

BILL ANALYSIS

Senate Research Center

S.B. 1618
By: Estes
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In recent years, there has been a significant rise in the use of e-cigarettes or other vapor devices that are a non-tobacco means of delivering nicotine to the user. There are currently 45 million smokers in the country, and statistics indicate that 31 percent of people who tried e-cigarettes quit smoking within six months. E-cigarette sales exceeded \$2.4 billion in 2014 and continue to rise. The conversion of smokers to non-tobacco nicotine products is expected to yield millions of dollars of savings in healthcare costs to insurers and taxpayers.

The purpose of S.B. 1618 is to limit the ability of minors to obtain non-tobacco nicotine products. Despite the benefits these products provide in terms of moving users away from tobacco products, as a state we do not want to encourage the use of nicotine products among youth. The bill also places certain requirements on the sale and shipment of these nicotine products. The bill creates two new subchapters in the Health and Safety Code to accomplish these goals, rather than inserting the provisions in subchapters pertaining to tobacco products.

As proposed, S.B. 1618 amends current law relating to certain nicotine products other than cigarettes or tobacco products, including the sale or marketing of nicotine products to minors, the possession or use of those nicotine products by minors, and to delivery sales of those nicotine products, and creates an offense.

[**Note:** While the statutory reference in this bill is to the Texas Department of Health (TDH), the following amendments affect the Department of State Health Services, as the successor agency to TDH.]

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Department of State Health Services in SECTION 1 (Section 161.662, Health and Safety Code) of this bill.

Rulemaking authority is expressly granted to the comptroller of public accounts of the State of Texas in SECTION 1 (Section 161.655, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 161, Health and Safety Code, by adding Subchapters W and X, as follows:

SUBCHAPTER W. CERTAIN NICOTINE PRODUCTS OTHER THAN CIGARETTES OR TOBACCO PRODUCTS

Sec. 161.651. DEFINITIONS. Defines “cigarette,” “nicotine product,” “retail sale,” “retailer,” and “tobacco product.”

Sec. 161.652. SALE OF NICOTINE PRODUCTS TO PERSONS YOUNGER THAN 18 YEARS OF AGE PROHIBITED; PROOF OF AGE REQUIRED. (a) Provides that a person commits an offense if the person, with criminal negligence:

(1) sells, gives, or causes to be sold or given a nicotine product to someone who is younger than 18 years of age; or

(2) sells, gives, or causes to be sold or given a nicotine product to another person who intends to deliver it to someone who is younger than 18 years of age.

(b) Provides that, if an offense under this section occurs in connection with a sale by an employee of the owner of a store in which nicotine products are sold at retail, the employee is criminally responsible for the offense and is subject to prosecution.

(c) Provides that an offense under this section is a Class C misdemeanor.

(d) Provides that it is a defense to prosecution under Subsection (a)(1) that the person to whom the nicotine product was sold or given presented to the defendant apparently valid proof of identification.

(e) Provides that a proof of identification satisfies the requirements of Subsection (d) if it contains a physical description and photograph consistent with the person's appearance, purports to establish that the person is 18 years of age or older, and was issued by a governmental agency. Authorizes the proof of identification to include a driver's license issued by this state or another state, a passport, or an identification card issued by a state or the federal government.

Sec. 161.653. USE OF CERTAIN ELECTRONICALLY READABLE INFORMATION WHEN ESTABLISHING PROOF OF AGE. (a) Defines "transaction scan device."

(b) Authorizes a person to access electronically readable information on a driver's license, commercial driver's license, or identification certificate for the purpose of complying with Section 161.652.

(c) Prohibits information accessed under this section from being sold or otherwise disseminated to a third party for any purpose, including any marketing, advertising, or promotional activities. Authorizes the information to be obtained by court order or on proper request by the comptroller of public accounts of the State of Texas (comptroller), a law enforcement officer, or a law enforcement agency.

(d) Provides that a person who violates this section commits an offense and that an offense under this section is a Class A misdemeanor.

(e) Provides that it is an affirmative defense to prosecution under Section 161.652 that:

(1) a transaction scan device identified a license or certificate as valid and the defendant accessed the information and relied on the results in good faith; or

(2) if the defendant is the owner of a store in which nicotine products are sold at retail, the offense under Section 161.652 occurs in connection with a sale by an employee of the owner, and the owner had provided the employee with a transaction scan device in working condition and adequate training in the use of the transaction scan device.

Sec. 165.654. SALE OF NICOTINE PRODUCTS TO PERSONS YOUNGER THAN 27 YEARS OF AGE. (a) Prohibits a person from selling, giving, or causing to be sold or given a nicotine product to someone who is younger than 27 years of age unless the person to whom the nicotine product was sold or given presents an apparently valid proof of identification.

(b) Requires a retailer to adequately supervise and train the retailer's agents and employees to prevent a violation of Subsection (a).

(c) Provides that a proof of identification described by Section 161.652(e) satisfies the requirements of Subsection (a).

Sec. 161.655. WARNING NOTICE. (a) Requires each person who sells nicotine products at retail or by vending machine to post a sign in a location that is conspicuous to all employees and customers and that is close to the place at which the nicotine products may be purchased.

(b) Sets forth the required language of the sign.

(c) Requires the comptroller by rule to determine the design and size of the sign.

(d) Requires the comptroller on request to provide the sign at cost to any person who sells nicotine products. Authorizes the comptroller to provide the sign at cost to distributors of nicotine products or wholesale dealers of nicotine products in this state for distribution to persons who sell nicotine products. Prohibits a distributor or wholesale dealer from charging for distributing a sign under this subsection.

(e) Provides that a person commits an offense if the person fails to display a sign as prescribed by this section and provides that an offense under this subsection is a Class C misdemeanor.

(f) Authorizes the comptroller to accept gifts or grants from any public or private source to perform the comptroller's duties under this section.

Sec. 161.656. NOTIFICATION OF EMPLOYEES AND AGENTS. (a) Requires each retailer to notify each individual employed by that retailer who is to be engaged in retail sales of nicotine products that state law:

(1) prohibits the sale or distribution of nicotine products to any person who is younger than 18 years of age as provided by Section 161.652 and that a violation of that section is a Class C misdemeanor; and

(2) requires each person who sells nicotine products at retail or by vending machine to post a warning notice as provided by Section 161.655, requires each employee to ensure that the appropriate sign is always properly displayed while that employee is exercising the employee's duties, and provides that a violation of Section 161.655 is a Class C misdemeanor.

(b) Requires that the notice required by Subsection (a) be provided within 72 hours of the date an individual begins to engage in retail sales of nicotine products. Requires the individual to signify that the individual has received the notice required by Subsection (a) by signing a form stating that the law has been fully explained, that the individual understands the law, and that the individual, as a condition of employment, agrees to comply with the law.

(c) Requires that each form signed by an individual under this section indicate the date of the signature and the current address and social security number of the individual. Requires the retailer to retain the form signed by each individual employed as a retail sales clerk until the 60th day after the date the individual has left the employer's employ.

(d) Provides that a retailer required by this section to notify employees commits an offense if the retailer fails, on demand of a peace officer or an agent of the

comptroller, to provide the forms prescribed by this section. Provides that an offense under this section is a Class C misdemeanor.

(e) Provides that it is a defense to prosecution under Subsection (d) to show proof that the employee did complete, sign, and date the forms required by Subsections (b) and (c). Requires that proof be shown to the comptroller or an agent of the comptroller not later than the seventh day after the date of a demand under Subsection (d).

Sec. 161.657. **VENDOR ASSISTED SALES REQUIRED; VENDING MACHINES.**

(a) Prohibits a retailer or other person, except as provided by Subsection (b), from offering nicotine products for sale in a manner that permits a customer direct access to the nicotine products or installing or maintaining a vending machine containing nicotine products.

(b) Provides that Subsection (a) does not apply to a facility or business that is not open to persons younger than 18 years of age at any time or a premises for which a person holds a package store permit issued under the Alcoholic Beverage Code.

(c) Authorizes the comptroller or a peace officer, with or without a warrant, to seize, seal, or disable a vending machine installed or maintained in violation of this section. Provides that property seized under this subsection is subject to forfeiture to the state in accordance with law.

(d) Provides that a person commits an offense if the person violates Subsection (a) and provides that an offense under this subsection is a Class C misdemeanor.

Sec. 161.658. **DISTRIBUTION OF NICOTINE PRODUCTS TO MINORS.**

(a) Prohibits a person from knowingly distributing to persons younger than 18 years of age a free sample of a nicotine product or a coupon or other item that the recipient may use to receive a free or discounted nicotine product or a sample nicotine product.

(b) Prohibits a person from accepting or redeeming, offering to accept or redeem, or hiring a person to accept or redeem a coupon or other item that the recipient may use to receive a free or discounted nicotine product or a sample nicotine product if the recipient is younger than 18 years of age. Prohibits a coupon or other item that such a recipient may use to receive a free or discounted nicotine product or a sample nicotine product from being redeemable through mail or courier delivery.

(c) Provides that a person commits an offense if the person violates this section and that an offense under this subsection is a Class C misdemeanor.

Sec. 161.659. **ENFORCEMENT; UNANNOUNCED INSPECTIONS.** (a) Requires the comptroller to enforce this subchapter in partnership with local law enforcement agencies and with their cooperation. Prohibits the comptroller, except as expressly authorized by law, from adopting any rules governing the subject matter of this subchapter.

(b) Authorizes the comptroller to make block grants to counties and municipalities to be used by local law enforcement agencies to enforce this subchapter in a manner that can reasonably be expected to reduce the extent to which nicotine products are sold or distributed to persons who are younger than 18 years of age. Requires that random unannounced inspections be conducted at various locations where nicotine products are sold or distributed to ensure compliance with this subchapter at least annually. Requires the comptroller to rely, to the fullest extent possible, on local law enforcement agencies to enforce this subchapter.

(c) Authorizes the comptroller, to facilitate the effective administration and enforcement of this subchapter, to enter into interagency contracts with other state

agencies, and authorizes those agencies to assist the comptroller in the administration and enforcement of this subchapter.

(d) Requires that the use of a person younger than 18 years of age to act as a minor decoy to test compliance with this subchapter be conducted in a fashion that promotes fairness. Authorizes a person to be enlisted by the comptroller or a local law enforcement agency to act as a minor decoy only if the following requirements are met:

(1) written parental consent is obtained for the use of a person younger than 18 years of age to act as a minor decoy to test compliance with this subchapter;

(2) at the time of the inspection, the minor decoy is younger than 17 years of age;

(3) the minor decoy has an appearance that would cause a reasonably prudent seller of nicotine products to request identification and proof of age;

(4) the minor decoy carries either the minor's own identification showing the minor's correct date of birth or carries no identification, and a minor decoy who carries identification presents it on request to any seller of nicotine products; and

(5) the minor decoy answers truthfully any questions about the minor's age.

Sec. 161.660. CERTAIN OUTDOOR SIGNS. (a) Defines “church,” “school,” and “sign.”

(b) Prohibits a sign containing an advertisement for nicotine products from being located closer than 1,000 feet to a church or school, except as provided by this section.

(c) Provides that the measurement of the distance between the sign containing an advertisement for nicotine products and an institution listed in Subsection (b) is from the nearest property line of the institution to a point on a street or highway closest to the sign, along street lines and in direct lines across intersections.

(d) Provides that this section does not apply to a sign located on the premises of a business establishment or on the premises of the business or retail center in which the business establishment is located that contains the name of the business establishment and describes the type of business conducted.

(e) Provides that a person commits an offense if the person places or authorizes the placement of a sign in violation of this section and provides that an offense under this subsection is a Class C misdemeanor.

Sec. 161.661. POSSESSION, PURCHASE, CONSUMPTION, OR RECEIPT OF NICOTINE PRODUCTS BY MINORS PROHIBITED. (a) Provides that an individual who is younger than 18 years of age commits an offense if the individual possesses, purchases, consumes, or accepts a nicotine product or falsely represents himself or herself to be 18 years of age or older by displaying proof of age that is false, fraudulent, or not actually proof of the individual's own age in order to obtain possession of, purchase, or receive a nicotine product.

(b) Provides that it is an exception to the application of this section that the individual younger than 18 years of age possessed the nicotine product in the presence of an adult parent, a guardian, or an adult spouse of the individual or an

employer of the individual, if possession or receipt of the nicotine product is required in the performance of the employee's duties as an employee.

(c) Provides that it is an exception to the application of this section that the individual younger than 18 years of age is participating in an inspection or test of compliance in accordance with Section 161.659.

(d) Provides that an offense under this section is punishable by a fine not to exceed \$250 or an appropriate and commensurate term of community service.

Sec. 161.662. **PACKAGING REQUIREMENTS.** (a) Requires that each nicotine product sold in a retail sale in this state be packaged in child-resistant packaging. Authorizes the Texas Department of Health (TDH) to adopt rules to implement this subsection. Requires that any adopted rules be consistent with federal law.

(b) Requires that each nicotine product sold in a retail sale in this state list the product's ingredients on the packaging of the product, including information regarding the nicotine yield of the nicotine product. Authorizes TDH to adopt rules to implement this subsection. Requires that any adopted rules be consistent with federal law.

SUBCHAPTER X. DELIVERY SALES OF CERTAIN NICOTINE PRODUCTS OTHER THAN CIGARETTES OR TOBACCO PRODUCTS

Sec. 161.701. **DEFINITIONS.** Defines "delivery sale," "delivery service," "nicotine product," "shipping container," and "shipping documents."

Sec. 161.702. **REQUIREMENTS FOR DELIVERY SALES.** (a) Prohibits a person from making a delivery sale of a nicotine product to an individual who is under the age prescribed by Section 161.652.

(b) Requires a person taking a delivery sale order to comply with:

- (1) the age verification requirements prescribed by Section 161.703;
- (2) the disclosure requirements prescribed by Section 161.704;
- (3) the shipping requirement prescribed by Section 161.705; and
- (4) each law of this state that generally applies to sales of a nicotine product that occurs entirely within this state.

Sec. 161.703. **AGE VERIFICATION REQUIREMENT.** (a) Prohibits a person from mailing or shipping a nicotine product in connection with a delivery sale order unless before mailing or shipping the nicotine product the person accepting the delivery sale order first:

- (1) obtains from the prospective customer a certification that includes:
 - (A) reliable confirmation that the purchaser is at least 18 years of age; and
 - (B) a statement signed by the prospective purchaser in writing and under penalty of law:
 - (i) certifying the prospective purchaser's address and date of birth;
 - (ii) confirming that the prospective purchaser understands that signing another person's name to the certification is

illegal, that sales of a nicotine product to an individual under the age prescribed by Section 161.652 are illegal under state law, and that the purchase of a nicotine product by an individual under that age is illegal under state law; and

(iii) confirming that the prospective purchaser wants to receive mailings from a company that sells nicotine products;

(2) makes a good faith effort to verify the information contained in the certification provided by the prospective purchaser under Subdivision (1) against a commercially available database or obtains a photocopy or other image of a government-issued identification bearing a photograph of the prospective purchaser and stating the date of birth or age of the prospective purchaser;

(3) sends to the prospective purchaser, by e-mail or other means, a notice that complies with Section 161.704; and

(4) for an order made over the Internet or as a result of an advertisement, receives payment for the delivery sale from the prospective purchaser by a credit or debit card that has been issued in the purchaser's name or by check.

(b) Authorizes a person taking a delivery sale order to request that a prospective purchaser provide the purchaser's e-mail address.

Sec. 161.704. DISCLOSURE REQUIREMENTS. Requires that the notice required by Section 161.703(a)(3) include a prominent and clearly legible statement that nicotine product sales to individuals who are below the age prescribed by Section 161.652 are illegal under state law and sales of nicotine products are restricted to those individuals who provide verifiable proof of age in accordance with Section 161.703.

Sec. 161.705. SHIPPING REQUIREMENT. Requires a person who mails or ships a nicotine product in connection with a delivery sale order to include as part of the shipping documents a certain clear and conspicuous statement. Sets forth the required language of the statement.

Sec. 161.706. GENERAL OFFENSES. (a) Provides that a person commits an offense if the person violates a provision of this subchapter for which a criminal penalty is not otherwise provided.

(b) Provides that an offense under Subsection (a) is a Class C misdemeanor.

(c) Provides that, if it is shown on the trial of a person that the person has previously been convicted of an offense under this section, the offense is a Class B misdemeanor.

Sec. 161.707. KNOWING VIOLATION. (a) Provides that a person who knowingly violates a provision of this subchapter or who knowingly submits a certification under Section 161.703(a)(1) in another person's name commits an offense.

(b) Provides that an offense under this section is a Class A misdemeanor.

Sec. 161.708. FORFEITURE. (a) Provides that a nicotine product sold or that a person attempted to sell in a delivery sale that does not comply with this subchapter is forfeited to the state and shall be destroyed.

(b) Provides that a fixture, equipment, or other material or personal property on the premises of a person who, with the intent to defraud this state, fails to comply with this subchapter is forfeited to the state.

Sec. 161.709. ENFORCEMENT. Authorizes the attorney general or the attorney general's designee to bring an action in a court of this state to prevent or restrain a violation of this subchapter by any person or by a person controlling such a person.

SECTION 2. EFFECTIVE DATE. Effective date: September 1, 2015.