

BILL ANALYSIS

C.S.S.B. 248
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Ways & Means
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Reports indicate that minors are able to easily obtain e-cigarettes through brick-and-mortar retailers. In addition to developing a harmful addiction, minors using e-cigarettes are more likely to smoke cigarettes later in life and may be exposed to potentially fatal diseases such as lung injuries resulting from e-cigarette use. It has been suggested that the current statutory tools for enforcing the purchase age on e-cigarettes and tobacco are outdated and ineffective because e-cigarette retailers, unlike cigarette and other tobacco retailers, are not required to obtain a permit. One consequence of this lack of regulation is that there is no comprehensive list of retail locations to guide enforcement efforts. Additionally, the system used by the comptroller of public accounts to penalize permitted retailers that sell tobacco to minors is ineffective, as tight timelines and lax penalties mean retailers typically escape accountability. C.S.S.B. 248 seeks to increase compliance, dissuade underage sales, and harmonize regulations with those applicable to tobacco sales by establishing an e-cigarette retailer permit and revising various provisions relating to the sale of cigarettes and tobacco products. The bill also creates a new class of tobacco wholesaler permit for an interstate warehouse in order to resolve an issue identified by comptroller staff regarding untaxed tobacco that is intended for out-of-state wholesale.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the comptroller of public accounts in SECTIONS 1 and 4 of this bill.

ANALYSIS

C.S.S.B. 248 amends the Health and Safety Code to establish an e-cigarette retailer permit and to prohibit a person from engaging in business as an e-cigarette retailer in Texas unless the person has been issued the permit by the comptroller of public accounts. The permit requirement applies from January 1, 2022. The bill requires an e-cigarette retailer to obtain a permit for each place of business owned or operated by the retailer and prohibits the comptroller from issuing a permit for a place of business that is a residence or a unit in a public storage facility. The bill provides for the following with regard to the permit:

- requirements for the comptroller to prescribe the form and content of the permit application, provide the form on request, and begin accepting permit applications not later than October 1, 2021;
- requirements for permit applicants to provide specified information and a provision establishing the confidentiality of financial information provided with regard to the permit;

- conditions for the issuance of a permit, required contents of the permit, and grounds for denial of a permit;
- establishment of a two-year permit period and of a permit application fee set at the same amount required for a cigarette retailer, or at half of that amount if the e-cigarette permit is held in combination with certain other permits, and related fee payment provisions;
- requirements for display of the permit;
- deposit and appropriation of revenue from the sale of the permits;
- grounds and procedures for the final suspension or revocation of the permit, including certain notice and hearing requirements; and
- procedures relating to the summary suspension of a permit if the permit holder's continued operation constitutes an immediate and substantial threat, including related notice and hearing requirements.

C.S.S.B. 248 requires the comptroller to conduct all hearings required by the bill's provisions relating to the e-cigarette retailer permit in accordance with the Administrative Procedure Act but excepts summary suspension proceedings from that requirement. The bill provides for the conduct of hearings by one or more comptroller's designees and authorizes the comptroller to prescribe the rules of procedure governing the hearings.

C.S.S.B. 248 subjects a person who engages in the business of an e-cigarette retailer without a permit, or who violates a provision of the bill or an associated comptroller rule relating to e-cigarette retail permits to which the person is subject, to a maximum civil penalty of \$2,000 for each violation. The bill establishes that each day on which a violation occurs is a separate violation and authorizes the attorney general to bring suit in the appropriate venue to recover those penalties. The bill creates a Class A misdemeanor offense for a person who acts as an e-cigarette retailer and does the following:

- receives, possesses, or sells e-cigarettes without having a permit; or
- receives or possesses e-cigarettes without having a permit posted in the requisite manner.

C.S.S.B. 248 authorizes the comptroller to adopt rules to implement the permit, including rules exempting a person who sells e-cigarettes to consumers through a marketplace from the permit requirement. The bill includes in the definition of "e-cigarette" a consumable liquid solution or other material aerosolized or vaporized during the use of an electronic cigarette or other similar device and exempts from the permit requirement an appropriately labeled product that is approved by the FDA for use in the treatment of nicotine or smoking addiction.

C.S.S.B. 248 consolidates and transfers to the Health and Safety Code provisions relating to certain disciplinary actions by the comptroller against a retailer of cigarettes or a retailer of cigars and tobacco products and extends those consolidated provisions to include a retailer of e-cigarettes as follows:

- subjects an applicable retailer to disciplinary action if an agent or employee of the retailer commits an offense relating to the distribution of any of those products and removes a condition that the retailer, with criminal negligence, failed to prevent the offense through adequate supervision and training;
- authorizes the comptroller to suspend the applicable permit for a place of business and to administratively assess a fine according to a specified scale if the comptroller finds, after notice and an opportunity for a hearing, that the permit holder violated Health and Safety Code provisions relating to distribution of those products at that place of business;
- removes the permit holder's violation of certain advertising provisions from the grounds for such a permit suspension, administrative fine, or related disciplinary measure;
- imposes the following updated scale of administrative fines and penalties:
 - a maximum fine of \$1,000 for the first violation during the 24-month period preceding the violation at that place of business;
 - a maximum fine of \$2,000 for the second violation during the 24-month period preceding the most recent violation at that place of business;

- a maximum fine of \$3,000 and five-day permit suspension for the third violation during that period; and
- a permit revocation for the fourth or subsequent violation during that period, including revocation of a sales tax permit for a person who does not hold an e-cigarette, cigarette, or tobacco products retailer permit;
- prohibits a person whose permit has been revoked from applying for a permit for the same place of business before the expiration of six months after the effective date of the revocation;
- with regard to certain conditions under which the comptroller may suspend a permit but is prohibited from revoking a permit, replaces the condition that the permit holder has not violated a specific provision involving a sale by an employee to a person below the age limit more than seven times in the preceding 24 months with the condition that the permit holder has not violated any applicable provision relating to the distribution of cigarettes, e-cigarettes, or tobacco products within the preceding 48 months;
- repeals provisions relating to the approval of seller training programs; and
- authorizes the comptroller to adopt rules to implement these revised disciplinary actions.

C.S.S.B. 248 requires revenue collected from certain advertising fees and from the sale of e-cigarette, cigarette, cigar, and other tobacco product retailer's permits to be deposited to the general revenue fund. The bill restricts the appropriation of the revenue to the following entities, in order of priority:

- the comptroller for the purpose of administering e-cigarette, cigarette, and cigars and tobacco products retailer permitting;
- the comptroller for the purpose of administering and enforcing statutory provisions regulating the following:
 - the distribution of cigarettes, e-cigarettes, and tobacco products;
 - prohibited advertisement of those products; and
 - e-cigarette and tobacco use by minors;
- the Department of State Health Services for the purpose of administering certain tobacco product awareness programs; and
- the appropriate entity for the purpose of administering that entity's responsibilities relating to the grant program supporting certain youth groups whose programs include components related to reduction of the members' use of tobacco and e-cigarettes.

C.S.S.B. 248 amends the Tax Code to establish the extent of the applicability of certain provisions governing the cigarette tax and the cigars and tobacco products tax to an interstate warehouse and interstate warehouse transaction, as those terms are defined by the bill, by doing the following:

- requiring a comptroller permit for each applicable place of business for a person engaging in business as an interstate warehouse and prohibiting a person from holding a state-issued distributor's permit and an interstate warehouse's permit for the same location;
- establishing that certain transactions involving an interstate warehouse are not classified as a "first sale" for purposes of the cigarette tax or the cigars and tobacco products tax;
- restricting the sale of cigarettes and tobacco products by an interstate warehouse to an interstate transaction, prohibiting an interstate warehouse from making an intrastate sale of cigarettes or tobacco products without written authorization by the comptroller, and authorizing the following to sell cigarettes and tobacco products to an interstate warehouse:
 - an out-of-state manufacturer who is not a permitted distributor;
 - a permitted distributor who manufactures or produces cigarettes or tobacco products in Texas; and
 - a permitted importer or permitted wholesaler;
- exempting the transfer of possession of cigarettes by an interstate warehouse in an interstate warehouse transaction from the cigarette tax stamp requirement;

- authorizing the comptroller to issue a combination permit for cigarettes and tobacco products to a interstate warehouse but prohibiting an interstate warehouse from holding a combination permit as a retailer of cigarettes or tobacco products;
- establishing a \$300 application fee for an interstate warehouse permit;
- requiring each interstate warehouse to keep certain records at each place of business of all cigarettes and tobacco products purchased or received;
- requiring each interstate warehouse to keep at each place of business in Texas certain records of each sale, distribution, exchange, or use of cigarettes or tobacco products, whether taxed or not;
- requiring an interstate warehouse, on request by the comptroller, to provide to the comptroller copies of periodic cigarette and tobacco product reports filed with each state into which the interstate warehouse sells those products and copies of each report required under certain federal law;
- applying to an interstate warehouse certain civil penalties for violations of statutory provisions governing the cigarette tax and cigars and tobacco products tax; and
- extending to a person acting as an interstate warehouse the applicability of certain permit-related offenses and the offense of failure to deliver an invoice to a purchaser.

C.S.S.B. 248 defines "interstate warehouse transaction" as the sale or delivery of cigarettes or cigars and tobacco products, as applicable, from an interstate warehouse to a person located in another state who is licensed or permitted by the other state to affix that state's cigarette stamps or otherwise pay the state's excise tax on cigarettes as required and defines "interstate warehouse" as a person in Texas who receives unstamped cigarettes from a manufacturer, bonded agent, distributor, or importer and stores the cigarettes exclusively for an interstate warehouse transaction. The bill includes a credit card among the authorized payment options for all classes of comptroller cigarette permits and cigars and tobacco products permits.

C.S.S.B. 248 repeals Section 161.124, Health and Safety Code and the following provisions of the Tax Code:

- Section 154.1142;
- Section 154.1143;
- Sections 154.121(c), (d), and (e);
- Sections 155.058(c), (d), and (e);
- Section 155.0592; and
- Section 155.0593.

EFFECTIVE DATE

September 1, 2021.

COMPARISON OF SENATE ENGROSSED AND SUBSTITUTE

While C.S.S.B. 248 may differ from the engrossed in minor or nonsubstantive ways, the following summarizes the substantial differences between the engrossed and committee substitute versions of the bill.

The substitute includes definitions absent from the engrossed for "place of business" and "commercial business location." The substitute includes a prohibition absent from the engrossed against the comptroller issuing an e-cigarette retailer's permit for a place of business that is a residence or a unit in a public storage facility.

While both the engrossed and substitute expand the definition of "e-cigarette" to include a certain consumable liquid solution or other aerosolized or vaporized material, the substitute does not include a specification from the engrossed that the expanded definition applies regardless of whether the liquid or other material contains nicotine.

The substitute does not include a requirement present in the engrossed for the comptroller to prorate the fee for an e-cigarette retailer's permit renewal.

The substitute includes provisions absent from the engrossed that establish civil penalties for a person who violates the bill's provisions relating to an e-cigarette retailer's permit and that create a Class A misdemeanor offense for selling, receiving, or possessing e-cigarettes without such a permit or for receiving or possessing e-cigarettes without proper display of the permit.

The substitute includes a provision absent from the engrossed revising the deposit and appropriation of revenue collected from certain advertising fees and from the sale of e-cigarette, cigarette, cigar, and other tobacco product retailer's permits and consequently includes certain related conforming changes, including a repeal of provisions relating to the previous appropriation of money from certain cigarette and tobacco product permits. The substitute does not include a provision present in the engrossed specifically for the appropriation of revenue from the sale of e-cigarette retailer's permits.