HB 134

Department of Legislative Services

Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 134 (Delegate J. Lewis)

Economic Matters and Health and Government Operations

Business Regulation - Flavored Tobacco Products - Prohibition

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This emergency bill prohibits the manufacture, shipment, import, or sale of flavored tobacco products within the State. A violation is a misdemeanor punishable by maximum penalties of a $1,000 fine and/or 30 days imprisonment. Further, the manufacture, shipment, import, or sale of (or attempt to manufacture, ship, import, or sell) a flavored tobacco product into or within the State constitutes doing business without an appropriate license; thus, a violation is a misdemeanor subject to existing penalties.

Fiscal Summary

State Effect: General fund revenues decrease by $11.8 million in FY 2021 due to a reduction in tax revenues collected; future years reflect annualization and a projected decline in consumption. General fund expenditures for the Maryland Department of Health (MDH) increase by $50,400 in FY 2021 only. Also, general fund revenues and expenditures increase to the extent penalties are imposed, beginning in FY 2021.

(in dollars)	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
GF Revenue	($11,796,000)	($69,372,000)	($70,731,000)	($72,034,000)	($73,287,000)
GF Expenditure	$50,400	-	-	-	-
Net Effect	($11,846,400)	($69,372,000)	($70,731,000)	($72,034,000)	($73,287,000)

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

Local Effect: Montgomery County revenues may decrease significantly beginning in FY 2021 due to a decrease in e-cigarette excise tax revenues. Minimal increase in local government revenues and expenditures due to the bill’s penalty provisions. Enforcement by local health departments can be handled with existing resources.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Definitions

Tobacco Product: The bill essentially moves the current law definition of "tobacco product" as it applies to Title 16, Subtitle 3A of the Business Regulation Article to now apply to Title 16 in its entirety; the same definition is established to apply to Title 16.5 and Title 16.7 of the Business Regulation Article. "Tobacco product" means a product intended for inhalation, absorption, ingestion, smoking, heating, chewing, dissolving, or any other manner of consumption by a human being and that is made of, derived from, or contains tobacco or nicotine. "Tobacco product" includes:

- cigarettes, cigars, pipe tobacco, chewing tobacco, snuff, snus, and any other tobacco products (OTP);
- electronic smoking devices (ESD); and
- any component, part, or accessory of the above listed items regardless of nicotine content, including filters, rolling papers, blunt wraps, hemp wraps, hookahs, pipes, and liquids used in ESD.

"Tobacco product" does not include 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.

Flavored Tobacco Product: The bill establishes a new, consistent definition for "flavored tobacco product" that applies to Title 16, Title 16.5, and Title 16.7 of the Business Regulation Article. "Flavored tobacco product" means a tobacco product that contains a taste or smell, other than that of tobacco, which is distinguishable by an ordinary consumer either before or during the consumption of the tobacco product. "Flavored tobacco product" includes a tobacco product with a taste or smell of fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, a candy, a dessert, an alcoholic beverage, an herb, or a spice.

Prohibition on Manufacture, Distribution, and Sale of Flavored Tobacco Products

A cigarette, OTP, or ESD license does not authorize the license holder to manufacture, ship, import, or sell into or within the State a flavored tobacco product. A public statement that a cigarette, OTP, or ESD has or produces a taste or smell other than tobacco is presumptive evidence that the cigarette is a flavored tobacco product if the statement is made by:

- the manufacturer;
- a person authorized by the manufacturer to make public statements about the cigarette, OTP, or ESD;
- a licensed wholesaler or a person authorized by the wholesaler to make public statements on the wholesaler's behalf; or
- another licensee as specified (as relevant to the type of license – a subwholesaler, retailer, storage warehouse, tobacconist, or vape shop vendor) or a person authorized by such a licensee to make public statements on that licensee's behalf.

A violation is a misdemeanor punishable by a fine of up to $1,000 and/or imprisonment for up to 30 days.

In addition, the manufacture, shipment, import, or sale of or attempt to manufacture, ship, import, or sell a flavored tobacco product into or within the State constitutes doing business without an appropriate cigarette, OTP, or ESD license, as prohibited under existing law. Accordingly, a violation is a misdemeanor punishable by a fine of up to $1,000 and/or imprisonment for up to 30 days. Each day that a violation continues is a separate offense.

Furthermore, a person may not sell or dispense or offer to sell or dispense a flavored tobacco product through a vending machine in the State. A violation is a misdemeanor subject to an existing maximum fine of $100.

Current Law: Chapter 396 of 2019 made several changes to State law governing the sale of tobacco products. Among other things, the Act redefined "tobacco product" as it applies to provisions of the Business Regulation, Criminal Law, Health-General, and Local Government articles to include ESD, previously termed electronic nicotine delivery systems (ENDS).

"ESD" is defined as a device that can be used to deliver aerosolized or vaporized nicotine to an individual inhaling from the device. It includes (1) an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, a vape pen and vaping liquid, and (2) any component, part, or accessory of such a device regardless of whether or not it is sold separately, including any substance intended to be aerosolized or vaporized during use of the device. "ESD" excludes a drug, device, or combination product authorized for sale by FDA under the Food, Drug, and Cosmetic Act. "OTP" is defined as any cigar or roll for smoking, other than a cigarette, made in whole or in part of tobacco or any other tobacco or product made primarily from tobacco, other than a cigarette, that is intended by smoking or chewing or as a snuff.

Tobacco Licensing and Regulation

The Business Regulation Article governs the licensing of cigarette, OTP, and ESD manufacturers, wholesalers, retailers, storage warehouses, and vending machine operators. Beginning January 1, 2021, manufacturer, manufacturer, wholesaler, storage warehouse, and vending machine operator licenses are issued by the Alcohol and Tobacco Commission (ATC). The clerks of the circuit courts issue retail licenses.

With limited exception, a person may not act, attempt to act, or offer to act as (1) a cigarette manufacturer, retailer, storage warehouse, subwholesaler, vending machine operator, or wholesaler; (2) an OTP manufacturer, retailer, storage warehouse, wholesaler, or tobacconist; or (3) an ESD manufacturer, retailer, wholesale distributor, wholesaler importer, or vape shop vendor without an appropriate license. A violation is a misdemeanor punishable by a fine of up to $1,000 and/or imprisonment for up to 30 days. Each day that a violation continues is a separate offense.

Recent federal legislation raised the minimum age for an individual to purchase or be sold tobacco products from 18 to 21.

Monitoring and Enforcement

Pursuant to Chapter 12 of 2019 and Chapters 359 and 360 of 2020, alcohol and tobacco enforcement duties are transferred from the Field Enforcement Division of the Comptroller's Office to ATC effective January 1, 2021. The Comptroller's Office, however, retains duties related to enforcement of tobacco taxes.

Federal Regulation of Electronic Nicotine Delivery Systems

In 2019, FDA finalized a rule extending its regulatory authority over tobacco products to include ENDS. According to revised guidance issued in April 2020, FDA intends to prioritize enforcement against any ENDS product that is offered for sale after September 9, 2020, for which the manufacturer has not submitted a premarket application, as well as flavored, cartridge-based ENDS products (except for tobacco- or menthol-flavored products) sold without marketing authorization, regardless of whether a premarket application has been submitted to FDA.

State Revenues: Cigarettes are taxed at a rate of $2.00 per pack. Generally, the tax rate for OTP is 30% of the wholesale price, which is the price for which a wholesaler buys OTP, exclusive of any discount, trade allowance, rebate, or other reduction. The tax rate for cigars is 70% of the wholesale price of the cigars. The tax rate for premium cigars is 15% of the wholesale price of the premium cigars.

Cigarette and OTP tax revenues accrue to the general fund. In fiscal 2021, cigarette tax revenues are projected to total $296.5 million, and OTP tax revenues are projected to total $47.4 million. In addition, the State sales and use tax rate of 6% is imposed on the final retail price of cigarettes and OTP. ESD and their components are subject to the State sales and use tax but are not subject to a State excise tax.

General fund revenues decrease by an estimated $11.8 million in fiscal 2021 due to lost tobacco product and sales and use tax revenues under the bill's prohibition, as shown in **Exhibit 1**. This estimate assumes the bill takes effect May 1, 2021.

Exhibit 1
Estimated State Revenue Impacts of the Bill
Fiscal 2021-2025
($ in Millions)

	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
Cigarette tax	($7.7)	($44.8)	($45.3)	($45.8)	($46.1)
OTP tax	(2.0)	(11.8)	(12.3)	(12.9)	(13.5)
Sales and use tax	(2.2)	(12.7)	(13.1)	(13.4)	(13.7)
Total Revenues	**($11.8)**	**($69.4)**	**($70.7)**	**($72.0)**	**($73.3)**

OTP: other tobacco products

Notes: Numbers may not sum to total due to rounding. Fiscal 2021 revenue impacts reflect two months of impact only, assuming the bill takes effect May 1, 2021. Also, this estimate is based on projected fiscal 2021 cigarette and OTP tax revenues as of March 2020. Current projections for fiscal 2021, as noted above, estimate slightly lower cigarette tax revenues and slightly higher OTP tax revenues (by about $2.5 million and $4.8 million, respectively). Although the revenue losses by source may be slightly different than noted above, the total impact on revenues should be similar.

Source: Department of Legislative Services

This estimate (1) is based on the estimated percentage of menthol and flavored products consumed in the State in calendar 2015 and (2) assumes that most individuals who consume these products substitute other taxable tobacco products that are not affected by the bill. For example, based on research examining the impact of a similar policy restriction enacted in Ontario, Canada, it is assumed that the bill decreases the consumption of taxable cigarettes in the State by approximately 15% for the remainder of fiscal 2021 and in fiscal 2022. Future years reflect further declines in consumption.

To the extent that individuals do not substitute other taxable tobacco products, revenue losses are greater. Further, to the extent the bill takes effect sooner than May 1, 2021, revenues losses in fiscal 2021 are greater.

However, the Department of Legislative Services (DLS) notes that there is uncertainty about the impact of FDA enforcement action relating to the sale of certain flavored and other vaping products on consumption of these products and, therefore, the potential revenue losses that would be observed in the absence of the bill.

Revenues losses are offset minimally to the extent the bill's monetary penalty provision and expanded application of existing monetary penalty provisions result in increased general fund revenues. Any such impact, however, is anticipated to be minimal.

State Expenditures: General fund expenditures for MDH increase by an estimated $50,390 in fiscal 2021 only for the department to update training and educational materials for tobacco retailers and local health departments. Costs reflect necessary mailings and modification to enforcement and educational materials.

General fund expenditures increase further as a result of the bill's incarceration penalty and expanded application of an existing incarceration penalty to the extent more people are committed to State correctional facilities for convictions in Baltimore City. Any such impact, however, is anticipated to be minimal.

It is assumed that ATC, once transitioned from the Comptroller's Office and fully operational, can enforce the bill's provisions with budgeted resources.

If the bill results in reduced tobacco use-related 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, and federal fund revenues decrease correspondingly. However, DLS advises that this impact cannot be reliably quantified at this time, as it depends on whether and to what extent the bill reduces tobacco, OTP, and ESD use in the State.

Local Revenues: Montgomery County imposes a 30% tax on the wholesale value of vaping products, which generated $1.3 million in fiscal 2020 and is estimated to generate $1.1 million in fiscal 2021. Under the bill, Montgomery County tax revenues decline beginning in fiscal 2021. The amount of the decline depends on the decrease in vaping products sold as a result of the bill, beyond the decrease resulting from FDA's regulatory action on these products.

Local Expenditures: Expenditures increase as a result of the bill's incarceration penalty and expanded application of an existing incarceration penalty. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. Per diem operating costs of local detention facilities have ranged from approximately $40 to $170 per inmate in recent years.

Small Business Effect: Sales decline, significantly in some cases, for small businesses in Maryland that sell flavored tobacco products.

Additional Information

Prior Introductions: HB 3, a similar bill as introduced, passed the House as amended and received a hearing in the Senate Finance Committee, but no further action was taken. Its cross file, SB 233, received a hearing in the Senate Finance Committee, but no further action was taken.

Designated Cross File: SB 177 (Senator Washington) - Finance and Budget and Taxation.

Information Source(s): Maryland Association of County Health Officers; Montgomery County; Comptroller's Office; Judiciary (Administrative Office of the Courts); Maryland Department of Health; Department of Legislative Services

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