An unlicensed establishment and an individual acting on behalf of an unlicensed establishment could not sell nicotine or tobacco products. The bill would prescribe administrative fines, licensure sanctions, and misdemeanor penalties for specific violations of its licensure requirements and prohibitions. To obtain or renew a license, an establishment would have to apply to the Department of Health and Human Services (DHHS) and pay a DHHS-prescribed application fee. The DHHS would have to begin accepting license applications within 15 months after the bill's effective date. The bill's application fees and administrative and civil fines would have to be deposited into the proposed Nicotine and Tobacco Regulation Fund. The DHHS would have to use the Fund to administer and enforce compliance with the bill, such as for conducting two unannounced compliance checks on each establishment annually.

Senate Bill 652 would provide that the Age of Majority Act would not supersede provisions of the Youth Tobacco Act, renamed the Nicotine and Tobacco Act by Senate Bill 651, and the Michigan Regulation and Taxation of Marihuana Act. It is tie-barred to Senate Bill 651.

BRIEF FISCAL IMPACT

Senate Bill 651 would have an indeterminate negative fiscal impact on the DHHS, no significant impact on the Department of Treasury, and a positive fiscal impact on local units of government. The Department of Treasury would incur minimal costs to establish the Nicotine and Tobacco Regulation Fund. Additionally, the bill would have an indeterminate negative fiscal impact on the DHHS, as total costs would depend on implementation expenses and the appropriations made by the Legislature from the Nicotine and Tobacco Regulation Fund. Local units of government would receive revenue collected from misdemeanor fines imposed under the bill.

Senate Bill 652 would have no fiscal impact on the State or local units of government.

MCL 722.641 et al. (S.B. 651)
722.52 & 722.53 (S.B. 652)

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CONTENT

Senate Bill 651 would amend the Youth Tobacco Act to do the following:

- Require an establishment to hold a valid license to sell a nicotine or tobacco product at retail.
- Prescribe administrative fines and licensing sanctions to a person who sold a nicotine or tobacco product on behalf of an establishment that was unlicensed.
- Prescribe requirements for new licenses and license renewals, including conditions under which a license could be denied or revoked.
- Allow the DHHS to promulgate rules to implement licensure requirements.
- Require the DHHS to begin accepting license applications and affidavits for temporary exemption before licensure within 15 months after the bill's effective date.
- Prohibit a licensed establishment from participating in the delivery of a nicotine or tobacco product off-premises, knowingly selling a nicotine or tobacco product to a person that intended to resell the product, or selling a nicotine or tobacco product itinerantly, remotely, or by flash retail.
- Prohibit an unlicensed establishment from displaying, advertising, or selling its nicotine and tobacco products.
- Prescribe administrative fines and license suspensions or revocations to an establishment that violated the bill's provisions.
- Create the Nicotine and Tobacco Regulation Fund and require fees and fines collected by the DHHS to be deposited into the Fund to be spent on appropriation to ensure compliance with the bill.
- Require the DHHS to conduct at least two unannounced compliance checks per year at each licensed establishment and publish the results of each check.
- Prescribe the conditions under which the DHHS could seize, confiscate, and destroy a nicotine or tobacco product.
- Modify penalties levied on an establishment for selling, giving, or furnishing an illegal nicotine or tobacco product to a minor to include higher penalties and the suspension and revocation of an establishment's license.
- Require an establishment to examine the photographic identification of an individual attempting to purchase a nicotine or tobacco product and prescribe requirements for this photographic identification.
- Prescribe misdemeanor penalties for a person who sold, gave, or furnished an unqualified vapor product to a minor.
- Modify establishment's signage requirements.

Senate Bill 652 would amend the Age of Majority Act to exempt from the Act the Michigan Regulation and Taxation of Marihuana Act and the Youth Tobacco Act.

Senate Bill 651 is described in greater detail below.

Senate Bill 651

Licensure to Sell Nicotine or Tobacco Products

Generally, the bill would require an establishment to hold a valid license to sell a nicotine or tobacco product at retail. "Establishment" would mean a place of business, or area within a place of business, where a nicotine or tobacco product is sold, or is intended to be sold, at retail. "Nicotine or tobacco product" would mean any of the following:

- A product that contains, is made of, or is derived from nicotine or tobacco, from any source; that is intended for human consumption or is likely to be consumed by humans, by any means, including inhaling, absorbing, or ingesting; and that is not regulated as a drug or device by the United States Food and Drug Administration.
- An alternative nicotine product.
- A tobacco product.
- A qualified vapor product.
- A component, part, or accessory of a product, including filters, rolling papers, blunt or hemp wraps, flavor enhancers, or pipes, if the component, part, or accessory is not a product regulated as a drug or device by the United States Food and Drug Administration.

Flash retail establishments and itinerant establishments would be ineligible for licensure. "Flash retail" would mean the use of a mobile, pop-up, or temporary structure for retail.

A *person*¹ could not sell a nicotine or tobacco product at retail unless the sale was at, and on behalf of, an establishment that held a valid license or was temporarily exempt from licensure; however, this provision would not apply to a nonmanagerial employee who was at an establishment, was employed by the establishment, and did not know, and did not have reason to know, that the establishment did not have a valid license or was temporarily exempt from licensure.

A person that sold a nicotine or tobacco product without a license would be subject to an administrative fine and license ineligibility as follows:

- For a first violation in a period of 36 months, \$500, and the person would be ineligible to be granted a license for the 30 days immediately after the first violation.
- For a second violation in a period of 36 months, \$1,000, and the person would be ineligible to be granted a license for the three years immediately after the second violation.
- For a third or subsequent violation in a period of 36 months, \$2,000, and the person would be ineligible to be granted a license for the five years immediately after the third or subsequent violation.

Application for & Renewal of Licensure

An application for a new license would have to be in a form prescribed by the DHHS. In the application, the applicant would have to include the following information for each establishment for which the applicant requested a license:

- The name, address, and telephone number of the establishment and of each operator of the establishment.
- One name and mailing address to receive communication under the Act; an establishment, or an operator of an establishment, that did not include a specific name and mailing address would be consenting to receive communication at an address listed prior.
- If the establishment were required to be licensed under the Tobacco Products Tax Act, proof that the establishment was licensed, as applicable, under that Act.
- The establishment's and each operator of the establishment's record for violations of the Youth Tobacco Act that occurred in the five years immediately before the date the application was submitted; the record would have to include the date and location of each violation.
- The signature of each operator of the establishment, under the penalty of perjury.

¹ "Person" would mean an individual or a partnership, corporation, limited liability company, association, governmental entity, or other legal entity.

- Other information that the DHHS found necessary for the administration or enforcement of the Act.
- Payment for the new license fee.
- An affidavit that affirmed that 1) the establishment had not sold and would not sell a nicotine or tobacco product at retail without holding a valid license, and 2) each operator of the establishment had read the Act and had provided training to each employee of the establishment, if any.

The training described in the latter requirement would have to include the following information:

- That the sale of a nicotine or tobacco product to a minor was prohibited by law.
- The consequences of selling a nicotine or tobacco product to a minor.
- The types of identification that were permissible under the Act for proof of an individual's age.

An establishment that had an application pending DHHS approval would have to inform the DHHS of a change in the information submitted with the application at least ten business days after the change occurred.

The DHHS would have to set the fee to apply for a new license. The new license fee, in conjunction with the renewal fee, would have to be sufficient to cover the cost to administer and enforce licensure under the Act. Additionally, the bill would require DHHS to begin accepting affidavits and license applications within 15 months after the bill's effective date.

Within 90 days after the DHHS received a complete application for a new license, the DHHS would have to grant a license to each establishment for which the applicant requested a license unless the DHHS found that one or more of the following bases of denial exist:

- Information included in the application was inaccurate or false.
- The establishment, or an operator of the establishment, was ineligible for licensure under the Act.
- The applicant requested a license for an establishment to sell a nicotine or tobacco product that was prohibited by applicable law.
- Granting a license to the establishment would not be consistent with the public health and general welfare, as evidenced by the establishment's, or an operator of the establishment's, history of noncompliance with the Act or any other law that related to the retail sale of a nicotine or tobacco product.
- The establishment, or an operator of the establishment, had an unpaid fine under the Act.

For each license and each license renewal, the DHHS would have to issue a certificate of licensure to the establishment that held the license. Subject to a license suspension or revocation, a license, a license renewal, and a certificate of licensure would be valid for one year.

To renew a license, an establishment would have to apply to the DHHS between 30 and 60 days before the expiration of the license term. If the establishment were subject to a license suspension period at the expiration of the license term, the establishment would have to apply to the DHHS within 60 days before the expiration of the license term. If an establishment failed to submit a license renewal application in a timely manner, the establishment would have to apply for a new license.

An application for a renewed license would have to be in a form prescribed by the DHHS. In the application, the applicant would have to include the following information for each establishment for which the applicant requested a renewed license:

- The name, address, and telephone number of the establishment and each operator of the establishment.
- An affidavit that affirmed 1) the establishment had not sold and would not sell a nicotine or tobacco product at retail without holding a valid license, and 2) the establishment or an operator of the establishment was not subject to a license ineligibility period under the Act.
- The signature of each operator of the establishment, under the penalty of perjury.
- Other information that the DHHS found necessary for the administration or enforcement of the Act.
- Payment for the renewal fee.

If the DHHS received a complete application for a renewed license, it would have to renew the license of each establishment for which the applicant requested a renewed license within 60 days after receiving the application or, for an establishment subject to a license suspension period, within 60 days after the expiration of the suspension period.

In addition to the bases of denial previously described, the bill would require the DHHS to deny, suspend, revoke, or refuse to renew an establishment's license for good cause, which would include all the following:

- An applicant for the establishment submitted a false or fraudulent license application.
- An applicant for the establishment included a false or fraudulent statement in a license application.
- The establishment possessed a certificate that was false or fraudulent.
- The establishment displayed a certificate that was false or fraudulent.

Transfer or Change of an Establishment's Ownership Interest

An establishment's license would not be transferable to another establishment. When all ownership interest in an establishment was transferred, the establishment's history of violations under the Act while under the ownership of the transferor would not be assumed by the transferee, if the transfer met all the following requirements:

- The transfer was the result of an arm's-length transaction.
- The transfer was not between relatives or related entities.
- The transfer was not made to avoid a consequence of a violation of the Act.

"Arm's-length transaction" would mean a transaction, in good faith and for consideration that reflects fair market value, between two or more informed parties that are all uncompelled and willing to make the transaction.

An establishment would have to inform the DHHS if any of the following changes occurred within 60 days of the change:

- Ownership interest in the establishment was transferred.
- A person became an operator of the establishment and was not included on the establishment's most recent license application.
- A person ceased to be an operator of the establishment.

Temporary Licensure Exemptions for Current Sellers

An establishment would be temporarily exempt from the licensure provisions of the Act if an affidavit were filed with the DHHS and met the following requirements:

- The affidavit affirmed 1) before the bill's effective date, the establishment lawfully sold a nicotine or tobacco product at retail, 2) an application for licensure had been submitted for the establishment, and DHHS approval was pending, and 3) the establishment had not been granted a license.
- The affidavit included the signature of each operator of the establishment, under the penalty of perjury.

An establishment's temporary exemption would expire when the establishment's application was no longer pending DHHS approval.

Other Requirements

The bill would require an establishment to do the following:

- If the establishment held a license, publicly display the applicable certificate of licensure issued, or a copy of the certificate.
- Prohibit the sale, consumption, and use of marihuana on the establishment's premises.
- If the establishment did not hold a valid license and was *not* temporarily exempt from licensure, 1) keep each of the establishment's nicotine or tobacco products out of public view, and 2) refrain from advertisement that could lead a reasonable consumer to believe that a nicotine or tobacco product could lawfully be obtained at the establishment.

Under the bill, an establishment could *not* do any of the following:

- Deliver, or knowingly participate in a delivery of, a nicotine or tobacco product to a consumer that was not on the establishment's premises.
- Knowingly sell a nicotine or tobacco product to a person that intended to deliver the nicotine or tobacco product to a consumer as part of a commercial transaction.
- Sell a nicotine or tobacco product itinerantly, remotely, or by flash retail.

An establishment that violated these requirements would be subject to an administrative fine of between \$250 and \$2,000. The DHHS would also have to suspend or revoke the establishment's license as follows:

- For a first violation in a period of 36 months, a 30-day suspension.
- For a second violation in a period of 36 months, a 90-day suspension.
- For a third violation in a period of 36 months, a one-year suspension.
- For a fourth or subsequent violation in a period of 36 months, the DHHS would have to revoke the license.

The DHHS could bring an action to collect these fines.

Departmental Duties

The bill would require the DHHS and the Department of Treasury to share information that was necessary for the effective administration or enforcement of the Act.

The DHHS could not deny, suspend, revoke, or refuse to renew a license or impose an administrative fine or license ineligibility period under the Act unless the person subject to

the DHHS's action was provided notice and an opportunity for a hearing. After an individual was provided notice and an opportunity for a hearing, the DHHS could seize and confiscate a nicotine or tobacco product that was possessed, delivered, offered for sale, or sold in violation of the Act. If all appeals, including judicial review, were exhausted for a nicotine or tobacco product seized and confiscated, the DHHS would have to destroy the nicotine or tobacco product.

Prohibition Against Sales to Minors, Requirements to Check Identification

Among other things, the Act prohibits a person from selling, giving, or furnishing a tobacco product, vapor product, or alternative nicotine product to a minor, including through a vending machine. A person who violates this prohibition is guilty of a misdemeanor punishable by 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.

Instead, the bill would delete the misdemeanor penalties and specify that a person could not sell, give, or furnish a nicotine or tobacco product to a minor, which would include an alternative nicotine product, a tobacco product, a *qualified* vapor product, or a component or accessory, including those sold through vending machine. "Qualified vapor product" would mean one or both of the following:

- A vapor product that produces vapor from nicotine or tobacco.
- A vapor product that contains nicotine or tobacco.

Additionally, the bill would specify that the prohibition would not apply to a minor's handling or transportation of a nicotine or tobacco product under the terms of the minor's employment. Nor would this prohibition apply if an establishment sold, gave, or furnished a nicotine or tobacco product to a minor after the establishment made a diligent and good-faith effort to examine photographic identification in person.

The bill would *require* an establishment to examine, in person, photographic identification of the individual attempting to purchase a nicotine or tobacco product before the product was sold, given, or furnished. The photographic identification would have to meet all the following requirements:

- Appear to be authentic and government issued.
- Establish the identity of the minor.
- Misrepresent that the minor is an individual 21 years of age or older.

An establishment that violated the provisions above would be subject to an administrative fine, suspension or revocation of the establishment's license, or both, as follows:

- For a first violation in a period of 36 months, \$1,500.
- For a second violation in a period of 36 months, \$2,000, and if the establishment held a license, the DHHS would have to suspend the license for 30 days.
- For a third violation in a period of 36 months, \$2,500, and if the establishment held a license, the DHHS would have to suspend the license for one year.
- For a fourth or subsequent violation in a period of 36 months, \$3,000, and if the establishment held a license, the DHHS would have to revoke the license.

The DHHS could bring an action to collect these fines.

Additionally, the bill would prescribe a misdemeanor penalty for a person who sold, gave, or furnished an *unqualified* vapor product to a minor, including through a vending machine, 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.

These misdemeanor penalties would not apply to a minor's handling or transportation of an unqualified vapor product under the terms of the minor's employment. Nor would this prohibition apply if an establishment sold, gave, or furnished an unqualified vapor product to a minor after the establishment made a diligent and good-faith effort to examine photographic identification in person, which would have to meet the requirements outlined above.

Compliance Checks

The bill would require the DHHS to monitor each establishment for compliance with the Act. The DHHS, or its designee, would have to conduct at least two unannounced compliance checks per year at each establishment. Each compliance check would have to involve the following:

- An individual, 18 years of age or older but less than 21 years of age, who entered the establishment and attempted a purchase of a nicotine or tobacco product.
- A visual inspection to ascertain whether the establishment sold, or offered to sell, a nicotine or tobacco product that was prohibited under applicable law.

Within three months after an establishment failed a compliance check, the DHHS, or its designee, would have to conduct an additional compliance check at the establishment. At least annually, the DHHS would have to publish the results of each compliance check conducted during the applicable time frame.

Required Signage

The Act requires a person who sells tobacco products, vapor products, or alternative nicotine products at retail to post, in a place close to the point of sale and conspicuous to employees and customers, a sign produced by the DHHS.

If the sign is more than six feet from the point of sale, it must be 5-1/2 inches by 8-1/2 inches and the statement required must be printed in 36-point boldfaced type. If the sign is six feet or less from the point of sale, it must be 2 inches by 4 inches and the statement required must be printed in 20-point boldfaced type. Currently, the sign must read as follows:

"The purchase of a tobacco product, vapor product, or alternative nicotine product by a minor under 21 years of age and the provision of a tobacco product, vapor product, or alternative nicotine product to a minor are prohibited by law. A minor who unlawfully purchases or uses a tobacco product, vapor product, or alternative nicotine product is subject to criminal penalties."

The bill would require this sign to be unobstructed and placed within six feet from each point of sale of nicotine and tobacco products. It would have to be 14 inches by 11 inches, with the text printed with uppercase letters using high-contrast red ink. Additionally, the bill would amend the text to read as follows:

"The purchase of a tobacco product, vapor product, or alternative nicotine product by an individual who is less than 21 years of age and the provision of a nicotine or tobacco product to an individual who is less than 21 years of age are prohibited by law. An individual who is less than 21 years of age and unlawfully purchases, possesses, or uses a tobacco product, vapor product, or alternative nicotine product is subject to criminal penalties."

If the DHHS, or the Department's designee, observed a violation of these requirements, notified the establishment in writing of the violation, and in the 30-day period immediately after the notification the establishment failed to cure the violation, the establishment would be subject to an administrative fine of \$50.

The Nicotine and Tobacco Regulation Fund

The bill would create the Fund in the State Treasury and require the bill's fees and administrative fines to be deposited into the Fund. The State Treasurer could deposit money and other assets from any source into the Fund. The State Treasurer would have to direct the investment of the fund and credit interest and earnings from the investments to the Fund. The DHHS would be the administrator of the Fund for auditing purposes.

The DHHS could spend money from the Fund, on appropriation, only for the administration and enforcement or licensure under the Act, including all the following:

- To ensure compliance with applicable law that related to the retail sale of a nicotine or tobacco product, the education and training of persons that sold, or intended to sell, a nicotine or tobacco product at retail; DHHS staff; and others that were subject to or enforce the applicable law.
- Application processing.
- Compliance checks.

Deleted Provisions

Currently, the Act specifies that it is an affirmative defense to a charge of a violation of selling a tobacco product, vapor product, or alternative nicotine product 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, vapor products, or alternative nicotine products, as applicable, to individuals less than 21 years of age and that the defendant enforced and continues to enforce the policy. The Act prescribes a process for the defendant and prosecutor to provide and rebut the affirmative defense

The Act also prescribes requirements for verifying the age of an individual before selling, offering for sale, giving, or furnishing a tobacco product, vapor product, or alternative nicotine product to the individual. Generally, a person must verify that the individual is at least 21 years of age by examining identification if the individual appears younger than 27 years old or performing an age verification through a third-party servicer for sales made on the internet.

The bill would delete these provisions.

Title

Currently, the Act is known as the Youth Tobacco Act. The bill would change this to the "Nicotine and Tobacco Act".

PREVIOUS LEGISLATION

(This section does not provide a comprehensive account of previous legislative efforts on this subject matter.)

Senate Bill 651 is similar to Senate Bill 575 of the 2021-2022 Legislative Session and Senate Bill 782 of the 2019-2020 Legislative Session.

FISCAL IMPACT

Senate Bill 651

The bill could have an indeterminate negative fiscal impact and an indeterminate positive fiscal impact on the State and local government. New misdemeanor arrests and convictions under the bill could increase resource demands on law enforcement, court systems, community supervision, and jails; however, it is unknown how many people would be prosecuted under provisions of the bill. Local jail costs vary by jurisdiction and thus costs for local governments would vary. Local revenue to local libraries could increase under the bill as any additional revenue from imposed fines would go to local libraries.

The bill would not have a significant fiscal impact on the Department of Treasury. The administrative fines as well as licensing fees imposed under the bill would be deposited into the newly-created Nicotine and Tobacco Regulation Fund administered by Treasury. The exact amount of revenue directed to the Fund is unknown and would depend on the magnitude and volume of fees and administrative fines collected under the bill.

The establishment of the Fund would result in minimal costs for the Department of Treasury, but it is likely that investment and management activities would not result in any significant increase in expenditures for the Department. The bill does not specify whether money in the Fund would remain in the Fund at the end of the fiscal year.

The bill would have an indeterminate negative fiscal impact on DHHS. The total cost impact to the Department would depend on the implementation costs minus the amount appropriated by the Legislature from the Nicotine and Tobacco Regulation Fund. Under the bill, the Department would need to administer and enforce licensure for an establishment to sell nicotine or tobacco products at retail. The total cost to the Department would depend on the number of additional full-time equivalents (FTEs) necessary to process applications and perform compliance checks, as well as the cost of any information technology programs and upgrades, which could be significant. The average annual staffing cost incurred by the Department would be approximately \$138,900 per FTE, which includes salary and benefits.

These costs would be offset by fees collected upon submission of an application for a new license or the renewal of a license, which the bill states should be set at a level sufficient to cover the cost of administration and enforcement of licensure. These fees, along with other fees collected under the bill would be deposited into the Nicotine and Tobacco Regulation Fund.

Money from the Nicotine and Tobacco Regulation Fund could only be spent upon appropriation by the Legislature, meaning that it is likely that there would be a lag between when the Department incurred costs to establish the licensing program under the bill and when the fees deposited into the Fund were available.

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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.