EXPLANATORY MEMORANDUM TO

THE TOBACCO AND VAPES ACT 2026 (AGE VERIFICATION DEFENCE TO UNDERAGE SALES) (ENGLAND AND WALES) REGULATIONS 2026

2026 No. [XXXX]

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Dame Diana Johnson, Minister of State for Public Health and Patient Safety at the Department of Health and Social Care confirms that this Explanatory Memorandum meets the required standard.

2.2 Richard Boden, Deputy Director for Tobacco and Vapes Policy, at the Department of Health and Social Care confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 The Tobacco and Vapes Team at the Department of Health and Social Care can be contacted by email at the following address with any queries regarding the instrument: tobaccocontrol@dhsc.gov.uk. Alternatively, the department can be contacted by telephone: 0300 790 4007.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument specifies the steps that a person may take to verify that a customer was born before 1 January 2009 before selling tobacco products, herbal smoking products or cigarette papers, or that a customer is aged 18 or over before selling vaping products or nicotine products. Under sections 1(2)(a) and 10(2)(a) of the Tobacco and Vapes Act 2026 ("the 2026 Act"), a person charged with an offence of selling those products to someone under the age of sale may establish a defence by proving that they took the steps specified in this instrument. The specified steps provide for age verification using both physical identity documents and digital identification and set out the circumstances in which a person charged with an age of sale offence may rely on each method.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. Policy Context

What is being done and why?

5.1 The 2026 Act introduced new age of sale requirements for relevant products in England and Wales.

5.2 From 1 January 2027, it is an offence to sell a tobacco product, a herbal smoking product or cigarette papers to a person born on or after 1 January 2009, replacing the previous offence of selling tobacco products or cigarette papers to anyone under the age of 18 years. This policy aims to create a 'smoke-free generation', reducing tobacco use in the UK population over time. It responds to the evidence that smoking is the number one preventable cause of death, disability and ill health. It kills up to two-thirds of its long-term users and causes around 75,000 deaths a year in the UK. It also substantially increases the risk of many major health conditions throughout people's lives and costs society billions of pounds through lost productivity and health and care costs.

5.3 From 29 October 2026, it is an offence to sell any vaping product or nicotine product to a person who is under the age of 18, replacing the previous age of sale restrictions which applied only to nicotine inhaling products. This aims to close gaps in the previous legislative framework and ensure that non-nicotine vapes and nicotine products cannot be sold to anyone under 18. Ensuring that vaping restrictions cover all vapes aims to prevent children accessing these products and to avoid loopholes which can be exploited. Nicotine products, particularly nicotine pouches, are becoming increasingly popular; it is estimated that 3.3% of children have tried a nicotine pouch. Introducing age restrictions for these products aims to prevent children becoming dependent on nicotine, which is highly addictive.

5.4 This instrument sets out steps that a person may take to verify a customer's age before selling any of these products. Under the 2026 Act, a person charged with an age of sale offence may rely on a statutory defence by proving that they took the relevant steps specified in this instrument. This aims to provide greater clarity for retailers about how they can verify the age of customers attempting to buy these products and to encourage them to implement robust age verification procedures, thereby supporting the success of the new age of sale provisions.

5.5 The instrument sets out two alternative methods of age verification: verifying a physical identity document meeting certain criteria or digital identification meeting certain criteria. These criteria are outlined below. A person charged with an age of sale offence who can prove that they took the specified steps for either method before selling the product will be able to rely on the defence.

5.6 These provisions have been designed to align, where appropriate, with equivalent age verification arrangements for alcohol sales, supporting consistency for retailers and consumers across age-restricted products.

5.7 The 2026 Act also provides a separate defence where a person charged with an age of sale offence proves that they otherwise took all reasonable steps to avoid committing the offence. This can be found in sections 1(2)(b) and 10(2)(b). That separate defence remains available, and compliance with the steps specified in this instrument is therefore not the only means of establishing a defence to an age of sale offence.

<u>Physical identity documents</u>

5.8 To satisfy the defence using a physical identity document, the person charged with an age of sale offence must prove that they inspected a document that the customer

showed them before the sale. The document must be a physical identity document bearing a) the customer's photograph, b) a date of birth and c) a holographic mark or ultraviolet feature. It must appear to a reasonable person a) that the document included those features, b) that it had not been altered and c) that it demonstrated that the customer met the relevant age requirement.

5.9 For tobacco products, herbal smoking products or cigarette papers, the date of birth must be before 1 January 2009. For vaping and nicotine products, the date of birth must confirm that the customer is 18 or over.

5.10 Examples of documents that contain the required features (a photograph, date of birth and either a holographic mark or ultraviolet feature) include passports, photocard driving licences and PASS cards.

5.11 This requirement is consistent with the requirements in the mandatory licensing conditions for alcohol sales. This aims to ensure that the many retailers who sell alcohol and products in scope of this instrument can take a consistent approach to age verification across both sets of products.

Digital identification

5.12 Alternatively, a person charged with an age of sale offence may satisfy the defence by proving that they verified the customer's age through certain forms of digital identification, rather than a physical identity document.

5.13 This instrument does not require individuals to use digital identification for age verification, or businesses to adopt its use, and customers and retailers may prefer to continue to use physical identity documents. It simply provides an additional voluntary option for age verification. This reflects the Government's wider commitment to modernise age verification, reflecting how some people now shop and technological advancements whilst minimising the sharing of personal data and avoiding the need to carry physical identity documents.

5.14 The digital identification provisions in this instrument refer to digital verification services ("DVS", as defined under section 27 of the Data (Use and Access) Act 2025 ("the Data Act")) and their providers ("DVSP") listed in the statutory digital verification services register ("DVS register"), which is established and maintained under section 32 of the Data Act.

5.15 The Data Act established a statutory regime of standards, governance and oversight for registered DVS. To be listed in the DVS register, a DVSP must hold a valid certificate issued by an accredited conformity assessment body (who must be so accredited by the UK Accreditation Service). That certificate must confirm that they are providing DVS in accordance with the UK DVS trust framework, published under section 28 of the Data Act ("the DVS trust framework").

5.16 The rules in the DVS trust framework draw on existing technical standards, best practice, guidance and legislation. They also place rigorous security requirements on certified DVSP based on robust international standards. The DVS trust framework rules are intended to support secure and privacy-enhancing DVS.

5.17 To satisfy the defence using digital identification, the person charged with an age of sale offence must prove that they confirmed that the customer provided digital identification, which the person could verify in line with their DVS agreement (see paragraph 5.18). They must prove that they then used this digital identification provided by the customer to verify that the customer met the relevant age requirement. This verification must take place through technological means, for example by

scanning a QR code or through another technical mechanism provided by the DVS; a visual inspection of the digital identification will not be sufficient.

5.18 A person can only accept and verify digital identification if they are covered by an agreement with a registered DVSP ("the relevant DVSP") for the delivery of DVS, where the following criteria are met:

5.18.1 The relevant DVSP has agreed that, in the course of providing its services, it will confirm whether or not the customer has attained the relevant age. This means that the relevant DVSP must provide information (such as a date of birth, age, or yes/no response) that enables the person selling the relevant product to determine whether a customer attempting to buy tobacco products, herbal smoking products or cigarette papers was born before 1 January 2009 or whether a customer attempting to buy vaping or nicotine products is at least 18 years old.

5.18.2 The relevant DVSP has agreed that it will deliver identification that reaches at least a 'medium level of confidence', as defined in either version 0.4 or 1.0 of the DVS trust framework, depending upon which version (of the DVS trust framework) the registered DVS being provided is registered against.

5.18.3 The level of confidence must have been verified by a DVSP, whether that DVSP is the DVSP providing the service to the person selling the product (i.e. the relevant DVSP) or another DVSP.

5.18.4 The relevant DVSP is registered as a provider of those services in accordance with either version 0.4 or version 1.0 of the DVS trust framework.

5.19 The regulations recognise both version 0.4 and version 1.0 of the DVS trust framework to support the transition between framework versions and ensure that services registered against either version can continue to be relied upon.

5.20 The requirements set out above aim to prevent the improper use of digital identification for the purposes of verification and are designed to protect an individual's data.

5.21 The requirements are also intended to ensure that digital identification used for age verification is based on robust evidence about the individual and can be trusted to relate to that individual. This reduces the chance of someone fraudulently obtaining a digital proof of age or using one that relates to someone else. By requiring use of a registered DVSP and preventing visual inspection of the digital identification being relied upon for the proof of age check, this instrument supports persons selling relevant products to be confident that the proof of age has not been tampered with, for example, by altering a screenshot of the digital identification being relied upon.

5.22 The digital provisions in this instrument broadly mirror provisions in The Licensing Act 2003 (Mandatory Licensing Conditions) (Amendment) Order 2026[1], which enables the use of digital identification for alcohol sales in England and Wales.

5.23 DVS can be used both for in-person sales and online sales of tobacco products, herbal smoking products, cigarette papers, vaping products and nicotine products.

Corporate defendants

5.24 To satisfy this defence, the person charged with the offence must have completed the steps specified in this instrument. Any person who is not able to evidence that they completed these steps may still be able to rely on the alternative defence in the 2026

[1] https://www.legislation.gov.uk/ukdsi/2026/9780348284980

Act of taking all reasonable steps to avoid committing the offence. This may apply to corporate defendants where they are unable to show they have completed the steps specified in this instrument directly but can demonstrate they have taken other actions. It will be for a court to determine what constitutes all reasonable steps under the alternate defence. We will set out in guidance recommended policies and practices that corporate retailers can implement to reduce the risk of unlawful sales occurring, such as providing training for staff and using till prompts.

Coming into force and application

5.25 These regulations come into force on 1 January 2027 and the defence applies in relation to offences committed on or after this date. For vaping and nicotine products, this means that there is a short delay between the coming into force of the new age of sale offence under section 10 of the 2026 Act on 29 October 2026, and the point at which this defence begins to apply. The alternative defence in the 2026 Act is available to persons charged with committing an offence under section 10 in the interim period. For tobacco products, herbal smoking products and cigarette papers, the offence comes into force on 1 January 2027 and the defence is available from that date.

What was the previous policy, how is this different?

5.26 Previously, the legislation which set out the old age of sale offences for tobacco products, cigarette papers and nicotine inhaling products did not specify particular age verification measures that persons selling these products could take to demonstrate compliance. Instead, whether a person charged with an age of sale offence had a defence depended on whether they could prove that they took 'all reasonable precautions and exercised all due diligence' to avoid committing the offence.

5.27 By contrast, this instrument provides a prescribed route to establishing a defence through specified age verification steps. This aims to provide greater certainty to retailers about how best to verify customers' age when selling products in scope of the 2026 Act.

5.28 This new defence applies to the new age of sale offences in the 2026 Act.

5.29 This instrument does not affect the separate defence in the 2026 Act for a person charged with an age of sale offence to prove that they otherwise took all reasonable steps to avoid committing the offence.

6. Legislative and Legal Context

How has the law changed?

6.1 Previously, the Children and Young Persons Act 1933 ("the 1933 Act"), as amended by The Children and Young Persons (Sale of Tobacco etc) Order 2007, made it an offence to sell tobacco, herbal smoking products or cigarette papers to someone who is under the age of 18 in England and Wales. The Nicotine Inhaling Products (Age of Sale and Proxy Purchasing) Regulations 2015 ("the 2015 Regulations") made it an offence to sell a nicotine vape to children under the age of 18.

6.2 Under the 1933 Act and the 2015 Regulations it was a defence for a person charged with the offence to prove that they 'took all reasonable precautions and exercised all due diligence to avoid the commission of the offence'.

6.3 Section 10 of the 2026 Act establishes a new age of sale offence for vaping and nicotine products from 29 October 2026 and section 1 of the 2026 Act establishes a

new age of sale offence for tobacco products, herbal smoking products and cigarette papers from 1 January 2027.

6.4 Sections 1(2)(a) and 10(2)(a) provide that it is a defence for a person charged with an age of sale offence to prove that they took such steps as may be specified in regulations made by the Secretary of State to verify that the customer was over the age of sale. This instrument sets out the steps that must be satisfied to meet these defences.

6.5 Sections 1(2)(b) and 10(2)(b) of the 2026 Act provide alternative defences, that the person charged with the offence 'otherwise took all reasonable steps to avoid the commission of the offence'.

Why was this approach taken to change the law?

6.6 Without this instrument, a person charged with an age of sale offence would be able to rely on the defence set out in sections 1(2)(b) and 10(2)(b) of the 2026 Act. However, the approach of setting out a separate defence in this instrument has been chosen to provide additional clarity for retailers, responding to calls from the retail sector. It also provides clarity for retailers about how they can use digital forms of age verification.

7. Consultation

Summary of consultation outcome and methodology

7.1 We have not considered it necessary to undertake a further consultation on these regulations, as the steps will not place mandatory requirements on businesses. However, we have considered responses to other relevant consultations.

7.2 From October to December 2023, the then Government held an open consultation on policy proposals for inclusion in the Tobacco and Vapes Bill[2]. There were 27,921 responses, including 896 from organisations and 27,025 from individuals in both personal and professional capacities. Although the questions in the consultation focused on the core policies under consideration for inclusion in the primary legislation, a number of the responses were relevant to this instrument. Some of the responses suggested forms of physical and digital identification that should be acceptable proofs of age and highlighted the need to give consideration to customers who may not hold common forms of identification.

7.3 From January to March 2024, the then Government consulted on whether digital identities should be used for verifying a customer's age when selling alcohol[3]. The insights from this consultation are relevant given similarities between the two sets of products (for example, there is significant overlap between retailers selling alcohol and those selling tobacco and vapes). The majority of respondents to the consultation (72%) indicated that the Licensing Act 2003 should be amended to allow the use of digital identities as proof of age in the sale of alcohol, and that digital identities should be permitted in all retail settings. The majority of respondents (82%) agreed that providers of digital identity services used for age verification for alcohol sales should be certified against government approved standards contained within the UK DVS trust framework (formerly known as the UK digital identity and attributes trust framework).

[2] https://www.gov.uk/government/consultations/creating-a-smokefree-generation-and-tackling-youth-vaping
[3] https://www.gov.uk/government/consultations/alcohol-licensing-age-verification/outcome/alcohol-licensing-age-verification-consultation-results

7.4 We have consulted with the Welsh Government in developing these regulations and have obtained consent from Welsh ministers, as required by the 2026 Act.

7.5 We are consulting with the Information Commissioner's Office (ICO) in relation to Article 36(4) of the UK General Data Protection Regulation (UK GDPR).

8. Applicable Guidance

8.1 Guidance has been published on the new age of sale provisions for tobacco products, herbal smoking products and cigarette papers[4] and for vaping products and nicotine products[5]. These documents will be updated in due course to provide further information on the age verification defence in this instrument.

8.2 Information on digital identity and digital verification services is available via the Office for Digital Identities and Attributes website[6].

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full impact assessment has not been prepared for this instrument as it does not impose any direct costs to businesses, beyond those already accounted for in the Impact Assessment for the 2026 Act[7]. This estimated that the cost to retailers for age verification of the smoke-free generation policy would be £83.5m based on 2024 prices; for shisha bars this was unable to be quantified. The contents of this instrument should not impact on those estimates. Indirect impacts in relation to the digital identification provisions, which were not accounted for in the Impact Assessment for the 2026 Act, are discussed below.

Impact on businesses, charities and voluntary bodies

9.2 Businesses will be impacted if they choose to implement digital verification services (DVS) to verify a customer's age before selling tobacco products, herbal smoking products, cigarette papers, vaping products or nicotine products.

9.3 Firstly, businesses will need to familiarise themselves with the guidance on the steps that may be taken to verify a customer's age using digital identification before selling the products in scope. Based on evidence and estimates by the Home Office[8] on the rate at which businesses will take up DVS over a 10-year appraisal period and estimates of the number of businesses selling products in scope, the Department of Health and Social Care (DHSC) estimates total familiarisation costs to be around £390,000 (2027 prices).

9.4 Secondly, businesses that adopt DVS will need to train staff. Based on evidence and estimates by the Home Office[9] on the rate at which businesses will take up DVS over a 10-year appraisal period, estimates of the number of businesses selling products in scope and the number of people that work in the businesses, DHSC estimates total training costs to be around £720,000 (2027 prices).

[4] https://www.gov.uk/guidance/selling-tobacco-herbal-smoking-products-and-cigarette-papers
[5] https://www.gov.uk/guidance/selling-vaping-and-nicotine-products
[6] https://www.gov.uk/government/organisations/office-for-digital-identities-and-attributes
[7] https://www.gov.uk/government/publications/the-tobacco-and-vapes-bill-impact-assessment
[8] https://www.legislation.gov.uk/ukdsi/2026/9780348284980/pdfs/ukdsiod_9780348284980_en_001.pdf
[9] https://www.legislation.gov.uk/ukdsi/2026/9780348284980/pdfs/ukdsiod_9780348284980_en_001.pdf

9.5 Thirdly, there is expected to be a cost incurred by businesses that adopt DVS as a result of DVS providers charging licence holders for the provision of their DVS. In the absence of evidence on how much DVS providers will charge, it has been estimated as a cost per DVS check. Based on estimates of the number of transactions of products in scope and estimates by Home Office[10] on the rate at which consumers will take up the use of DVS and that each check using DVS will cost 15 pence, DHSC estimates that the total cost of DVS checks to businesses over a 10-year appraisal period will be around £178 million (2027 prices). It should be noted that this estimate does not include the cost for DVS checks of herbal smoking products due to limited data and evidence on the use of these products. However, we expect any additional costs for herbal smoking product transactions to be minimal.

9.6 Businesses that adopt DVS will also incur costs to implement the necessary technology. However, we expect these costs to be minimal as DVS is expected to be compatible with existing infrastructure such as QR codes or Near Field Communication (NFC).

9.7 The total estimated costs to businesses of implementing DVS are around £179 million (2027 prices) over a 10-year appraisal period. However, it will be up to each individual business if they choose to implement DVS. This means this instrument does not impose any direct costs to businesses.

9.8 These costs do not include familiarisation and training costs to any retailers that also sell alcohol, such as convenience stores and supermarkets, as these costs will have been accounted for in the Home Office's assessments of the costs to businesses of implementing DVS in relation to The Licensing Act 2003 (Mandatory Licensing Conditions) (Amendment) Order 2026[11].

9.9 The legislation does impact any small and micro businesses that implement DVS. Small and micro businesses may face potential barriers in adopting digital identification such as implementation costs and infrastructure constraints. As adoption of DVS is voluntary, there are no direct costs. However, smaller businesses that do not implement DVS may risk losing customers over time if customer reliance grows.

9.10 The impact on the public sector is that local trading standards officers, who will enforce the regulations, will need to familiarise themselves with the new age verification requirements. The specific impact of familiarisation costs for trading standards in relation to DVS impact is estimated to be around £7,000, so not expected to be significant.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is through wider evaluation of the 2026 Act. Section 165 of the Act creates a statutory requirement for the Secretary of State to carry out a review of its operation within 4-7 years of passage. We expect this review to capture any relevant findings on age verification, as an integral part of the operation of the age of sale provisions introduced by the Act.

10.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Dame Diana Johnson, Minister of State for Public Health and Patient Safety has made the

[10] https://www.legislation.gov.uk/ukdsi/2026/9780348284980/pdfs/ukdsiod_9780348284980_en_001.pdf
[11] https://www.legislation.gov.uk/ukdsi/2026/9780348284980/memorandum/contents

following statement: “It is not considered necessary to include a review clause in this instrument as this would be duplicative of the existing statutory review requirement in Section 165 of the Tobacco and Vapes Act 2026”.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Minister of State for Public Health and Patient Safety has made the following statement regarding Human Rights: “In my view the provisions of The Tobacco and Vapes Act 2026 (Age Verification Defence to Underage Sales) (England and Wales) Regulations 2026 are compatible with the Convention rights.”

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).