

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 7

(Senator Middleton, *et al.*)

Finance

Economic Matters and Judiciary

Electronic Cigarettes - Sale to Minors - Components, Supplies, and Enforcement

This bill clarifies that the prohibition against selling, distributing, or offering for sale to a minor an electronic nicotine-delivery device includes the sale, distribution, or offer for sale of any component of the device or any product used to refill the device. The bill also clarifies that the prohibition does not extend to a device that has been approved by the U.S. Food and Drug Administration (FDA) as a tobacco cessation product and is being marketed and sold only for that purpose. The bill alters the penalty structure from criminal to civil, specifies the amount of the penalty, and authorizes law enforcement officers and county health officers to issue civil citations for violations.

Fiscal Summary

State Effect: Potential minimal decrease in general fund revenues due to the violation changing from a misdemeanor to a civil infraction and the District Court remitting collected penalties to the county in which the violation occurred; because the application of the current penalty occurs so rarely, the effect on State finances is negligible. Any increase in the workload of the District Court is expected to be minimal and can likely be handled with existing resources.

Local Effect: Potential minimal increase in revenues due to the bill's penalty provisions. Local government expenditures are not materially affected by the bill. Enforcement can be handled with existing resources.

Small Business Effect: Minimal. Retailers would no longer be able to sell components of electronic cigarettes to minors; however, they are already prohibited from selling the device itself to minors.

Analysis

Bill Summary: A person who violates the prohibition is subject to a civil penalty of \$300, and \$500 for any violation occurring within 24 months after a previous violation. As in current law, it is a defense against prosecution if the person examined the purchaser's valid form of identification and the identification indicated the purchaser to be at least 18 years of age. A law enforcement officer, county health officer, or the county health officer's designee may issue a civil citation for violations; "designee" means a retired sworn law enforcement officer employed by a county health officer or an employee of a local health department (LHD) who is trained in civil enforcement.

A civil citation must include specified information, including a notice stating the person's right to elect to stand trial for the violation and a warning that the failure to pay the civil penalty or to timely contest liability may result in a default judgment that may include the civil penalty, court costs, and administrative expenses. The bill establishes a procedure to allow for persons to contest a citation in District Court. The District Court must remit any collected penalties to the county in which the violation occurred.

Current Law: State law (Chapter 714 of 2012) prohibits the sale, distribution, or offer for sale to a minor of an electronic *device* that can be used to deliver nicotine to the individual inhaling from the device, including an electronic cigarette, cigar, cigarillo, or pipe. The statute does not specifically include the sale or distribution of *components or parts of the device* as subject to the same prohibition. The statute also exempts a nicotine device that contains or delivers nicotine intended for human consumption if the device has been approved by FDA; however, the statute does not specifically state that the device must be approved as a tobacco cessation product, and that the device must be marketed and sold solely for this purpose, in order to qualify for the exemption.

A person who violates this law is guilty of a misdemeanor and is subject to a fine of up to \$1,000 for each violation; however, the statute does not define an enforcement mechanism for violations.

Background: Electronic cigarettes (sometimes referred to as "e-cigarettes") are battery-operated devices that typically contain nicotine cartridges and other chemicals imitating flavors such as chocolate, mint, or strawberry. When a user draws on an electronic cigarette, a light-emitting diode causes the tip to glow, and the inhaled nicotine vapor is exhaled in a cloud that resembles cigarette smoke but dissipates more quickly and does not have a lingering odor. Depending on the type of device, the nicotine cartridges are removable and/or refillable with liquid nicotine. The cartridges and liquid nicotine can be purchased separately from the device.

According to the U.S. Centers for Disease Control and Prevention, youth use of e-cigarettes is on the rise; more than a quarter million youth who had never smoked a traditional tobacco cigarette used e-cigarettes in 2013, a threefold increase since 2011.

E-cigarette manufacturers maintain that their products are safe and serve as an alternative to traditional tobacco cigarettes. However, the American Lung Association, American Cancer Society, American Heart Association, and Campaign for Tobacco-Free Kids have called for increased regulation and research of e-cigarettes, claiming that the products have not been proven safe and may also initiate nicotine addiction for youth due to the variety of youth-appealing flavors. FDA has also stated that consumers do not know the potential risks of using e-cigarettes because they have not been fully studied; an early FDA analysis of a small sample of e-cigarettes found detectable levels of carcinogens and toxins in the products. *The New York Times* has reported that the long-term effects of the nicotine vapor are still unclear, but that there is currently no evidence that the vapor causes cancer or heart disease; however, some high-powered, high-heat e-cigarettes may produce carcinogens at levels similar to traditional tobacco cigarettes.

According to the National Conference of State Legislatures, 41 states have prohibited the sale of e-cigarettes to minors. FDA initially attempted to regulate e-cigarettes as drug/device combination products under the federal Food, Drug, and Cosmetic Act. However, a 2010 federal appellate court held that FDA may not regulate e-cigarettes as drug/device combination products unless manufacturers specifically market the products as tobacco cessation aids. The court did hold, however, that FDA could regulate e-cigarettes as “tobacco products” under the Family Smoking Prevention and Tobacco Control Act of 2009 (TCA). FDA chose not to appeal the ruling and instead moved forward with regulations under its TCA authority. In April 2014, FDA issued its Proposed Rule to deem e-cigarettes as “tobacco products” subject to its regulatory authority. Among other regulations, FDA proposes to require a minimum age of 18 to purchase e-cigarettes (including any components or parts that contain nicotine). The public comment period for the Proposed Rule closed in August 2014, with thousands of comments submitted. FDA must review these comments and issue its Final Rule before the regulations take effect.

State Revenues: General fund revenues may decline by a minimal amount due to the penalty structure change and the requirement that the District Court remit any collected penalties to the county in which the violation occurred. However, current enforcement of the existing prohibition against the sale of electronic nicotine-delivery devices to minors appears to be minimal; the District Court has no record of any charges for violations since the statute was enacted in 2012. Therefore, any effect on State revenues as a result of the bill’s penalty provisions is expected to be negligible.

State Expenditures: The Judiciary advises its expenditures increase due to the costs of recalling and revising civil citations to include the bill’s required warnings for the civil

infraction, and to alter the programming for the District Court's cash register system. The Department of Legislative Services assumes that any modifications can be incorporated into already necessary annual changes and so can be handled with existing resources. Additionally, the Judiciary advises that, while it is difficult to project the number of additional civil citations the District Court will receive as a result of the bill, it does not anticipate numbers that would have a significant fiscal or operational impact on the District Court.

The Comptroller's Office advises that its field enforcement agents will be able to handle enforcement with existing resources, since they are already monitoring similar prohibitions at the same types of retail establishments.

Local Fiscal Effect: Local revenues may increase by a minimal amount, to the extent of enforcement. LHDs and law enforcement agencies (LEAs) advise that, because the bill adds an additional component to an already established prohibition, enforcement can be handled with existing resources. The Department of Health and Mental Hygiene also advises that LHD and LEA enforcement can be handled with existing resources.

Additional Information

Prior Introductions: None.

Cross File: HB 489 (Delegate A. Miller, *et al.*) - Economic Matters and Judiciary.

Information Source(s): Baltimore City; Calvert, Caroline, Howard, Montgomery, and Prince George's counties; Comptroller's Office; Department of Health and Mental Hygiene; Department of State Police; Judiciary (Administrative Office of the Courts); State's Attorneys' Association; Maryland Association of Counties; Maryland Association of County Health Officers; Campaign for Tobacco-Free Kids; American Cancer Society; American Heart Association; American Lung Association; National Conference of State Legislatures; *The New York Times*; U.S. Centers for Disease Control and Prevention; U.S. Food and Drug Administration; Department of Legislative Services

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