

BILL ANALYSIS

Senate Research Center

S.B. 97
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Health & Human Services
5/28/2015
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Electronic cigarettes, also known as e-cigarettes or vape pens, are battery-powered vaporizers that turn nicotine, flavor, and other chemicals into an aerosol that is then inhaled by the user. The liquid that is vaporized in e-cigarettes comes in hundreds of flavors. Some of these flavors, such as bubble gum and milk chocolate, are likely attractive to younger persons.

As the popularity of these products continues to grow among adolescents, so do concerns regarding their potentially harmful effects. However, because these products are relatively new to the market, a comprehensive assessment of their health impact, especially their long-term consequences, has yet to be developed.

Though some research suggests e-cigarettes are less harmful than conventional cigarettes, they are not risk free because they contain nicotine, a highly addictive drug. E-cigarettes may serve as a point of entry into the use of nicotine, though whether youth who use e-cigarettes later go on to smoke conventional tobacco cigarettes has yet to be determined.

However, their effects on youth could still be substantial. Adolescence is a critical juncture in the development of nicotine addiction, and nicotine in any form—smokeless, combustible, or electronic—can have adverse effects on adolescent brain development.

In 2014, more teens used e-cigarettes than traditional tobacco cigarettes or any other tobacco product, and the Centers for Disease Control and Prevention found that e-cigarette use doubled among students at high schools and middle schools across the country, growing from 3.3 percent in 2011 to 6.8 percent in 2012.

E-cigarettes are currently unregulated at the federal level and in Texas, and the United States Food and Drug Administration has yet to finalize regulations that would ban the sale of these devices to anyone under 18 years of age. As of October 2014, 41 states and one territory prohibit sales of electronic cigarettes or vaping/alternative tobacco products to minors.

These products' lack of regulation, together with their influence on adolescents and the concern they present to the public health community, reinforce the need for legislation at the state level.

S.B. 97 defines e-cigarettes and adds e-cigarettes to existing cigarette and tobacco product provisions in Chapter 161, Health and Safety Code, as well as Section 48.01, Penal Code. Key provisions of S.B. 97:

- Prohibit the sale of e-cigarettes to any person younger than 18 years of age;
- Prohibit anyone younger than 18 years of age from possessing, purchasing, consuming, or accepting an e-cigarette;
- Prohibit e-cigarette sales in a manner that permits a customer direct access to the e-cigarette as well as the installation of a vending machine containing e-cigarettes; and
- Create an offense for selling e-cigarettes to any person who is younger than 18 years of age. A violation of that section is a Class C misdemeanor and a fine of up to \$500 may be imposed.

S.B. 97 amends current law relating to regulation of the sale, distribution, possession, use, and advertising of e-cigarettes, cigarettes, and tobacco products and amends provisions subject to a criminal penalty.

[**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

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends the heading to Subchapter H, Chapter 161, Health and Safety Code, to read as follows:

SUBCHAPTER H. DISTRIBUTION OF CIGARETTES, E-CIGARETTES, OR TOBACCO PRODUCTS

SECTION 2. Amends Section 161.081, Health and Safety Code, by adding Subdivision (1-a) to define “e-cigarette” and amending Subdivisions (3) and (4) to redefine “retail sale” and “retailer.”

SECTION 3. Amends the heading to Section 161.082, Health and Safety Code, to read as follows:

Sec. 161.082. SALE OF CIGARETTES, E-CIGARETTES, OR TOBACCO PRODUCTS TO PERSONS YOUNGER THAN 18 YEARS OF AGE PROHIBITED; PROOF OF AGE REQUIRED.

SECTION 4. Amends Sections 161.082(a), (b), and (d), Health and Safety Code, to include e-cigarettes in the provisions set forth under those subsections regarding an offense and a defense to prosecution.

SECTION 5. Amends Section 161.0825(e), Health and Safety Code, to include e-cigarettes in the provisions of that subsection regarding an affirmative defense to prosecution.

SECTION 6. Amends the heading to Section 161.083, Health and Safety Code, to read as follows:

Sec. 161.083. SALE OF CIGARETTES, E-CIGARETTES, OR TOBACCO PRODUCTS TO PERSONS YOUNGER THAN 27 YEARS OF AGE.

SECTION 7. Amends Section 161.083, Health and Safety Code, by adding Subsection (a-1) and amending Subsections (b) and (c), as follows:

(a-1) Prohibits a person from selling, giving, or causing to be sold or given an e-cigarette to someone who is younger than 27 years of age unless the person to whom the e-cigarette was sold or given presents an apparently valid proof of identification.

(b) Changes a reference to Subsection (a) (relating to federal regulations regarding the sale of cigarettes or tobacco products) to Subsections (a) and (a-1).

(c) Changes a reference to Subsection (a) to Subsections (a) and (a-1).

SECTION 8. Amends Sections 161.084(a), (b), and (d), Health and Safety Code, to include e-cigarettes in the provisions set forth under those subsections regarding a posted statement about the sale of certain products.

SECTION 9. Amends Sections 161.085(a) and (b), Health and Safety Code, to include e-cigarettes in the provisions set forth under those subsections.

SECTION 10. Amends Section 161.086(a), Health and Safety Code, to include e-cigarettes in the provisions set forth under that subsection.

SECTION 11. Amends the heading to Section 161.087, Health and Safety Code, to read as follows:

Sec. 161.087. DISTRIBUTION OF CIGARETTES, E-CIGARETTES, OR TOBACCO PRODUCTS.

SECTION 12. Amends Sections 161.087(a) and (b), Health and Safety Code, as follows:

(a) Includes e-cigarettes among the items a person is prohibited from distributing to persons younger than 18 years of age.

(b) Prohibits a person, including a permit holder, except as provided by Subsection (c) (relating to providing that certain prohibitions under this section do not apply to a transaction between permit holders unless the transaction is a retail sale), from accepting or redeeming, or offering to accept or redeem, a coupon or other item that the recipient may use to receive a free or discounted cigarette, e-cigarette, or tobacco product or a sample cigarette, e-cigarette, or tobacco product if the recipient is younger than 18 years of age. Includes e-cigarettes among items subject to certain restrictions.

SECTION 13. Amends Subchapter H, Chapter 161, Health and Safety Code, by adding Section 161.0875, as follows:

Sec. 161.0875. SALE OF E-CIGARETTE NICOTINE CONTAINERS. (a) Prohibits a person from selling or causing to be sold a container that contains liquid with nicotine and that is an accessory for an e-cigarette unless:

(1) the container satisfies the child-resistant effectiveness standards under 16 C.F.R. Section 1700.15(b)(1) when tested in accordance with the method described by 16 C.F.R. Section 1700.20; or

(2) the container is a cartridge that is prefilled and sealed by the manufacturer and is not intended to be opened by a consumer.

(b) Provides that a person who complies with those standards, if the federal government adopts standards for the packaging of a container described by Subsection (a), is considered to be in compliance with this section.

SECTION 14. Amends Sections 161.088(b) and (d), Health and Safety Code, as follows:

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

(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 and Subchapter R 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 and Subchapter R;

(2) at the time of the inspection, order, or delivery, 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 cigarettes, e-cigarettes, or tobacco 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 or any person who delivers cigarettes, e-cigarettes, or tobacco products; and

(5) the minor decoy answers truthfully any questions about the minor's age at the time of the inspection, order, or delivery.

SECTION 15. Amends Subchapter H, Chapter 161, Health and Safety Code, by adding Section 161.0902, as follows:

Sec. 161.0902. E-CIGARETTE REPORT. (a) Requires the Texas Department of Health (TDH), not later than January 5th of each odd-numbered year, to report to the governor, lieutenant governor, and speaker of the house of representatives on the status of the use of e-cigarettes in this state.

(b) Requires that the report include, at a minimum:

(1) a baseline of statistics and analysis regarding retail compliance with this subchapter and Subchapter R;

(2) a baseline of statistics and analysis regarding illegal e-cigarette sales, including:

(A) sales to minors;

(B) enforcement actions concerning minors; and

(C) sources of citations;

(3) e-cigarette controls and initiatives by TDH, or any other state agency, including an evaluation of the effectiveness of the controls and initiatives;

(4) the future goals and plans of TDH to decrease the use of e-cigarettes;

(5) the educational programs of TDH and the effectiveness of those programs; and

(6) the incidence of use of e-cigarettes by regions in this state, including use of e-cigarettes by ethnicity.

(c) Authorizes TDH to include the report required by this section with a similar report for cigarettes or tobacco products required by law.

SECTION 16. Amends the heading to Subchapter N, Chapter 161, Health and Safety Code, to read as follows:

SUBCHAPTER N. E-CIGARETTE AND TOBACCO USE BY MINORS

SECTION 17. Amends Section 161.251, Health and Safety Code, by adding Subdivision (1-a) to define “e-cigarette.”

SECTION 18. Amends the heading to Section 161.252, Health and Safety Code, to read as follows:

Sec. 161.252. POSSESSION, PURCHASE, CONSUMPTION, OR RECEIPT OF CIGARETTES, E-CIGARETTES, OR TOBACCO PRODUCTS BY MINORS PROHIBITED.

SECTION 19. Amends Sections 161.252(a) and (b), Health and Safety Code, to include e-cigarettes in the provisions set forth under those subsections regarding the purchase, possession, consumption, or receipt of certain products by minors.

SECTION 20. Amends the heading to Section 161.253, Health and Safety Code, to read as follows:

Sec. 161.253. E-CIGARETTE AND TOBACCO AWARENESS PROGRAM; COMMUNITY SERVICE.

SECTION 21. Amends Sections 161.253(a), (b), (c), (d), and (e), Health and Safety Code, as follows:

(a) Requires the court, on conviction of an individual for an offense under Section 161.252, to suspend execution of sentence and require the defendant to attend an e-cigarette and tobacco awareness program approved by the commissioner of public health (commissioner). Authorizes the court to require the parent or guardian of the defendant to attend the e-cigarette and tobacco awareness program with the defendant.

(b) Authorizes an e-cigarette and tobacco awareness program to be taught in languages other than English, on request.

(c) Requires the court, if the defendant resides in a rural area of this state or another area of this state in which access to an e-cigarette and tobacco awareness program is not readily available, to require the defendant to perform eight to 12 hours of e-cigarette- and tobacco-related community service instead of attending the e-cigarette and tobacco awareness program.

(d) Provides that the e-cigarette and tobacco awareness program and the e-cigarette- and tobacco-related community service are remedial and are not for punishment.

(e) Requires the defendant, not later than the 90th day after the date of a conviction under Section 161.252, to present to the court, in the manner required by the court, evidence of satisfactory completion of the e-cigarette and tobacco awareness program or the e-cigarette- and tobacco-related community service.

SECTION 22. Amends Section 161.255(a), Health and Safety Code, to authorize an individual convicted of an offense under Section 161.252 to apply to the court to have the conviction expunged. Requires the court, if the court finds that the individual satisfactorily completed the e-cigarette and tobacco awareness program or e-cigarette- and tobacco-related community service ordered by the court, to order the conviction and any complaint, verdict, sentence, or other document relating to the offense to be expunged from the individual’s record and prohibits the conviction from being shown or made known for any purpose.

SECTION 23. Amends Section 161.256, Health and Safety Code, as follows:

Sec. 161.256. JURISDICTION OF COURTS. Authorizes a justice court or municipal court to exercise jurisdiction over any matter in which a court under this subchapter may impose a requirement that a defendant attend an e-cigarette and tobacco awareness program or perform e-cigarette- and tobacco-related community service, or order the suspension or denial of a driver's license or permit.

SECTION 24. Amends the heading to Subchapter O, Chapter 161, Health and Safety Code, to read as follows:

SUBCHAPTER O. PREVENTION OF TOBACCO AND E-CIGARETTE USE
BY MINORS

SECTION 25. Amends the heading to Section 161.301, Health and Safety Code, to read as follows:

Sec. 161.301. TOBACCO AND E-CIGARETTE USE PUBLIC AWARENESS CAMPAIGN.

SECTION 26. Amends Section 161.301(a), Health and Safety Code, as amended by S.B. 219, Acts of the 84th Legislature, Regular Session, 2015, to require the commissioner to develop and implement a public awareness campaign designed to reduce the use by minors in this state of tobacco and e-cigarettes as defined by Section 161.081, rather than reduce tobacco use by minors in this state, and to authorize the campaign to use advertisements or similar media to provide education information about tobacco and e-cigarette use.

SECTION 27. Amends Section 161.302(a), Health and Safety Code, to make a conforming change.

SECTION 28. Amends Subchapter P, Chapter 161, Health and Safety Code, by adding Section 161.356, as follows:

Sec. 161.356. COMPLIANCE WITH FEDERAL LAW. Provides that a person is considered to have complied with this subchapter if the person complies with Subchapter IX of 21 U.S.C. Chapter 9 and rules adopted under that subchapter.

SECTION 29. Amends the heading to Subchapter R, Chapter 161, Health and Safety Code, to read as follows:

SUBCHAPTER R. DELIVERY SALES OF CIGARETTES AND E-CIGARETTES

SECTION 30. Amends Section 161.451, Health and Safety Code, by amending Subdivisions (1) and (3) to redefine "delivery sale" and "shipping container" and adding Subdivision (2-a) to define "e-cigarette."

SECTION 31. Amends Section 161.452, Health and Safety Code, as follows:

Sec. 161.452. REQUIREMENTS FOR DELIVERY SALES. (a) Prohibits a person from making a delivery sale of cigarettes or e-cigarettes to an individual who is under the age prescribed by Section 161.082.

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

(1)-(6) Makes no change to these subdivisions;

(c) Requires a person taking a delivery sale order of e-cigarettes to comply with:

(1) the age verification requirements prescribed by Section 161.453;

- (2) the disclosure requirements prescribed by Section 161.454;
- (3) the shipping requirements prescribed by Section 161.455;
- (4) the registration and reporting requirements prescribed by Section 161.456; and
- (5) each law of this state that generally applies to sales of e-cigarettes that occur entirely within this state.

SECTION 32. Amends Section 161.453, Health and Safety Code, by adding Subsections (c) and (d), as follows:

(c) Prohibits a person from mailing or shipping e-cigarettes in connection with a delivery sale order unless before accepting a delivery sale order the person verifies that the prospective purchaser is at least 18 years of age through a commercially available database or aggregate of databases that is regularly used for the purpose of age and identity verification. Requires the person, after the order is accepted, to use a method of mailing or shipping that requires an adult signature.

(d) Authorizes a retailer in this state that otherwise complies with applicable laws relating to retail sales and primarily sells e-cigarettes to comply with Subsection (c) by:

- (1) verifying the age of the prospective purchaser with a commercially available database or 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;
- (2) obtaining a written statement signed by the prospective purchaser, under penalty of law, certifying the prospective purchaser's address and date of birth; and
- (3) receiving payment for the delivery sale from the prospective purchaser by a credit card or debit card that has been issued in the prospective purchaser's name or by a check that is associated with a bank account in the prospective purchaser's name.

SECTION 33. Amends Section 161.454, Health and Safety Code, as follows:

Sec. 161.454. DISCLOSURE REQUIREMENTS. (a) Creates this subsection from existing text. Requires that the notice required by Section 161.453(a)(3) for a delivery sale of cigarettes include a prominent and clearly legible statement that:

(1)-(3) Makes no change to these subdivisions.

(b) Requires that a delivery sale of an e-cigarette include a prominent and clearly legible statement that:

- (1) e-cigarette sales to individuals younger than the age prescribed by Section 161.082 are illegal under state law; and
- (2) e-cigarette sales are restricted to individuals who provide verifiable proof of age in accordance with Section 161.453.

SECTION 34. Amends Section 161.455, Health and Safety Code, by adding Subsection (a-1) and amending Subsection (b), as follows:

(a-1) Requires a person who mails or ships e-cigarettes in connection with a delivery sale order to include as part of the shipping documents a clear and conspicuous statement. Sets forth the language of the statement.

(b) Requires a person taking a delivery sale order who delivers the cigarettes or e-cigarettes without using a third-party delivery service to comply with the delivery requirements prescribed by this subchapter that apply to a delivery service.

SECTION 35. Amends Section 161.456, Health and Safety Code, as follows:

Sec. 161.456. REGISTRATION AND REPORTING REQUIREMENTS. (a) Prohibits a person from making a delivery sale or ship cigarettes or e-cigarettes in connection with a delivery sale unless the person first files with the comptroller a statement that includes:

(1) and (2) Makes no change to these subdivisions.

(b) Requires each person who has made a delivery sale or shipped or delivered cigarettes or e-cigarettes in connection with a delivery sale during the previous month, except as provided by Subsection (d), not later than the 10th day of each month, to file with the comptroller a memorandum or a copy of the invoice that provides for each delivery sale:

(1) the name, address, telephone number, and e-mail address of the individual to whom the delivery sale was made;

(2) the brand or brands of the cigarettes or e-cigarettes that were sold; and

(3) the quantity of cigarettes or e-cigarettes that were sold.

(c) Provides that a person who complies with 15 U.S.C. Section 376, as amended, with respect to cigarettes, is considered to have complied with this section.

(d) Provides that a person is exempt from the requirement of filing with the comptroller a memorandum or a copy of an invoice under Subsection (b) if, in the two years preceding the date the report is due, the person has not violated this subchapter and has not been reported under Section 161.090 to the comptroller as having violated Subchapter H.

(e) Requires a person required to submit a memorandum or a copy of an invoice under Subsection (b) to submit a memorandum or a copy of an invoice to the comptroller for each delivery sale of a cigarette or e-cigarette in the previous two years unless the person has previously submitted the memorandum or copy to the comptroller.

(f) Requires a person to maintain records of compliance with this section until at least the fourth anniversary of the date the record was prepared.

SECTION 36. Amends Section 161.461(a), Health and Safety Code, to provide that cigarettes or e-cigarettes sold or that a person attempted to sell in a delivery sale that does not comply with this subchapter are forfeited to the state and shall be destroyed.

SECTION 37. Amends Section 28.004(k), Education Code, as follows:

(k) Requires a school district to publish in the student handbook and post on the district's Internet website, if the district has an Internet website:

(1) Makes no change to this subdivision;

(2) a statement of:

(A) and (B) Makes no change to these paragraphs; and

(C) whether the district has adopted and enforces policies and procedures that prescribe penalties for the use of e-cigarettes, as defined by Section 38.006, and tobacco products by students and others on school campuses or at school-sponsored or school-related activities; and

(3) Makes no change to this subdivision.

SECTION 38. Amends Section 38.006, Education Code, as follows:

Sec. 38.006. E-CIGARETTES AND TOBACCO PRODUCTS ON SCHOOL PROPERTY. (a) Defines "e-cigarette."

(b) Requires the board of trustees of a school district to:

(1) prohibit smoking or using e-cigarettes or tobacco products at a school-related or school-sanctioned activity on or off school property;

(2) prohibit students from possessing e-cigarettes or tobacco products at a school-related or school-sanctioned activity on or off school property; and

(3) ensure that school personnel enforce the policies on school property.

SECTION 39. Amends Section 48.01, Penal Code, by amending Subsections (a), (c), (d), and (e) and adding Subsection (a-1), as follows:

(a) Defines "e-cigarette" in this section.

(a-1) Provides that a person commits an offense if the person is in possession of a burning tobacco product, smokes tobacco, or operates an e-cigarette in a facility of a public primary or secondary school or an elevator, enclosed theater or movie house, library, museum, hospital, transit system bus, intrastate bus, plane, or train which is a public place. Deletes existing text referring to definitions under Section 541.201 (Vehicles), Transportation Code.

(c) Changes a reference to Subsection (a) of Section 48.01 to Subsection (a-1).

(d) Provides that it is an exception to the application of Subsection (a-1) if the person is in possession of a burning tobacco product, smokes tobacco, or operates the e-cigarette exclusively within an area designated for smoking tobacco or operating an e-cigarette or as a participant in an authorized theatrical performance. Makes a conforming change.

(e) Requires that an area designated for smoking tobacco or operating an e-cigarette on a transit system bus or intrastate plan or train also include the area occupied by the operator of the transit system bus, plane, or train.

Makes nonsubstantive changes.

SECTION 40. Makes application of Sections 161.082(a) and 161.252(a), Health and Safety Code, as amended by this Act, and Section 48.01, Penal Code, as amended by this Act, prospective to October 1, 2015.

SECTION 41. (a) Requires the comptroller to develop the sign described by Section 161.084, Health and Safety Code, as amended by this Act, and to make the sign available to the public not later than September 15, 2015.

(b) Effective date, this section: September 1, 2015.

SECTION 42. Effective date, except as otherwise provided by this Act: October 1, 2015.