

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 1094
Economic Matters

(Delegates Rosenberg and Waldstreicher)

Finance and Judicial Proceedings

Distribution of Electronic Cigarettes to Minors - Prohibition and Penalties

This bill (1) establishes that the distribution of electronic nicotine delivery systems (ENDS) to minors is a misdemeanor subject to existing criminal penalties for the distribution of tobacco products to minors; (2) establishes that the possession of ENDS by minors is a civil offense subject to existing civil procedures and dispositions for the possession of tobacco products by minors; and (3) increases civil penalties for subsequent civil violations of distributing ENDS to minors. The bill also makes a series of technical corrections to existing law.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues due to the bill's criminal penalty provisions. Expenditures are likely not materially affected, as discussed below.

Local Effect: Potential minimal increase in revenues due to the bill's civil penalty provisions. Expenditures may increase minimally, as discussed below.

Small Business Effect: Minimal.

Analysis

Bill Summary/Current Law:

Health-General Article: Civil Penalties for Distribution of ENDS to Minors

Chapter 425 of 2015 prohibited a person from selling, distributing, or offering 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.

Chapter 814 of 2017 establishes the term and definition of “electronic nicotine delivery system” under the Business Regulation Article and applies this definition to the prohibition against distributing such products to minors. “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 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.

“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.

Under current law, a person who violates this law is subject to a civil penalty of \$300 for a first violation and \$500 for any violation that occurs within 24 months after a previous violation. It is a defense against prosecution if the defendant examined the purchaser’s valid identification (issued by an employer, government unit, or institution of higher education) that identified the purchaser as at least age 18. The District Court must remit any penalties collected to the county in which the violation occurred.

The bill alters the civil penalties for a violation of this law as follows: (1) *up to* \$300 for a first violation; (2) up to \$1,000 for a second violation occurring within 24 months after the first violation; and (3) up to \$3,000 for each subsequent violation occurring within 24 months after the preceding violation.

Criminal Law Article: Possession and Distribution of Tobacco Products Expanded to Encompass ENDS

Under current law, a commercial tobacco distributor may not distribute any type of tobacco product, tobacco paraphernalia, or coupon redeemable for a tobacco product to a minor, unless the minor is acting solely as the agent of his or her employer (who distributes tobacco products or paraphernalia for commercial purposes). Likewise, someone else may not purchase for, sell to, or distribute to a minor any tobacco product or tobacco paraphernalia. A person that violates these provisions is guilty of a misdemeanor and is subject to a maximum fine of \$300 for a first violation, \$1,000 for a second violation

occurring within two years after the first violation, and \$3,000 for each subsequent violation occurring within two years after the preceding violation. However, in a prosecution for a violation, it is a defense that the defendant examined the purchaser's or recipient's license or other valid identification that positively identified the purchaser or recipient as being at least age 18.

Additionally, a minor may not use or possess tobacco products or cigarette rolling paper unless he or she is acting as the agent of the minor's employer, within the scope of employment. A minor is also prohibited from using false forms of identification to obtain tobacco products or cigarette rolling paper, including one that identifies someone other than the minor. A minor who violates these provisions is guilty of a civil offense.

The bill includes ENDS in these provisions and makes conforming changes.

Background: ENDS as defined in statute 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.

Federal Regulations

In 2016, the U.S. Food and Drug Administration 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). The 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.

Electronic Cigarette Use

Electronic cigarette use has been on the rise since first introduced in the United States in the mid-2000s. 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%. The trend appears to be continuing; a 2017 National Institutes of Health survey of high school seniors found that 27.8% had reported "vaping" in the prior year.

State Revenues: The bill establishes the distribution of ENDS to minors as a misdemeanor subject to fines of up to (1) \$300 for a first violation; (2) \$1,000 for a second violation occurring within two years of a first violation; and (3) \$3,000 for a subsequent violation occurring within two years of a preceding violation. However, the bill also establishes corresponding *civil* penalties for violations of distributing ENDS to minors and precludes

criminal prosecutions arising out of the same violation. Thus, to the extent the bill results in *criminal* violations and the assessment of corresponding *criminal* fines, general fund revenues may increase minimally.

State Expenditures: The Department of Legislative Services (DLS) notes that Chapter 773 of 2017 requires the Maryland Department of Health (MDH) to collaborate and consult with the Comptroller's Office, local health departments, and local law enforcement agencies to develop ongoing strategies for enforcement of § 10-107 and § 10-108 of the Criminal Law Article and to annually report on the development of such strategies and retailer training. Chapter 773 also requires the Comptroller's Office to annually report on the number of violations of these provisions and the subsequent actions taken by the Comptroller's Office. The bill includes ENDS in § 10-107 and § 10-108 of the Criminal Law Article. Thus, this analysis assumes that MDH and the Comptroller's Office must include information relating to strategies/training and violations involving ENDS, respectively, in the annual reports required under Chapter 773. However, DLS advises that such requirements can likely be handled with existing resources.

Local Revenues: Revenues may increase minimally, to the extent the bill results in *civil* citations and the assessment of increased *civil* penalties for subsequent violations of distributing ENDS to minors, which must be remitted to the county in which the violation occurred. Again, the bill precludes the issuance of civil citations and criminal prosecutions arising out of the same violation.

Local Expenditures: Expenditures for local jurisdictions may increase minimally, to the extent data must be provided to the Comptroller's Office regarding specified violations committed by minors and retailers involving ENDS.

Additional Information

Prior Introductions: None.

Cross File: None.

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

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