

**SUBJECT:** Creating an e-cigarette retailer permit; expanding definition of e-cigarette

**COMMITTEE:** Ways and Means — committee substitute recommended

**VOTE:** 9 ayes — Meyer, Button, Cole, Guerra, Murphy, Noble, Rodriguez, Sanford, Shine

0 nays

2 absent — Thierry, Martinez Fischer

**SENATE VOTE:** On final passage, April 8 — 27-3 (Creighton, Hall, Hughes)

**WITNESSES:** For — Maria Monge, Texas Pediatric Society, Texas Medical Association, Texas Public Health Coalition, and Texas Tobacco Control Partners; Becca Harkleroad, Texas School Nurses Organization; Kellen Kruk; Micah Sanchez; (*Registered, but did not testify*: Joel Romo, American Heart Association, Texas Tobacco Control Partners, and The Cooper Institute; Marisa Finley, Baylor Scott and White Health; Karen Reagan, McLane Co., Inc.; Kathy Grant, Smoke Free Alternatives Trade Association; David Reynolds, Texas Chapter of the American College of Physicians; Troy Alexander and Dan Finch, Texas Medical Association; Suzi Kennon, Texas PTA; Dale Craymer, Texas Taxpayers and Research Association)

Against — (*Registered, but did not testify*: Matt Burgin, Texas Food and Fuel Association)

On — (*Registered, but did not testify*: Shannon Brandt, Comptroller of Public Accounts)

**BACKGROUND:** Health and Safety Code sec. 161.081(1-a) defines an “e-cigarette” as an electronic cigarette or any other device that simulates smoking by using a mechanical heating element, battery, or electronic circuit to deliver nicotine or other substances to the individual inhaling from the device. The term includes a device described by this definition, regardless of the

product name or description, and a component, part, or accessory for the device. The term does not include a prescription medical device unrelated to the cessation of smoking.

Ch. 161, subch. H, regulates the distribution of cigarettes, e-cigarettes, and tobacco products.

Tax Code chs. 154 and 155 require certain permits of cigarette, cigar, and tobacco products distributors, wholesalers, bonded agents, manufacturers, export warehouses, importers, and retailers.

Concerns have been raised that existing penalties and enforcement mechanisms relating to the purchasing age of e-cigarettes and tobacco products are insufficient to prevent minors from obtaining these products. To address these concerns, some have called for the creation of an e-cigarette retailer permit and strengthening of enforcement mechanisms.

DIGEST:

CSSB 248 would expand the definition of e-cigarette, create an e-cigarette retailer permit, create an offense for operating without a permit, provide for fees and disciplinary actions, and impose regulations on interstate warehouse transactions, among other provisions.

**E-cigarette definition.** The bill would expand the definition of “e-cigarette” to include a consumable liquid solution or other material aerosolized or vaporized during the use of an electronic cigarette or certain other devices.

**E-cigarette retailer permit.** Before engaging in business as an e-cigarette retailer, a person would have to obtain a permit from the comptroller. A person who engaged in the business of selling e-cigarettes, including through a marketplace, would be considered an e-cigarette retailer. E-cigarette retailer permits would not be required until January 1, 2022.

A permit would have to be obtained for each place of business owned or operated by an e-cigarette retailer. The comptroller could not issue a permit for a place of business that was a residence or a unit in a public

storage facility. An e-cigarette retailer permit would expire on the last day of May of each even-numbered year.

Provisions of the bill relating to e-cigarette retailer permits would not apply to a product approved by the U.S. Food and Drug Administration (FDA) for use in the treatment of nicotine or smoking addiction and labeled with a “Drug Facts” panel in accordance with FDA regulations.

*Application.* The comptroller would have to prescribe the form and content of a permit application and begin accepting applications by October 1, 2021.

Each applicant applying for a permit to sell e-cigarettes from a vehicle would have to provide the make, model, vehicle identification number, registration number, and any other information concerning the vehicle required by the comptroller.

*Fees.* A permit application would have to be accompanied by a fee of:

- one-half of the fee amount for a cigarette retailer’s permit if at the time of application the applicant held a valid cigarette, cigar, or tobacco product retailer’s permit for the same place of business; or
- the amount of the fee for a cigarette retailer’s permit.

For a new permit, the comptroller would have to prorate the fee according to the number of months remaining during the period that the permit would be in effect.

A person who did not obtain a renewal permit in a timely manner would have to pay a late fee of \$50 in addition to the application fee. A person issued a permit for a place of business that permanently closed before the permit expiration date would not be entitled to a refund of the permit fee.

*Issuance and denial.* The comptroller would have to issue a permit to an applicant if the comptroller had received an application and fee and determined that issuing the permit would not jeopardize the administration

and enforcement of relevant law.

Permits would be issued for a designated place of business, with certain exceptions, and would be nonassignable.

A permit would have to indicate the type of permit, authorize the sale of e-cigarettes in Texas, and show that it was revocable and would have to be forfeited or suspended if the conditions of issuance, e-cigarette retailer permit regulations, or rules of the comptroller were violated.

The comptroller could reject an application and deny a permit if the comptroller found, after notice and opportunity for hearing, the premises where business would be conducted were not adequate to protect the e-cigarettes or an applicant or certain related persons had failed to disclose certain information or had previously violated e-cigarette retailer permit regulations.

*Display of permit.* A permit holder would have to keep the permit on public display at the place of business for which the permit was issued. A permit holder whose permit was assigned to a vehicle would have to post the permit in a conspicuous place on the vehicle.

*Permit suspension and revocation.* The comptroller could revoke or suspend a permit if the comptroller found, after notice and hearing, that the permit holder violated e-cigarette retailer permit regulations or a related rule. If the comptroller intended to suspend or revoke a permit, the comptroller would have to provide written notice to the permit holder including certain information.

The comptroller would have to give the permit holder notice before the 10th day before the final hearing. A permit holder could appeal the comptroller's decision to a district court in Travis County by 30 days after the comptroller's decision became final.

A person whose permit was suspended or revoked could not sell, offer for sale, or distribute e-cigarettes from the place of business to which the

permit applied until a new permit was granted or the suspension removed.

The comptroller could suspend a permit without notice or a hearing for the permit holder's failure to comply with relevant law or rules if the permit holder's continued operation constituted an immediate and substantial threat. The bill would specify the conduct of proceedings following the summary suspension of an e-cigarette retailer permit.

*Penalties.* A person would violate the bill's provisions related to e-cigarette retailer permits if the person engaged in the business of such a retailer without a permit or violated an applicable provision of law or rule. Each day on which a violation occurred would be separate violation, and a violator would have to pay a penalty of up to \$2,000 for each violation.

The attorney general would have to bring suit to recover penalties under the bill. A suit could be brought in Travis County or another county having jurisdiction.

*Offense.* It would be a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) to act as an e-cigarette retailer and sell e-cigarettes without a permit or receive or possess e-cigarettes without a permit or without displaying a permit easily visible to the public.

**Disciplinary actions.** A retailer would be subject to disciplinary action if an agent or employee of the retailer committed an offense under Health and Safety Code ch. 161, subch. H, relating to the distribution of cigarettes, e-cigarettes, or tobacco products. If the comptroller found, after notice and an opportunity for a hearing, that a permit holder violated ch. 161, subch. H, at a place of business for which a permit was issued, the comptroller could:

- assess a fine of up to \$1,000 for the first violation during the 24-month period preceding the violation;
- assess a fine of up to \$2,000 for the second violation during the 24-month period preceding the most recent violation; and
- assess a fine of up to \$3,000 and suspend the permit of that place of

business for up to five days for the third violation during the 24-month period preceding the most recent violation.

The comptroller would have to revoke an e-cigarette retailer permit or a permit issued under Tax Code chs. 154 or 155, as applicable, for the fourth or subsequent violation of Health and Safety Code ch. 161, subch. H, during the 24-month period preceding the most recent violation at that place of business. If the permit holder did not hold such a permit, the comptroller would have to revoke the holder's sales tax permit.

A permit holder whose permit was revoked could not apply for a permit for the same place of business until six months after the effective date of the revocation.

The comptroller could suspend a permit for a place of business but could not revoke the permit if the comptroller found that:

- the permit holder had not violated Health and Safety Code ch. 161, subch. H, more than seven times at the place of business in the 48-month period preceding the violation in question;
- the permit holder required its employees to attend a comptroller-approved seller training program;
- the employees had actually attended the training program; and
- the permit holder had not directly or indirectly encouraged the employees to violate the law.

**Use of revenue.** Revenue from cigarette and tobacco product advertising fees and from the sale of e-cigarette, cigarette, and cigar and tobacco product retailer permits would be deposited in the general revenue fund and could be appropriate only as provided, in order of priority, to:

- the comptroller for the purpose of administering retailer permitting;
- the comptroller for the purpose of administering and enforcing regulations on the distribution of cigarettes, e-cigarettes, or tobacco products, the prohibition of certain advertising, and e-cigarette and tobacco use by minors;

- the Department of State Health Services for the purpose of administering e-cigarette and tobacco awareness programs and the tobacco and e-cigarette use public awareness campaign; and
- the appropriate entity for the purpose of administering that entity's responsibilities under the grant program for youth groups.

**Interstate warehouses.** The bill would apply certain statutes in the Tax Code relating to the cigarette tax and the cigar and tobacco products tax to interstate warehouses and interstate warehouse transactions. These changes would include requiring a comptroller-issued permit for interstate warehouses and regulating the sale of cigarettes and tobacco products by warehouses, among other provisions.

Under the bill, an “interstate warehouse” would refer to a person in Texas who received untaxed tobacco products from a manufacturer, bonded agent, distributor, or importer and stored the products exclusively for an interstate warehouse transaction. An “interstate warehouse transaction” would refer to the sale or delivery of tobacco products from an interstate warehouse to a person located in another state who was licensed or permitted by the other state to pay the excise tax on tobacco products.

**Repealed statutes.** The bill would repeal certain statutes in the Tax Code relating to disciplinary actions against retailers of cigarettes or cigars and tobacco products that the bill consolidated in the Health and Safety Code with disciplinary actions against e-cigarette retailers. A statute in the Health and Safety Code relating to the use of the cigarette and tobacco product advertising fee also would be repealed.

The bill would take effect September 1, 2021, and the provisions relating to disciplinary actions against cigarette, e-cigarette, and tobacco product retailers would apply only to a violation that occurred on or after that date.

**NOTES:**

According to the Legislative Budget Board, the bill would have a positive impact of about \$900,500 to general revenue through fiscal 2023.