

Department of Legislative Services
 Maryland General Assembly
 2019 Session

FISCAL AND POLICY NOTE
 Third Reader - Revised

Senate Bill 895
 Finance

(Senator Kelley, *et al.*)

Economic Matters and Health and
 Government Operations

**Business Regulation - Tobacco Products and Electronic Smoking Devices -
 Revisions**

This bill (1) alters the definition of “tobacco product” to include electronic smoking devices (ESDs), renames electronic nicotine delivery systems (ENDS) to be ESDs, and makes related changes; (2) generally raises the minimum age, from 18 to 21, for an individual to purchase or be sold tobacco products; (3) exempts active duty military members who are at least age 18 and present valid military identification from the bill’s minimum age requirement; (4) authorizes the Maryland Department of Health (MDH) to conduct unannounced inspections of specified retailers; (5) specifies signage requirements for specified retailers; (6) alters restrictions pertaining to the sale of tobacco products through vending machines; and (7) makes other revisions to provisions of law pertaining to the distribution of tobacco products to minors and possession of tobacco products by minors.

Fiscal Summary

State Effect: General fund expenditures increase by \$30,400 in FY 2020 only. General fund revenues decrease significantly beginning in FY 2020, as discussed below.

(in dollars)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
GF Revenue	(-)	(-)	(-)	(-)	(-)
GF Expenditure	\$30,400	\$0	\$0	\$0	\$0
Net Effect	(-)	(-)	(-)	(-)	(-)

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

Local Effect: Revenues are likely affected in several counties, as discussed below. Enforcement can be handled with existing resources.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Tobacco Products and Electronic Smoking Devices – Definitions

Electronic Smoking Devices: The bill renames an ENDS to be an ESD and makes further revisions to the definition. Accordingly, an “ESD” is a device that can be used to deliver aerosolized or vaporized nicotine to an individual inhaling from the device. “ESD” includes an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, a vape pen, vaping liquid, and any component, part, or accessory of such a device, regardless of whether the component is sold separately, including any substance intended to be aerosolized or vaporized during the use of the device. “ESD” excludes a drug, device, or combination product authorized for sale by the U.S. Food and Drug Administration (FDA) under the federal Food, Drug, and Cosmetic Act.

Tobacco Products: The bill alters the definition of “tobacco product” to include ESDs and makes other revisions to the definition. Accordingly, “tobacco product” means a product that is intended for human inhalation, absorption, ingestion, smoking, heating, chewing, dissolving, or any other manner of consumption that is made of, derived from, or contains tobacco or nicotine. “Tobacco product” includes cigarettes, cigars, pipe tobacco, chewing tobacco, snuff, and snus; ESDs; and filters, rolling papers, pipes, and liquids used in ESDs, regardless of nicotine content. “Tobacco product” excludes a drug, device, or combination product authorized for sale by FDA under the federal Food, Drug, and Cosmetic Act.

Tobacco Products – Minimum Age

The bill generally raises, from 18 to 21, the minimum age for an individual to purchase or be sold tobacco products, exempts active duty military members who are at least 18 years old and present valid military identification from the minimum age requirement, and makes conforming changes. The bill affects several sections of the Annotated Code of Maryland, including the Criminal Law, Health-General, Local Government, and State Finance and Procurement articles. For example, references to “minor” or “18” are modified to be “an individual under the age of 21 years” or “21.” Accordingly, under the bill, existing exemptions from minimum age provisions applicable to minors acting solely as agents of their employers, as specified, apply to individuals younger than age 21. (Thus, the bill does not, for example, prohibit a retailer of tobacco products from employing an individual younger than age 21.)

In addition, the bill repeals a provision of criminal law that prohibits a minor from using or possessing a tobacco product, cigarette rolling paper, or an ENDS or from using a false form of identification to obtain a tobacco product, cigarette rolling paper, or an ENDS.

Furthermore, the bill repeals an authorized defense for a violation of a criminal prohibition against the distribution of tobacco products to an underage individual (under the bill, the criminal prohibition generally pertains to individuals younger than age 21) that the defendant examined the purchaser's or recipient's *employer-issued* or *school* identification. The bill specifies that it is a defense that the defendant examined the purchaser's or recipient's *government-issued* identification that positively identified the purchaser or recipient as *either* at least age 21 *or* as at least age 18 and an active duty member of the military.

Inspections of Retailers by the Maryland Department of Health

The bill authorizes MDH to conduct unannounced inspections of a licensed cigarette, other tobacco product (OTP), or ESD retailer to ensure the licensee's compliance with the criminal prohibition against the distribution or sale of tobacco products to underage individuals. MDH may use an individual younger than age 21 to assist in conducting the inspections.

Required Signs for Retail Licensees

A cigarette, OTP, or ESD retailer must post a sign in a location that is clearly visible to the consumer that states, in letters that are at least one half-inch high, "No person under the age of 21 may be sold tobacco products without military identification."

Restrictions on the Sale of Tobacco Products through a Vending Machine

In the State, a person may not sell, dispense, or offer to sell or dispense a tobacco product through a vending machine unless the vending machine is located in an establishment that individuals younger than age 21 are prohibited by law from entering at any time.

Civil Fines for Unlawful Sale of Tobacco Products to Underage Individuals

The bill specifies that if a person acting on behalf of a retailer violates specified prohibitions against the sale or distribution of tobacco products or ESDs, the retailer must pay the civil penalty.

Current Law:

Definitions

Electronic Nicotine Delivery Systems: "ENDS" 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. "ENDS" includes an

electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, and vaping liquid. “ENDS” excludes a nicotine device that contains or delivers nicotine intended for human consumption that is approved by FDA for sale as a tobacco cessation product and is being marketed and sold solely for that purpose; cannabis oil or any other unlawful substance; or an electronic device that is being used to deliver cannabis oil or other unlawful substance.

Tobacco Products: “Tobacco product,” as it applies to provisions of the Business Regulation, Criminal Law, Health-General, and Local Government articles, means any substance containing tobacco, including cigarettes, cigars, smoking tobacco, snuff, or smokeless tobacco.

Sale of Tobacco Products through Vending Machines

In the State, a person may not sell, dispense, or offer to sell or dispense a tobacco product through a vending machine unless the vending machine is located in an establishment that minors are prohibited by law from entering; is located in a bona fide fraternal or veterans organization; or can only be operated with a token, card, or similar device that an individual can only obtain or purchase from the owner or an employee or agent of the owner. A violator is guilty of a misdemeanor and subject to a maximum fine of \$100.

Criminal Law Article – Tobacco Products and Minors

A commercial tobacco distributor may not distribute a tobacco product, tobacco paraphernalia, a coupon redeemable for a tobacco product, or an ENDS to a minor. However, the prohibition does not apply to the distribution of a tobacco product or tobacco paraphernalia to a minor who is acting *solely as the agent* of his or her employer if the employer distributes such products for commercial purposes. (Thus, the law does not prohibit a retailer of tobacco products, for example, from employing a minor.) Likewise, someone else may not purchase for, sell to, or distribute to a minor a tobacco product, tobacco paraphernalia, or an ENDS. 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.

A minor may not use or possess tobacco products, cigarette rolling paper, or an ENDS. However, the prohibition does not apply to the possession of a tobacco product, cigarette rolling paper, or an ENDS by a minor who is acting as the agent of the minor’s employer within the scope of employment. Additionally, a minor is prohibited from using false forms

of identification to obtain tobacco products, cigarette rolling paper, or an ENDS, including a form of identification that identifies someone other than the minor. A minor who violates these provisions is guilty of a civil offense.

Health-General Article – Tobacco Products and Minors

Funding: State funds are used to (1) conduct media campaigns aimed at reducing smoking initiation, encouraging smokers to quit, and educating the public about the dangers of secondhand smoke exposure; (2) enforce existing laws banning the sale and distribution of tobacco products to minors; (3) promote and implement smoking cessation programs; and (4) implement school-based tobacco education programs.

Restrictions on Distribution of Tobacco Products and Electronic Nicotine Delivery Systems to Minors: A person may not distribute a tobacco product, tobacco paraphernalia, or a coupon redeemable for a tobacco product to a minor. However, the prohibition does not apply to the distribution of a tobacco product or tobacco paraphernalia to a minor who is acting *solely as the agent* of his or her employer if the employer distributes such products for commercial purposes. In addition, a person may not sell, distribute, or offer for sale to a minor an ENDS as defined under the Business Regulation Article. County health officers and designees of county health officers may issue civil citations for violations. A violator is subject to a maximum civil penalty of \$300 for a first violation; \$1,000 for a second violation occurring within 24 months after the previous violation; and \$3,000 for each subsequent violation occurring within 24 months 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. The District Court must remit any penalties collected to the county in which the violation occurred. The imposition of a civil penalty precludes prosecution for a violation of criminal laws relating to the distribution of tobacco products or ENDS that arises out of the same violation, and vice versa.

Local Government Article – Tobacco Products and Minors

In Carroll, Cecil, Garrett, and St. Mary's counties, a person may not (1) distribute a tobacco product to a minor unless the minor is acting *solely as the agent* of the minor's employer who is engaged in the business of distributing tobacco products; (2) distribute cigarette rolling papers to a minor; or (3) distribute to a minor a coupon redeemable for a tobacco product. Civil penalties vary depending on the county. It is a defense if the person examined the recipient's driver's license or other valid government-issued identification that positively identified the recipient as at least age 18. A county health officer or the county health officer's designee may issue civil citations for violations (except in Cecil County, where only a sworn law enforcement officer may do so). The District Court must remit any penalties collected to the county in which the violation occurred.

State Finance and Procurement Article – Cigarette Restitution Fund

The Cigarette Restitution Fund is used to fund the Tobacco Use Prevention and Cessation Program; the Cancer Prevention, Education, Screening, and Treatment Program; and other various programs aimed at reducing the use of tobacco products by minors, education and public school campaigns to decrease tobacco use, promoting smoking cessation, and other public purposes.

Background:

Rise in Youth Tobacco Use

FDA and the U.S. Department of Health and Human Services report that, between 2017 and 2018, use of tobacco products by high school and middle school students in the United States increased by 27.1% and 7.2%, respectively. The increase in youth tobacco use is largely attributable to a rise in youth e-cigarette use; between 2017 and 2018, e-cigarette use by high school and middle school students in the United States increased by 78% and 48%, respectively.

Minimum Age for Tobacco in Other States

According to the Campaign for Tobacco-Free Kids, as of March 2019, seven states (California, Hawaii, Maine, New Jersey, Oregon, Massachusetts, and – most recently as of February 2019 – Virginia) have raised the minimum age to purchase tobacco to 21, as have at least 440 localities (including New York City, Chicago, San Antonio, Boston, Cleveland, Minneapolis, both Kansas cities, and Washington, DC). In California and Virginia, active duty military members who are at least age 18 may purchase tobacco products using military identification.

Tobacco Taxes in Maryland

Chapter 121 of 1999 increased the cigarette tax from 36 to 66 cents. In addition, Chapter 121 imposed a 15% tax on the wholesale price of other tobacco products (OTPs) such as cigars and smokeless tobacco. Chapter 288 of 2002 increased the cigarette tax from 66 cents to \$1.00 per pack. Chapter 6 of the 2007 special session increased the cigarette tax to \$2.00 per pack.

Chapter 2 of the first special session of 2012 increased the OTP tax rate from 15% to 30% of the wholesale price for all products except cigars, effective July 1, 2012. The tax rate for cigars that are classified as premium cigars remained at 15% of the wholesale price; all other cigars are taxed at 70% of the wholesale price.

Cigarette and OTP tax revenues accrue to the general fund. In addition, the State sales tax rate of 6% is imposed on the final retail price of cigarettes and OTPs. In fiscal 2018, cigarette tax revenues totaled \$331.2 million, and OTP tax revenues totaled \$41.3 million.

State Revenues: The bill generally raises the minimum age to purchase tobacco products, tobacco paraphernalia, and ESDs from age 18 to 21, as specified. Based on prior-year estimates of the continued use among a portion of this age cohort and the tax revenues apportioned to their current use, general fund revenues decrease, likely significantly, due to a decrease in the collection of the various taxes imposed on such products (cigarette and OTP excise taxes and sales tax). The State does not currently tax ESDs as tobacco products. Any decrease in sales tax revenue resulting from the increased minimum age for purchasing ESDs under the bill cannot be reliably estimated at this time.

Nevertheless, **Exhibit 1** is illustrative of the *potential* revenue loss stemming from the bill’s alteration of the minimum age to purchase tobacco products from fiscal 2020 through 2024; the estimate for fiscal 2020 reflects the bill’s October 1, 2019 effective date. The estimate does not, however, reflect the continued authorized use of tobacco products by active duty military members ages 18 through 20 under the bill; tax revenues attributed to tobacco use among this group cannot be reliably estimated at this time.

Exhibit 1
Illustrative Tax Revenue Decreases
Fiscal 2020-2024
(\$ in Millions)

	<u>FY 2020</u>	<u>FY 2021</u>	<u>FY 2022</u>	<u>FY 2023</u>	<u>FY 2024</u>
Excise Tax	\$3.7	\$5.5	\$5.8	\$6.1	\$6.1
Sales Tax	1.1	1.4	1.4	1.4	1.4
Total General Fund	\$4.8	\$6.9	\$7.2	\$7.5	\$7.5

Note: Includes excise and sales taxes for both cigarettes and other tobacco products. The fiscal 2020 projection reflects the bill’s October 1, 2019 effective date.

Source: Comptroller’s Office (based on an estimate from the 2018 legislative session)

This illustrative estimate is based on the following facts and assumptions:

- The Comptroller's Office advised in 2018 that the excise tax rate for OTPs varies by product, but its weighted average is 43.5%. OTP tax collections are generally 10.9% of the amount collected for cigarettes. Thus, the reduction in OTP excise tax revenues is assumed to be 10.9% of the reduction in cigarette excise tax revenues.
- The Comptroller's Office estimated in 2018 that, under an increase in the minimum age from 18 to 21, 25% of individuals ages 18 through 20 will *continue* to consume tobacco products – with purchase in Maryland – the fiscal year the increased minimum age takes effect. This amount is estimated to decrease to 15% in the second year and by approximately five percentage points annually for the next two years – as current users are more likely to purchase illegally – until it stabilizes at 5%. The Comptroller's Office based this estimate on U.S. Centers for Disease Control and Prevention data regarding youth cigarette use and population projections.

The Department of Legislative Services (DLS) further advises that the impact of the bill's minimum age provision on tobacco tax revenues depends on rates of tobacco use among young adults that would be observed in the absence of the bill. In addition to moderating use among young adults, the bill likely changes the initiation age. For example, according to a 2015 report by the Institute of Medicine (IOM), approximately 90% of adults who are daily smokers report first use before reaching age 19. In that report, IOM also estimated that raising the minimum age to 21 may result in a 12% decrease in the prevalence of smoking by the time current teenagers reach adulthood, and that smoking initiation rates among those ages 18 to 20 may decrease by 15%. However, IOM notes that these estimates are based on national models and do not take into account variations in tobacco use, initiation rates, tobacco control activities, or the effects of new products (*e.g.*, ESD) on future smoking and tobacco use rates.

State Expenditures:

Maryland Department of Health Administrative Expenses

MDH advises that, under the bill, training and educational materials for tobacco retailers and local health departments must be updated to reflect the bill's changes. These costs are anticipated to total \$30,390, which include necessary mailings and modification to enforcement and educational materials. Thus, general fund expenditures increase accordingly in fiscal 2020 only.

Comptroller's Office Enforcement

The Comptroller's Office advises that it can enforce the bill's provisions with existing resources.

Potential Medicaid Expenditure Decrease

The Maryland Association of County Health Officers has historically advised altering the minimum age for purchasing tobacco products to 21 likely results in Medicaid savings in the near term, particularly from a potential reduction in preterm births and related hospital stays (as smoking during pregnancy is a contributing factor to such preterm births) and in smoking-related health care costs (*e.g.*, asthma treatment and related emergency department visits), and that out-year savings are also likely realized through a reduction in health care costs associated with tobacco-related diseases (*e.g.*, cancer, heart disease, and stroke). Thus, to the extent the bill results in reduced health care costs covered by Medicaid, general fund expenditures decrease. Medicaid-eligible services are subject to a federal match rate (which varies depending on the coverage group of the individual). Therefore, federal fund expenditures also decrease; federal fund revenues decrease correspondingly. However, DLS advises that the extent of this impact cannot be reliably estimated at this time, as it depends on whether and to what extent the bill reduces tobacco use in the State.

Local Revenues: The bill expands the definition of tobacco product (to include ESDs) as it applies to several provisions of State law, including provisions pertaining to civil offenses for the unlawful distribution of tobacco products in Carroll, Cecil, Garrett, and St. Mary's counties. Accordingly, Carroll, Cecil, Garrett, and St. Mary's County revenues increase minimally from civil penalties to the extent that additional citations are issued under the bill's expansion of the definition of tobacco products.

DLS notes that Montgomery County recently imposed its own excise tax on electronic cigarette products, which became effective August 2015. The tax rate is 30% of the wholesale price. Montgomery County reports that it collected over \$698,000 in e-cigarette tax revenue in fiscal 2018 and estimates e-cigarette tax revenue at approximately \$1.4 million in fiscal 2019. To the extent the bill results in reduced sales of electronic cigarette products, Montgomery County revenues decrease. However, the extent of this decrease cannot be reliably estimated at this time.

Small Business Effect: To the extent that small businesses in Maryland currently sell cigarettes, OTPs, and ESDs to young adults younger than age 21 (with the exception of active duty military personnel), sales decline. These businesses are subject to civil and criminal penalties if they continue to do so.

Additional Comments: According to the Department of Juvenile Services, in fiscal 2018, citations issued for tobacco-related violations accounted for only 0.7% of juvenile offenses. Accordingly, the bill's repeal of provisions prohibiting minors from possessing tobacco products or attempting to obtain tobacco products with false identification is not likely to materially impact State or local operations.

Additional Information

Prior Introductions: None.

Cross File: HB 1169 (Delegate D.E. Davis, *et al.*) - Economic Matters and Health and Government Operations.

Information Source(s): Maryland Association of County Health Officers; Anne Arundel County; Montgomery County; Maryland Association of Counties; Comptroller's Office; Judiciary (Administrative Office of the Courts); Maryland Department of Health; California Code; Virginia General Assembly; U.S. Food and Drug Administration; U.S. Department of Health and Human Services; U.S. Department of Defense; RAND Corporation; Campaign for Tobacco-Free Kids; Institute of Medicine; Department of Legislative Services

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