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FISCAL AND POLICY NOTE
First Reader

Senate Bill 119
 Finance

(Senator Middleton)

Electronic Nicotine Delivery Systems - Licensing

This bill establishes a licensing and regulatory framework for the manufacture, storage, wholesale distribution, and retail sale of electronic nicotine delivery systems (ENDS) (*i.e.*, e-cigarettes, other similar devices, and their components).

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 significantly affect that county’s revenues. Circuit court expenditures associated with license issuances increase minimally 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, storage, 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 an electronic cigarette, cigar, cigarillo, or pipe. It does not include 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. This definition is incorporated into an existing prohibition against the sale of ENDS to minors.

License Issuances

Licenses required to act as an ENDS manufacturer, wholesaler, or storage warehouse are issued by the Comptroller. The fees for manufacturer and storage warehouse licenses are \$25. The wholesaler license fee is \$250, unless the applicant holds a cigarette or other tobacco products (OTP) wholesaler or subwholesaler license issued under the Business Regulation Article, in which case the person is not required to pay the fee. 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. The Comptroller must pay all license fees it collects to the general fund.

Licenses required to act as an ENDS retailer or a vape shop vendor are issued by the clerk of the court in the appropriate county. Each license is \$25, unless the applicant has a cigarette retailer or OTP retailer license issued under the Business Regulation Article, in which case the person is not required to pay the fee. A license is required for each permanent or temporary place of business located in the same enclosure and operated by the same applicant. All license fees collected by the counties are subject to existing revenue distribution provisions for many clerk-issued licenses, including OTP retailer licenses.

The bill also establishes requirements and fees for the transfer 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. The General Assembly intends that these license fees be used to administer the bill.

Actions Authorized by Licenses

An ENDS manufacturer license authorizes the licensee (1) to sell ENDS to specified wholesalers and vape shop vendors; (2) except where otherwise prohibited by local law or specified State law, distribute sample products to consumers located in the State; (3) store ENDS in a licensed storage warehouse for subsequent shipment to licensed wholesalers, federal reservations, or persons out of State; and (4) on approval of the Comptroller, act as an agent of a State-licensed wholesaler for distribution of ENDS.

An ENDS storage warehouse license authorizes the licensee to operate a storage facility for the purpose of storing ENDS on behalf of a licensed manufacturer. If a storage warehouse licensee is a licensed ENDS wholesaler, the storage warehouse license authorizes the holder to store ENDS.

An ENDS wholesaler license authorizes the licensee to (1) sell ENDS to licensed retailers; (2) buy ENDS directly from a licensed manufacturer and a licensed wholesaler; (3) hold ENDS; (4) transport ENDS in the State; (5) sell ENDS to another licensed wholesaler if the Comptroller specifically authorizes the sale; and (6) store ENDS at a licensed storage warehouse.

An ENDS retailer license authorizes the licensee to sell ENDS to consumers and buy ENDS from a licensed *wholesaler*. A vape shop vendor license authorizes the licensee to sell ENDS as a vape shop vendor and buy ENDS from a licensed *manufacturer*.

Recordkeeping Requirements for Wholesalers

Each ENDS wholesaler must obtain an invoice for each purchase of ENDS, keep specified transaction records, and make an inventory record each month. Records must be kept for six years, or less if a shorter retention period is set by the Comptroller, and must be made available for examination by the Comptroller.

Transportation of Electronic Nicotine Delivery Systems

A person that transports ENDS by vehicle on a public road must have in the vehicle a delivery ticket or an invoice that states (1) the name and address of the seller or consignor; (2) the name and address of a buyer or consignee that is authorized to hold ENDS; and (3) the quantity and brands of ENDS that are being transported.

The Comptroller by regulation may require a common carrier that brings ENDS into the State to submit a copy of any freight bill relating to the shipment.

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 and authorizes the Comptroller to adopt related regulations.

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.

Unlicensed Activity Prohibited: A person may not act, attempt to act, or offer to act as an ENDS manufacturer, retailer, storage warehouse, wholesaler, 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 the appropriate State license and is the owner of the brand, the U.S. importer for the brand, or a designated agent in Maryland thereof. Violation is subject to disciplinary action by the Comptroller as specified in the bill.

Direct Shipment to Consumers Prohibited: A person that is engaged in the business of selling or distributing ENDS may not:

- sell or ship ENDS, ordered or purchased by mail or through an electronic network by a consumer or other unlicensed recipient, directly to a consumer or other unlicensed recipient in the State; or

- cause ENDS, ordered or purchased by mail or through an electronic network by a consumer or other unlicensed recipient, to be shipped directly to a consumer or other unlicensed recipient in the State.

A violation by a person that is not a licensee is a felony and subject to a maximum penalty of a \$500 fine, per transaction, and/or two years imprisonment. A violation by a licensee is subject to discipline by the Comptroller under the bill and is also a felony and subject to a maximum penalty of a \$500 fine for each package transported and/or two years imprisonment.

Current Law: The licensing and regulatory framework established for ENDS under the bill is similar to the existing licensing and regulatory framework for cigarettes and OTPs. Similar manufacturer, storage, and wholesaler licenses are issued by the Comptroller for these products. 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, and vape pens. Typically these are battery-operated devices with cartridges or reservoirs for liquids (e-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.

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 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

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, and storage warehouse licenses. The fees for manufacturer and storage warehouse licenses are \$25. The wholesaler license fee is \$250, unless the applicant holds a cigarette or OTP wholesaler or subwholesaler license issued under the Business Regulation Article, in which case the person is not required to pay the fee. Revenue from these fees accrues to the general fund. 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, *unless* the applicant has a cigarette retailer or OTP retailer license issued under the Business Regulation Article, in which case the person is not required to pay the fee. There were approximately 6,700 retail tobacco licensees in 2016.

The bill specifies that all fees collected by the counties 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 the fact that most businesses are not required to pay the

license fee, the impact 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 Revenues: ENDS retailer and vape shop vendor licenses issued to persons that also have a cigarette retailer or OTP license must be issued to the licensee at no cost. Therefore, 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. Nevertheless, the number of standalone businesses in a single county is unlikely to be large enough to significantly affect the county's revenues. Circuit court expenditures associated with license issuances increase minimally 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, storage, wholesale distribution, and retail sale of ENDS are affected by the bill's licensing requirements and associated fees (if applicable). These businesses are also regulated in much the same way as tobacco businesses, which affects business supply chains and prohibits certain actions. For example, all businesses, including small businesses, are prohibited from directly shipping (or causing direct shipment of) ENDS to consumers.

Additional Information

Prior Introductions: None.

Cross File: HB 523 (Delegate Jameson, *et al.*) - Economic Matters.

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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