

Legislative Analysis



NICOTINE AND TOBACCO ACT

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<http://www.house.mi.gov/hfa>

House Bill 6002 as introduced
Sponsor: Rep. Kristian Grant

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

House Bill 6003 as introduced
Sponsor: Rep. Abraham Aiyash

Committee: Families, Children and Seniors
Complete to 11-11-24

SUMMARY:

House Bill 6002 would amend the Youth Tobacco Act to do the following:

- Change the name of the act to the Nicotine and Tobacco Act.
- Require the licensure and regulation of establishments that sell *nicotine or tobacco products*.
- Prohibit selling or furnishing nicotine or tobacco products to *minors* (defined as individuals under the age of 21) and provide penalties.
- Create the Nicotine Regulation Fund in the state treasury.
- Prohibit persons from selling, giving or furnishing certain vapor products to minors.

Nicotine or tobacco products

For purposes of the bill, the term *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 (FDA) under 21 USC 351 to 360fff-8.
- An *alternative nicotine product*.
- A *tobacco product*.
- A *qualified vapor product*.
- A component, part, or accessory of a product described above, 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 FDA under 21 USC 351 to 360fff-8.

Alternative nicotine product means a noncombustible product containing that contains nicotine and is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means, but does not include a tobacco product, a vapor product, food, or a product regulated as a drug or device by the FDA under 21 USC 351 to 360fff-7.360fff-8.

Tobacco product means a product that contains tobacco and is intended for human consumption, including a cigar, a cigarette, noncigarette smoking tobacco, or

smokeless tobacco, but does not include a product regulated as a drug or device by the FDA under 21 USC 351 to 360fff-8.

Qualified vapor product would mean one or both of the following:

- A ***vapor product*** for the production of vapor from nicotine or tobacco.
- A vapor product that contains nicotine or tobacco.

Vapor product means a noncombustible product that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, to produce vapor from nicotine or any other substance, and the use or inhalation of which simulates smoking. Vapor product includes an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and a vapor cartridge or other container of nicotine or other substance in a solution or other form that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device. Vapor product does not include a product regulated as a drug or device by the FDA under 21 USC 351 to 360fff-8.

Establishment licensure

The bill would require an ***establishment*** to hold a valid license to sell a nicotine or tobacco product at retail, except as described below. The requirement would not take effect earlier than when the Department of Health and Human Services (DHHS) begins accepting affidavits and license applications as described below. Itinerant and ***flash retail*** establishments would be ineligible to hold a license.

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.

Flash retail would mean the use of a mobile, pop-up, or temporary structure for retail.

The bill would prohibit a person from selling a nicotine or tobacco product at retail unless the sale is at, and on behalf of, an establishment that holds a valid license or is temporarily exempt from licensure as described below. However, this would not apply to a ***nonmanagerial employee*** who is at an establishment and employed by the establishment and who does not know or have reason to know that the establishment does not hold a valid license or is not temporarily exempt from licensure.

Nonmanagerial employee means a cashier or clerk that does not have managerial control at their employer under the terms of their employment.

A person found in violation of the requirement or prohibition above 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 is ineligible to be granted a license for the 30 days immediately following the violation.
- For a second violation in a period of 36 months, \$1,000 and the person is ineligible to be granted a license for the three years immediately following the violation.
- For a third or subsequent violation in a period of 36 months, \$2,000 and the person is ineligible to be granted a license for the five years immediately following the violation.

An establishment would be required to do the following:

- If it holds a license, publicly display the applicable certificate of licensure or a copy.
- Prohibit the sale, consumption, and use of marijuana on its premises.
- If the establishment does not hold a valid license and is not temporarily exempt from licensure, keep its nicotine or tobacco products out of public view and refrain from advertisement that could lead a reasonable consumer to believe that a nicotine or tobacco product can be lawfully obtained at the establishment.

An establishment would be prohibited from doing any of the following:

- Delivering, or knowingly participating in a delivery of, a nicotine or tobacco product to a consumer that is not on the establishment's premises.
- Knowingly selling a nicotine or tobacco product to a person that intends to deliver the products to a consumer as part of a commercial transaction.
- Selling a nicotine or tobacco product itinerantly, remotely, or by flash retail.

An establishment found in violation of the requirements or prohibitions above would be subject to an administrative fine of up to \$2,000 (and not less than \$250). DHHS would have to suspend or revoke the establishment's license, if any, as follows:

- For a first violation in a period of 36 months, suspend the license for 30 days.
- For a second violation in a period of 36 months, suspend the license for 90 days.
- For a third violation in a period of 36 months, suspend the license for one year.
- For a fourth or subsequent violation in a period of 36 months, revoke the license.

DHHS could bring an action to collect a fine described above. A fine collected would have to be deposited in the Nicotine and Tobacco Regulation Fund.

DHHS responsibilities

DHHS would have to begin accepting license applications and temporary exemption affidavits no later than 15 months after the bill takes effect. DHHS would set the application fee for a new license. The new license fee, in conjunction with the renewal fee, would have to cover the cost to administer and enforce licensure under the bill.

An application for a new license would have to be on a form prescribed by DHHS, and an applicant would have to include the following information for each establishment requesting a license:

- The name, address, and phone number of the establishment.
- The name, address, and phone number of each operator of the establishment.
- For the establishment, or each operator, one name and mailing address to receive communication. An establishment or operator that does not include a name and mailing address consents to receiving communication at each operator address given above.
- Proof of any required licensure under the Tobacco Products Tax Act, as applicable.
- The establishment's and each operator's record, if any, for violations occurring in the previous five years, with the date and location of each violation.
- An affidavit affirming that the establishment has not sold and will not sell a nicotine or tobacco product at retail without holding a valid license and that each operator of the establishment has read the act and has provided training to each employee of the establishment, if any. This required training would have to include the following:
 - That the sale of a nicotine or tobacco product to a minor is prohibited by law.

- The consequences of selling a nicotine or tobacco product to a minor.
- The types of identification that are permissible under the act for proof of an individual's age.
- The signature, under the penalty of perjury, of each operator of the establishment.
- Other information DHHS finds necessary for the administration or enforcement of the act.
- Payment for the new license fee.

An establishment that has an application pending DHHS approval would have to inform DHHS of a change in the information submitted with the application no later than 10 business days after the change occurs.

Not later than 90 days after DHHS receives a complete application for a new license, it would have to grant a license to each establishment for which the applicant requested a license unless it finds that one or more of the following bases of denial exist:

- Information included in the application is inaccurate or false.
- The establishment, or an operator of the establishment, is ineligible for licensure.
- The applicant requests a license for an establishment to sell a nicotine or tobacco product that is 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's history of noncompliance with the act or any other law that relates to the retail sale of a nicotine or tobacco product.
- The establishment or an operator has an unpaid fine.

For each license granted and each license renewal, DHHS would have to issue a certificate of licensure to the establishment that holds the license.

Except as provided in the Administrative Procedures Act, and subject to a license suspension or revocation, a license and certificate of licensure would be valid for one year.

In addition to the bases of denial described above, DHHS would have to deny, suspend, revoke, or refuse to renew an establishment's license for good cause, including 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 possesses a certificate that is false or fraudulent.
- The establishment displays a certificate that is false or fraudulent.

License renewal

To renew a license for a period of one year, an establishment would have to submit an application for a renewed license as follows:

- If the establishment is *not* subject to a license suspension period at the expiration of the license term, no earlier than 60 days, and no later than 30 days, before the end of the license term.
- If the establishment *is* subject to a license suspension period at the expiration of the license term, no earlier than 60 days before the end of the license term, but no later than the day the license suspension period expires. An application submitted under this

provision would not be timely for purposes of section 91 of the Administrative Procedures Act.

If an establishment fails to submit a license renewal application, it would have to submit an application for a new license.

DHHS would have to set the fee to submit an application for a renewed license. The renewal fee, in conjunction with the new license fee, would have to be sufficient to cover the cost to administer and enforce licensure under the bill.

An application for a renewed license would have to be on a form prescribed by DHHS, and an applicant would have to include the following information for each establishment requesting a renewed license:

- The name, address, and phone number of the establishment.
- The name, address, and phone number of each operator of the establishment.
- An affidavit that affirms it has not sold and will not sell a nicotine or tobacco product at retail without holding a valid license and it or an operator is not subject to a license ineligibility period under the bill.
- The signature, under the penalty of perjury, of each operator of the establishment.
- Other information that DHHS finds necessary for the administration or enforcement of the act.
- Payment for the renewal fee.

If DHHS receives a complete application for a renewed license, it would have to renew the license of each establishment for which the applicant requested a renewal as follows:

- For an application from an establishment not subject to a license suspension period at the expiration of the license term, not later than 60 days after DHHS receives the application.
- For an application from an establishment that is subject to a license suspension period at the expiration of the license term, not later than 60 days after the expiration of the license suspension period.

DHHS could not renew the license of an establishment included in an application if it finds that one or more of the following bases of denial exist:

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

Except as provided in section 91 of the Administrative Procedures Act and subject to a license suspension or revocation, a license renewal would be valid for one year.

DHHS would have to monitor each establishment for compliance with the act, and it 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 who is 18, 19, or 20 years old who enters the establishment and attempts a purchase of a nicotine or tobacco product.
- A visual inspection to ascertain whether the establishment sells or offers to sell a nicotine or tobacco product that is prohibited under applicable law.

Not later than three months after an establishment fails a compliance check, DHHS or its designee would have to conduct an additional compliance check at the establishment as described above.

At least every year, DHHS would have to publish the results of each compliance check conducted during the applicable time frame.

Nontransferable license

The bill provides that an establishment's license is not transferable to another establishment. When all ownership interest in an establishment is transferred, the establishment's history of violations under the act, if any, while under the ownership of the transferor is not assumed by the transferee, as long as the transfer meets all the following requirements:

- It is the result of an *arm's-length transaction*.
- It is not between relatives or related entities.
- It is 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.

If any of the following changes occur with respect to an establishment, the establishment would have to inform DHHS no later than 60 days after the change:

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

Temporary establishment exemption

An establishment would be temporarily exempt from the licensure provisions if an affidavit is filed with DHHS that meets the following requirements:

- The affidavit affirms all of the following:
 - Before the effective date of the bill, the establishment lawfully sold a nicotine or tobacco product at retail.
 - An application has been submitted for the establishment, and the application is pending DHHS approval.
 - The establishment has not been granted a license.
- The affidavit includes, under the penalty of perjury, the signature of each operator.

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

Prohibited sales

The Youth Tobacco Act currently prohibits a person from selling, giving, or furnishing a tobacco, vapor, or alternative nicotine product to an individual under 21 years of age, including through a vending machine. A violation is a misdemeanor punishable by a fine of up to \$100 for a first offense, up to \$500 for a second offense, or up to \$2,500 for a third or subsequent offense.

The bill would instead prohibit an establishment from selling, giving, or furnishing a nicotine or tobacco product to an individual under 21 years of age, including through a vending machine. The bill would also require an establishment, before it sells, gives, or furnishes a nicotine or tobacco product to an individual, to examine, in person, photographic identification of the individual. An establishment that violates either the prohibition or the requirement 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 holds a license, the Department of Health and Human Services (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 holds a license, a one-year license suspension.
- For a fourth or subsequent violation in a period of 36 months, \$3,000 and, if the establishment holds a license, license revocation.

DHHS could bring an action to collect a fine described above. A fine collected would have to be deposited in the Nicotine and Tobacco Regulation Fund.

In addition, except as provided in the Michigan Regulation and Taxation of Marihuana Act, the bill would prohibit a person from selling, giving, or furnishing an unqualified vapor product (a vapor product that is not a *qualified vapor product* as defined above) to a minor, including through a vending machine. A person found in violation would be guilty of a misdemeanor punishable by a fine as follows:

- For a first offense, up to \$100.
- For a second offense, up to \$500.
- For a third or subsequent offense, up to \$2,500.

Similarly to current law, the two prohibitions described above would not apply to a minor's handling or transportation of a nicotine or tobacco product or an unqualified vapor product, as applicable, under the terms of their employment. The prohibition also would not apply to an establishment if it sells, gives, or furnishes a nicotine or tobacco product or an unqualified vapor product, as applicable, to a minor after making a diligent and good-faith effort to examine photographic identification in person. Identification under this exception would have to meet all of the following:

- 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.

Required signage

The act currently requires persons that sell tobacco, vapor, or alternative nicotine products to conspicuously post a DHHS-provided sign with a prescribed statement regarding the illegality of the sale of those products to, or their purchase by, someone who is under 21.

The bill would require an establishment to post an unobstructed sign produced by DHHS in a place six feet or less from each point of sale for a nicotine or tobacco product. The sign would have to be exactly 14 inches by 11 inches, with the following statement printed in 36-point boldfaced, uppercase type with high-contrast red ink:

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 product* is subject to criminal penalties.

If all of the following conditions were met, an establishment that violates the above signage requirements would be subject to an administrative fine of \$50:

- DHHS or its designee observed the violation.
- After that observation, DHHS notified the establishment in writing of the violation.
- The establishment failed to cure the violation in the 30-day period immediately following the notification.

DHHS could bring an action to collect a fine described above. A fine collected would have to be deposited in the Nicotine and Tobacco Regulation Fund.

Nicotine and Tobacco Fund

The bill would create the Nicotine and Tobacco Regulation Fund in the state treasury. The state treasurer could receive money or other assets from any source for deposit into the fund and would have to direct the investment of the fund and credit to it the interest and earnings from those investments. The treasurer would be the administrator of the fund for auditing purposes. DHHS would have to expend money from the fund, upon appropriation, only for the administrative enforcement of licensure, including all the following:

- To ensure compliance with applicable laws relating to the retail sale of a nicotine or tobacco product, the education and training of persons that sell or intend to sell a nicotine or tobacco product at retail, department staff, and others that are subject to or enforce the applicable law.
- Application processing.
- Compliance checks.

A fee collected under the act would have to be deposited in the fund.

Other provisions

DHHS could develop and issue rules to implement the licensure provisions of the bill.

DHHS and the Department of Treasury would have to share information necessary for the effective administration or enforcement of the act.

DHHS could not deny, suspend, revoke, or refuse to renew a license or impose an administrative fine or license ineligibility period unless the person subject to the action is provided notice and an opportunity for a hearing under the Administrative Procedures Act.

DHHS could seize and confiscate a nicotine or tobacco product possessed, delivered, offered for sale, or sold in violation of the act providing its possessor, deliverer, offeror, or seller notice and an opportunity for a hearing under the Administrative Procedures Act. Once all appeals, including judicial review, are exhausted for a nicotine or tobacco product so seized and confiscated, DHHS would have destroy the nicotine or tobacco product.

MCL 722.641, 722.44 and 722.645 and proposed MCL 722.641a

House Bill 6003 would amend the Age of Majority Act of 1971 to change a reference to the Youth Tobacco Act to instead refer to the Nicotine and Tobacco Act, the title proposed by House Bill 6002. The bill would also provide that the Age of Majority Act does not apply to the Michigan Regulation and Taxation of Marihuana Act (as its provisions allowing adult recreational marijuana use do not apply to individuals who are 18 or over but under 21). The bill cannot take effect unless House Bill 6002 is also enacted.

MCL 722.52 and 722.53

FISCAL IMPACT:

House Bill 6002 would increase state expenditures to the Department of Health and Human Services by an indeterminate amount and have no fiscal impact on local units of government. The fiscal impact of the bill would be dependent on the cost of the administration and regulation of the sale of tobacco products in the state. The department is required to create the applications for licensure and is responsible for setting the application fee amount. The fee amount must cover the cost to administer and enforce licensure. The department may expend funds from the Nicotine and Tobacco Regulation Fund for compliance checks and application processing. Increased revenue would be dependent on the amount of administrative fees for license violations that are collected from establishments. Administrative fees for rule violations range from \$50 to \$3,000 depending on the type of violation and number of violation that the establishment has received. Under the provisions of the bill, state costs would be covered by revenue from application fees along with administrative fines and would not require the use of GF/GP.

House Bill 6003 would not have a significant fiscal impact on state expenditures to DHHS or local units of government.

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