

Department of Legislative Services
 Maryland General Assembly
 2017 Session

FISCAL AND POLICY NOTE
 Enrolled - Revised

House Bill 523
 Economic Matters

(Delegate Jameson, *et al.*)

Finance

Electronic Nicotine Delivery Systems and Vaping Liquid - Licensing

This bill establishes a licensing and regulatory framework for the manufacture, wholesale distribution, and retail sale of electronic nicotine delivery systems (ENDS) (*i.e.*, e-cigarettes, other similar devices, and their components). A person with a tobacco-related license is authorized to manufacture, distribute, or sell ENDS in the same capacity as the person is licensed for tobacco and does not need a separate ENDS license.

Fiscal Summary

State Effect: General fund revenues increase minimally beginning in FY 2018 from licenses issued by the Comptroller and clerks of the court to certain ENDS-related businesses. The amount cannot be reliably estimated at this time. Both the Comptroller and the Judiciary (Administrative Office of the Courts) can generally implement the bill within their existing processes for tobacco licensing and regulation; however, general fund expenditures for the Judiciary increase by \$18,000 in FY 2018 for programming expenses. The bill’s penalty provisions are not anticipated to materially affect District Court caseloads, general fund revenues, or general fund expenditures.

| (in dollars) | FY 2018 | FY 2019 | FY 2020 | FY 2021 | FY 2022 |
|----------------|----------|---------|---------|---------|---------|
| GF Revenue | - | - | - | - | - |
| GF Expenditure | \$18,000 | \$0 | \$0 | \$0 | \$0 |
| Net Effect | (-) | - | - | - | - |

Note: () = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: Local government revenues increase minimally beginning in FY 2018 for each license issued to a standalone ENDS retailer or vape shop vendor by a local clerk of the court, as discussed below. License fees collected by a single county are unlikely to materially affect that county’s revenues. Circuit court expenditures associated with license issuances increase, likely negligibly, beginning in FY 2018. The bill’s penalty provisions

are not anticipated to materially affect circuit court caseloads, local revenues, or local expenditures.

Small Business Effect: Meaningful, as discussed below.

Analysis

Bill Summary: Relevant terms are defined, licenses and associated requirements for their application and issuance are created, and prohibited acts and penalties are established for the manufacture, wholesale distribution, and retail sale of ENDS.

“Electronic nicotine delivery system” means an electronic device, a component for an electronic device, or a product used to refill or resupply an electronic device that can be used to deliver nicotine to an individual inhaling from the device. It includes (1) an electronic cigarette, cigar, cigarillo, or pipe and (2) vaping liquid. It does not include (1) a nicotine device that contains or delivers nicotine intended for human consumption if the device has been approved by the U.S. Food and Drug Administration (FDA) for sale as a tobacco cessation product and is being marketed and sold solely for that purpose; (2) cannabis oil or any other unlawful substance; or (3) an electronic device that is being used to deliver cannabis oil or another unlawful substance. This definition is incorporated into an existing prohibition against the sale of ENDS to minors.

“Vaping liquid” means a liquid that (1) consists of propylene glycol, vegetable glycerin, or other similar substance; (2) may or may not contain natural or artificial flavors; (3) may or may not contain nicotine; and (4) converts to vapor intended for inhalation when heated in an electronic device.

License Issuances

ENDS manufacturer, wholesaler distributor, and wholesaler importer licenses are issued by the Comptroller. ENDS retailer and vape shop vendor licenses are issued by the clerk of the court in the appropriate county. Fees and exceptions (for existing tobacco licensees) are shown in **Exhibit 1**. Fees collected by the Comptroller must be paid into the State general fund. Fees collected by the clerks of the court are subject to existing distribution provisions for clerk-issued licenses (generally 92% local, 8% State general fund). The General Assembly intends that these license fees be used to administer the bill.

Prior to the issuance or renewal of any license, the Comptroller must conduct an investigation with regard to the applicant, the business to be operated, and the facts in the application. A separate ENDS retailer or a vape shop vendor license is required for each permanent or temporary place of business located in the same enclosure and operated by

the same applicant. The clerk must forward a copy of an application received for each license issued under the bill to the Comptroller within 30 days of issuing the license.

Exhibit 1
Electronic Nicotine Delivery System Licenses Issued under the Bill
Annual Licenses

| <u>License</u> | <u>Issuer</u> | <u>Fee</u> |
|------------------------|----------------------|-------------------|
| Manufacturer | Comptroller | \$25 |
| Wholesaler Distributor | Comptroller | 150 |
| Wholesaler Importer | Comptroller | 150 |
| Retailer | County Clerk | 25 |
| Vape Shop Vendor | County Clerk | 25 |

Note: Any person licensed under Title 16 or 16.5 of the Business Regulation Article (tobacco licenses) is authorized to manufacture, distribute, or sell ENDS in the same capacity as the person is licensed under that title and is not required to obtain an additional ENDS license.

Source: Department of Legislative Services

The bill also establishes requirements and fees for the transfer and assignment of the various licenses under different circumstances. All licenses are valid for one year, may be issued on a staggered basis, and must be issued to each applicant that meets the requirements specified in the bill.

Actions Authorized by Licenses

Manufacturers: An ENDS manufacturer license authorizes the licensee to (1) under specified conditions, sell ENDS to licensed in-state wholesalers, out-of-state ENDS wholesalers and retailers, licensed vape shop vendors, and consumers; (2) if the licensee also holds a license to act as an ENDS retailer or a vape shop vendor, transfer ENDS to inventory for sale under the retail license or vape shop license; and (3) except where otherwise prohibited by local law or specified State law, distribute ENDS products to a licensed ENDS retailer or vape shop vendor.

A licensed ENDS manufacturer may sell directly to a consumer if the licensee manufactures the ENDS and the consumer purchases or orders ENDS through the mail, a computer network, a telephonic network, or another electronic network.

Wholesalers: An ENDS wholesaler distributor or wholesaler importer license authorizes the licensee to (1) sell ENDS to ENDS retailers; (2) buy ENDS directly from an ENDS

manufacturer, wholesaler distributor, or wholesaler importer; (3) hold ENDS; (4) sell ENDS to another licensed ENDS wholesaler distributor or wholesaler importer; and (5) store ENDS at a licensed ENDS storage warehouse.

Retailers: An ENDS retailer license authorizes the licensee to (1) sell ENDS to consumers, but not through the mail, a computer network, a telephonic network, or another electronic network; (2) buy ENDS from an ENDS wholesaler distributor or wholesaler importer; (3) if the licensee also holds a license to act as an ENDS manufacturer, sell at retail ENDS manufactured under the manufacturer license; and (4) except where otherwise prohibited by local law or specified State law, distribute sample ENDS products to consumers in the State.

A vape shop vendor license authorizes the licensee to (1) sell ENDS as a vape shop vendor; (2) buy ENDS from an ENDS manufacturer; and (3) if the licensee also holds a license to act as an ENDS manufacturer, sell at retail ENDS manufactured under the manufacturer license.

Transportation of Electronic Nicotine Delivery Systems

A person that ships, imports, or sells ENDS into or within the State must (1) comply with any federal and State requirements concerning the placement of warning labels or other information on the containers or individual packages of ENDS and (2) ensure that the containers or individual packages of ENDS do not contain any information or markings that are false, misleading, or contrary to federal trademark laws or the State trademark law.

Comptroller Disciplinary Actions

Subject to specified hearing provisions, the Comptroller may deny a license to an applicant, reprimand a licensee, or suspend or revoke a license for (1) specified acts of fraud; (2) unlicensed transactions related to ENDS; or (3) if the applicant or licensee is convicted of specified crimes or violates specified laws or regulations related to ENDS. The Comptroller must deny a license to any applicant that has had a license revoked under these circumstances for one year and until the Comptroller is satisfied that the applicant will comply with the relevant State laws and regulations. The bill specifies the administrative process for the suspension or revocation of licenses by the Comptroller.

Prohibited Acts and Penalties

Unless otherwise specified, a person that violates any provision of the bill is guilty of a misdemeanor and on conviction is subject to a fine of up to \$1,000 and/or 30 days imprisonment.

A person may not act, attempt to act, or offer to act as an ENDS manufacturer, retailer, wholesaler distributor, wholesaler importer, or vape shop vendor in the State unless the person has an appropriate license. A violation is a misdemeanor and subject to a maximum penalty of a \$1,000 fine and/or 30 days imprisonment. Each day that a violation continues is a separate offense.

A person may not ship, import, or sell into or within the State any ENDS unless the person holds any license required by the bill. Violation is subject to disciplinary action by the Comptroller as specified in the bill.

Current Law: The licensing and regulatory framework established for ENDS under the bill is similar to that for cigarettes and other tobacco products. For tobacco, manufacturer and wholesaler licenses are issued by the Comptroller, subject to enforcement by the Comptroller's Office, and retail licenses are issued by the clerks of the court in the appropriate county.

Pursuant to Chapter 425 of 2015, under the Health-General Article, a person may not sell, distribute, or offer for sale to a minor an electronic device, a component for an electronic device, or a product used to refill or resupply 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. This prohibition does not apply to a nicotine device that has been approved by FDA as a tobacco cessation product and that is being marketed and sold solely for this purpose.

Background: "ENDS" as defined in the bill covers several technologies and their associated components, including electronic cigarettes (or e-cigarettes), vaporizers, vape pens, and vaping liquid. Typically these are battery-operated devices with cartridges or reservoirs for liquids (e-liquids or vaping liquids) that contain nicotine, flavoring chemicals, propylene glycol, glycerin, and other ingredients. When a user draws on an electronic cigarette or similar device, the liquid is heated into an aerosol that the user then inhales. The resulting vapor resembles cigarette smoke, but it dissipates more quickly and does not have a lingering odor.

Federal Regulation

In 2016, FDA finalized a rule extending its regulatory authority over tobacco products to include ENDS and components or parts of regulated tobacco products (*e.g.*, e-liquid). Accordingly, effective August 8, 2016, federal regulations prohibit retailers from selling ENDS to minors and require retailers to check the photo identification of any individual younger than age 27 who attempts to purchase ENDS. Further, retailers may not sell ENDS in vending machines or self-service displays (except in adult-only facilities) and may not give away free samples of ENDS, including components or parts.

Electronic Cigarette Use

Electronic cigarette use has been on the rise since first introduced in the United States in the mid-2000s, particularly among youth. According to the U.S. Centers for Disease Control and Prevention, between 2011 and 2015, electronic cigarette use among high school students increased from 1.5% to 16%; among middle school students, usage increased from 0.6% to 5.3%. Put another way, more than 10 times the number of high school students and nearly 9 times the number of middle school students used electronic cigarettes in 2015 than in 2011.

Field Enforcement Division of the Comptroller's Office

The Field Enforcement Division is the enforcement arm of the Comptroller's Office and is responsible for regulating the alcohol, motor fuel, and tobacco industries that conduct business in the State. The enforcement agents and inspectors are responsible for the detection and enforcement of the revenue laws relating to alcoholic beverage, tobacco, motor fuel, motor carrier, and sales and use taxes. The tasks performed to complete this function include conducting investigations, arresting violators, and performing compliance inspections for proper licenses.

State Fiscal Effect: Both the Comptroller and the Judiciary can generally implement the bill within their existing processes for tobacco licensing and regulation. However, the Judiciary estimates a one-time programming expense of approximately \$18,000 in fiscal 2018 to incorporate the new licenses.

Under the bill, the Comptroller issues ENDS manufacturer, wholesaler distributor, and wholesaler importer licenses. The manufacturer license fee is \$25 and the wholesaler license fees are each \$150. Revenue from these fees accrues to the general fund. However, as noted above, any person licensed under Title 16 or 16.5 of the Business Regulation Article (tobacco licenses) is authorized to manufacture, distribute, or sell ENDS in the same capacity as the person is licensed under that title and is not required to obtain an additional ENDS license. The Comptroller does not anticipate issuing many of these licenses and estimates minimal general fund revenues accruing from the associated fees beginning in fiscal 2018.

Under the bill, the local clerks of the court issue ENDS retailer and vape shop vendor licenses. Each license is \$25, but the same exclusion from licensing and fee requirements for existing tobacco licensees discussed above applies to these licenses. There were approximately 6,700 retail tobacco licensees in 2016; under the bill, these licensees can sell ENDS under their tobacco license. The bill specifies that all fees collected by the counties (*i.e.*, the local clerks of the court) are subject to specified distribution provisions

for miscellaneous business licenses. Generally, revenues from business licenses issued by local clerks of the court are split between local government (92%) and the State general fund (8%). Therefore, new general fund revenues are confined solely to 8% of the revenue generated from licenses issued to standalone ENDS retailers and vape shop vendors. The number of standalone businesses is unknown at this time. However, given the State/local revenue split and that retail tobacco licensees are not required to obtain a retail ENDS license, the effect on the general fund from these licenses is also anticipated to be minimal beginning in fiscal 2018.

The bill's penalty provisions are not anticipated to materially affect District Court caseloads, general fund revenues, or general fund expenditures.

Local Fiscal Effect: Consistent with the exemption for existing retail tobacco licensees and the State/local revenue split for clerk-issued licenses discussed above, local government revenues increase beginning in fiscal 2018 by \$23 (92% of \$25) for each license issued to a standalone ENDS retailer or vape shop vendor by a local clerk of the court. The number of standalone businesses is unknown at this time; however, the number of standalone businesses in a single county is unlikely to be large enough to materially affect that county's revenues. Circuit court expenditures associated with license issuances increase, likely negligibly, beginning in fiscal 2018. The bill's penalty provisions are not anticipated to materially affect circuit court caseloads or local revenues.

Small Business Effect: Small businesses involved in the manufacture, wholesale distribution/importation, and retail sale of ENDS are affected by the bill's licensing requirements and associated fees (if applicable). These businesses are regulated in much the same way as tobacco businesses, which affects business supply chains and prohibits certain actions. Small tobacco-related businesses, while not affected by the bill's licensing requirement or fees, nevertheless must comply with the general provisions related to ENDS (such as packaging requirements).

Additional Information

Prior Introductions: None.

Cross File: SB 119 (Senator Middleton) - Finance.

Information Source(s): Comptroller's Office; Judiciary (Administrative Office of the Courts); Department of Health and Mental Hygiene; Montgomery County; U.S. Food and Drug Administration; U.S. Centers for Disease Control and Prevention; Department of Legislative Services

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