

Department of Legislative Services
 Maryland General Assembly
 2015 Session

FISCAL AND POLICY NOTE

House Bill 1015 (Delegate Rosenberg)

Economic Matters and Health and
 Government Operations

Public Health - Responsible Tobacco Retailing Act of 2015

This bill increases the fees for a cigarette retailer license and an other tobacco products (OTP) license, and it requires retailers of electronic smoking devices (ESDs) and flavored tobacco products to obtain a license. Beginning in fiscal 2017, the bill requires retailers to pay an additional supplemental fee; the Comptroller must determine the supplemental fee based on specified criteria. The bill establishes the Responsible Tobacco Retailing Program in the Department of Health and Mental Hygiene (DHMH). All retailers must complete specified training requirements for licensure, which DHMH is required to administer. Beginning in fiscal 2017, the Governor must appropriate, as specified, retailer license fees toward the program. The bill authorizes disciplinary action and establishes civil citation penalties for the distribution of tobacco products to minors.

The bill takes effect July 1, 2015.

Fiscal Summary

State Effect: General fund expenditures increase by \$1.9 million in FY 2016 for DHMH to implement the training program and support local health department enforcement efforts and for the Judiciary to make programming changes. General fund expenditures increase by \$4.2 million annually beginning in FY 2017, under the assumptions discussed below. General fund revenues increase by \$2.1 million in FY 2016 and \$4.3 million annually thereafter due to licensing fee provisions. **This bill establishes a mandated appropriation beginning in FY 2017.**

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
GF Revenue	\$2,067,100	\$4,252,300	\$4,252,300	\$4,252,300	\$4,252,300
GF Expenditure	\$1,907,200	\$4,171,900	\$4,171,900	\$4,171,900	\$4,171,900
Net Effect	\$159,900	\$80,400	\$80,400	\$80,400	\$80,400

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

Local Effect: Local revenues increase – potentially significantly – due to the bill’s civil citation penalty provisions. Local health departments are assumed to receive additional funding to help cover costs associated with their enhanced enforcement efforts.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Cigarette Retailer License

An applicant for a cigarette retailer license must pay a fee of:

- \$30 for a license that becomes effective before October 1, 2015;
- \$145 for a license that becomes effective between October 1, 2015, and September 30, 2016; and
- \$175 for a license that becomes effective on or after October 1, 2016.

A person that operates a vending stand under a trader’s license issued to Blind Industries and Services of Maryland is required to obtain a cigarette retailer license but does not have to pay the fee.

Cigarette retailer licenses that are in effect on September 30, 2015, expire on that date.

OTP License, Flavored Tobacco Products License, and ESD License

An applicant for a retail OTP license must pay a fee of \$175; this fee does not apply to a retailer who also has a cigarette retailer license. A person that operates a vending stand under a trader’s license issued to Blind Industries and Services of Maryland is required to obtain an OTP retailer license (unless the person also has a cigarette retailer license) but does not have to pay the fee.

In order to sell flavored tobacco products (other than premium cigars), an applicant must pay a fee of \$50.

An ESD retailer must obtain an OTP license, unless the retailer also has a cigarette retailer license. Regardless, in order to sell disposable ESDs, refillable ESDs, and/or ESD paraphernalia, an applicant must also pay a fee of \$50.

The bill defines “electronic smoking device” as a device that can be used to deliver nicotine or other substances to the person inhaling from the device. This includes an electronic cigarette, cigar, cigarillo, pipe, and hookah. It does not include any device that has been approved by the U.S. Food and Drug Administration (FDA) as a smoking cessation aide. The bill defines “electronic smoking device paraphernalia” as cartridges, cartomizers, e-liquid, smoke juice, tips, atomizers, ESD batteries, ESD chargers, and any other item specifically designed for the preparation, charging, or use of ESDs. “ESD retailer” is defined as a person who sells ESDs to consumers or holds ESDs for sale to consumers.

Supplemental License Fee

Beginning in fiscal 2017 and every fiscal year thereafter, cigarette retailers and OTP retailers (which include ESD retailers) are subject to a supplemental license fee.

The Comptroller must calculate the fee by dividing the total federal Synar penalty for which Maryland is liable as of October 1 of each year (if any) by the total number of cigarette retailer licenses and OTP retailer licenses (distinct from cigarette retailer licenses) issued and determined to be in effect at the end of the immediately preceding fiscal year (excluding licenses issued to vending operators under a trader’s license for Blind Industries and Services of Maryland), and rounding up to the nearest whole dollar.

Responsible Tobacco Retailing Program

The purpose of the program is to reduce minors’ access to tobacco products and ESDs sold at retail in the State, provide education and outreach to State retailers to ensure awareness of restrictions on the sale of tobacco products, and recognize retailers that handle tobacco sales responsibly over time.

Beginning in fiscal 2017 and every fiscal year thereafter, the Governor must include the following appropriations for the program in the annual State budget: (1) at a minimum, 80% of estimated retailer license fee revenue; and (2) 100% of the supplemental license fee revenue.

DHMH must conduct inspections to ensure retailer compliance with the federal Synar law and provide to retailers, free of charge (1) retailer education and outreach and (2) a web-based retailer training course that retailers and employees must successfully complete.

On or after October 1, 2016, each applicant for a cigarette retailer license, OTP license, and ESD license must submit documentation to the clerk issuing the license showing that the applicant completed the training. By January 1, 2017, each person who distributes cigarettes, OTPs, or ESDs for commercial purposes must successfully complete the

web-based training and show proof of successful completion of the training to any authorized enforcement officer.

Additionally, a person may not distribute to a minor (1) a tobacco product; (2) an ESD; or (3) ESD paraphernalia. A person may not distribute these items for commercial purposes unless the person requests photographic identification and verifies that (1) the prospective purchaser is the same person as in the identification; (2) the identification has not been forged or tampered with; and (3) the prospective purchaser is at least 18 years of age. The photographic identification must have been issued by a governmental unit or institution of higher education and must contain the prospective purchaser's name and date of birth. It is an affirmative defense against prosecution if the defendant examined the purchaser's identification and reasonably relied on the authenticity of the identification when making the sale. The requirements to check identification do not apply if the prospective purchaser is at least 27 years of age.

Local health officers or their designees may issue civil citations to those who distribute cigarettes, OTPs, or ESDs to minors; fail to examine the identification of a person under the age of 27 before selling these items; or do not successfully complete the web-based training. A separate citation may be issued for each violation. Civil penalties are as follows: (1) for a first violation, between \$300 and \$600; (2) for a second violation occurring within 24 months of the first violation, between \$1,000 and \$1,500; (3) for subsequent violations occurring within 24 months of the preceding violation, between \$3,000 and \$5,000.

A person who is issued a civil citation for the aforementioned violations is also subject to additional civil penalties if the violation involved a flavored cigar (other than a premium cigar). Civil penalties are as follows: (1) for a first violation, between \$300 and \$600; (2) for a second violation occurring within 24 months of the first violation, between \$1,000 and \$1,500; (3) for subsequent violations occurring within 24 months of the preceding violation, between \$3,000 and \$5,000. A public statement or claim by a manufacturer or by the manufacturer's authorized representative that a cigar possesses or produces a characterizing flavor constitutes presumptive evidence that the cigar is a flavored cigar.

Additional Provisions

Cigarette retailers, OTP retailers, and ESD retailers are subject to discipline for violating any federal, State, or local law regulating the sale of tobacco products to minors; cigarette retailers may not make an offer of compromise to the Comptroller in lieu of disciplinary action for violations.

Except for the issuance of cigarette or OTP licenses and the collection of tobacco taxes, a law regulating the sale, marketing, and advertising of cigarettes and other tobacco products

does not preempt a county or municipal government from enacting more stringent provisions.

The bill applies only prospectively and may not be applied or interpreted to have any effect on or application to any cause of action arising before July 1, 2015.

Current Law:

Cigarette Retailer License

The Comptroller issues cigarette retailer licenses through the local clerks of the court. To obtain a license to sell cigarettes at retail, a person must (1) obtain a county license; (2) file an application with the clerk; and (3) pay the clerk a fee of \$30. A county license costs an additional \$25 in all counties except Cecil County, where the cost is \$50. Licenses expire on the first April 30 after the effective date, but they are renewable for an additional year. To renew a cigarette retailer license, licensees must pay the aforementioned application fees.

A person that operates a vending stand under a trader's license issued to Blind Industries and Services of Maryland is not required to obtain a cigarette retailer license.

The Comptroller may deny a license to an applicant, reprimand a licensee, or suspend or revoke a license if the applicant or licensee (1) fraudulently or deceptively obtains or attempts to obtain a license for another person; (2) fraudulently or deceptively uses a license; (3) fails to comply with the Maryland Cigarette Sales Below Cost Act; (4) sells cigarettes in less than 20 per package; (5) illegally buys cigarettes for resale; (6) is convicted of a felony or misdemeanor that is a crime of moral turpitude directly related to the fitness or qualification of the licensee or applicant; or (7) fails to pay a tax due.

Except in the case of selling tobacco products to a minor in violation of State law, a licensee whose license is suspended or revoked may petition the Comptroller for permission to make an offer of compromise (in which the licensee pays a sum of money in lieu of serving the suspension or revocation).

OTP License, Flavored Tobacco Products License, and ESD License

ESD retailers are not required to be licensed under State law. Retailers who sell flavored tobacco products must have an OTP license, but no additional/special license is required to sell flavored tobacco products in particular.

The Comptroller issues OTP retailer licenses through the local clerks of the court. To obtain a license to sell OTPs at retail, a person must (1) obtain a county license by filing

an application with the clerk and (2) pay the clerk a fee of \$15. Licensed cigarette retailers are not required to pay the OTP license fee. Licenses expire on the first April 30 after the effective date, but they are renewable for an additional year. To renew an OTP retailer license, licensees must pay the aforementioned application fee.

A person that operates a vending stand under a trader's license issued to Blind Industries and Services of Maryland is not required to obtain an OTP retailer license.

Tobacco Sales to Minors

Under the Criminal Law Article, a person may not purchase for or sell a tobacco product to a minor and may not distribute tobacco paraphernalia to a minor. A person licensed to commercially distribute tobacco products may not distribute a tobacco product, tobacco paraphernalia, or a coupon redeemable for a tobacco product to a minor. A person who violates this law is guilty of a misdemeanor and is subject to a fine of up to \$300 for the first violation, up to \$1,000 for the second violation occurring within two years of the first violation, and up to \$3,000 for subsequent violations occurring within two years of the preceding 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 18 years of age.

Federal law prohibits the sale and distribution of tobacco products to minors. The Synar amendment to the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act of 1992 prohibits the sale or distribution of tobacco products to minors. The Synar amendment requires states to enact their own state laws prohibiting retailers from selling tobacco products to minors and requires states to survey retailer compliance; states must prove that the retailer violation rate is 20% or less or risk losing federal funds. The Substance Abuse and Mental Health Services Administration administers the Synar program. In addition, the federal Family Smoking Prevention and Tobacco Control Act of 2009 prohibits the sale and distribution of cigarettes, roll-your-own tobacco, cigarette tobacco, and smokeless tobacco to minors. Retailers must also examine the photo identification of any purchaser younger than age 27. FDA contracts with states to conduct compliance checks, with violations resulting in warning letters, civil money penalties, or other enforcement mechanisms. States may use data from FDA compliance checks to fulfill Synar reporting requirements, provided certain criteria are met.

Background: According to the U.S. Surgeon General, smoking is the leading cause of preventable death and disease in the United States. Smoking is linked to cancer, heart attacks, strokes, and lung diseases. Young people who smoke are susceptible to nicotine addiction, reduced lung function and lung growth, and early cardiovascular damage. Nearly 9 out of 10 smokers start before the age of 18.

In November 2014, DHMH submitted its report on the *FY 2013 Biennial Tobacco Study* to the Governor and General Assembly, in which it summarized trends related to tobacco use behaviors among underage middle and high school youth in Maryland. According to the report, in 2013, the statewide average for underage public high school use of tobacco products was about 16%.

In a December 2014 press release, DHMH reported that about one in four licensed tobacco retailers in Maryland illegally sells tobacco to minors. Specifically, between October 2012 and September 2013, 24% of Maryland tobacco retailers sold cigarettes to underage youth; it is anticipated that Maryland will be the only state in the nation with a violation rate of over 20% for this time period. Additionally, between May 2014 and September 2014, the violation rate increased to 32%. Maryland youth also find that it is easy to buy tobacco, with 26% of youth who smoke reporting that they usually buy their own cigarettes; only 38% reported being asked to show photo identification.

According to DHMH, as a result of the failure to meet Synar retailer violation rates, Maryland was at risk of losing 40% of its Substance Abuse Prevention and Treatment Block Grant (SABG) award, which currently totals \$33,838,777. However, the State negotiated an alternative penalty: the State would commit additional funds toward improving the retailer compliance rate in an amount that equaled 1% of the SABG grant for each percentage point that the State was above the maximum noncompliance rate of 20%. For fiscal 2013, the State's noncompliance rate was 24.1%; therefore, the State agreed to commit \$1,387,390 in additional funds.

DHMH reports that the most recent noncompliance rate is 31.9%; therefore, the State will be required to commit \$4,026,815 in additional funds in fiscal 2016. The bill imposes a supplemental license fee against retailers to cover yearly Synar penalties beginning in fiscal 2017.

State Revenues: General fund revenues increase by \$2.1 million in fiscal 2016 and by \$4.3 million beginning in fiscal 2017 due to the bill's license fee provisions.

The Judiciary advises that in 2014, there were 7,085 cigarette retailers, 6,527 OTP retailers, and 106 tobacconists in the State. However, it is unclear how many of these OTP retailers/tobacconists also have cigarette retailer licenses which would exempt them from paying the increased fee for an OTP license.

DHMH additionally advises that about 3,000 retailers sell flavored tobacco products and about 1,500 sell ESDs and associated paraphernalia.

Exhibit 1 shows the anticipated net general fund revenue from the bill's altered license fee structure for cigarette retailers, OTP/tobacconist retailers, ESD retailers, and flavored

tobacco product retailers for fiscal 2016 through 2020. This analysis assumes that the number of retailers for each category of products remains constant over subsequent fiscal years, and that the number of OTP/tobacconist licensees required to pay the increased fee for an OTP license is negligible (since most OTP retailers also have a cigarette retailer license and so are exempt from paying both additional fees). The supplemental fee is based on yearly Synar-related expenditures; this analysis assumes that, as a result of increased retailer training and enforcement efforts, yearly Synar-related expenditures decrease from about \$4 million in fiscal 2016 to about \$3 million from fiscal 2017 through 2020.

Exhibit 1
Net General Fund Revenue Increase
Fiscal 2016-2020
(\$ Millions)

	<u>FY 2016</u>	<u>FY 2017</u>	<u>FY 2018</u>	<u>FY 2019</u>	<u>FY 2020</u>
Cigarette Licenses ¹	\$1.8 ²	\$1.0	\$1.0	\$1.0	\$1.0
OTP/Tobacconist Licenses ³	-	-	-	-	-
Electronic Smoking Device Licenses ⁴	0.1	0.1	0.1	0.1	0.1
Flavored Tobacco Licenses ⁴	0.2	0.2	0.2	0.2	0.2
Supplemental Fees ⁵	0.0	3.0	3.0	3.0	3.0
Total Revenue	\$2.1	\$4.3	\$4.3	\$4.3	\$4.3

¹Assumes the number of cigarette retailers remains constant from fiscal 2016 through 2020.

²Assumes that all retailers must be issued new licenses on October 1, 2015, and May 1, 2016, as required by the bill.

³Assumes the number of retailers required to pay the fee is negligible (most retailers also have a cigarette retailer license and are, therefore, exempt).

⁴Assumes the number of retailers remains constant from fiscal 2016 through 2020. The annual fee is \$50.

⁵Supplemental fees are not assessed until fiscal 2017. The amount assessed assumes additional Synar-related expenditures decrease from the anticipated fiscal 2016 level of \$4.0 million and remain constant at \$3.0 million from fiscal 2017 through 2020. Supplemental fees must be set to cover expenditures.

Note: Numbers may not sum to total due to rounding.

Source: Department of Legislative Services

State Expenditures: General fund expenditures for DHMH increase by \$1.9 million in fiscal 2016 for DHMH to hire one program administrator and one community health education specialist to administer and implement the program. The estimate includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. It also

includes contractual expenses to conduct regional training and outreach for retailers, material development and distribution, and website development and maintenance (including interactive retailer training components). DHMH advises that an additional \$1.3 million will be allocated to local health departments to support their enforcement efforts.

Positions	2
Salaries and Fringe Benefits	\$137,414
Local Health Departments	1,340,000
Regional Retailer Training	150,000
Material Development and Distribution	150,000
Website	100,000
Operating Expenses	9,740
Total FY 2016 State Expenditures	\$1,887,154

Future year expenditures reflect the mandated appropriation for the program, which is sufficient to fully cover full salaries with annual increases and employee turnover, annual increases in ongoing operating expenses, continued funding of local health departments, regional training, retailer outreach, and website maintenance. Additional funding is likely available in the out-years to further enhance enforcement efforts.

Thus, general fund expenditures increase by \$4.2 million annually beginning in fiscal 2017. **Exhibit 2** shows the anticipated mandated appropriation calculation from fiscal 2017 through 2020. The bill requires the Governor to appropriate at least 80% of *total* retailer license revenue and 100% of any supplemental fee revenue to the program beginning in fiscal 2017. The supplemental fee is based on yearly Synar-related expenditures; this analysis assumes that, as a result of increased retailer training and enforcement efforts, yearly Synar-related expenditures decrease from about \$4 million in fiscal 2016 to about \$3 million from fiscal 2017 through 2020.

The Judiciary additionally advises that circuit court cash register systems must be modified to reflect the bill's license fee changes. This would involve new license units, modifying license determination logic, updating fee tables, and other code changes, including for license applications. The Judiciary advises that the cost to make these changes is about \$20,000.

The Comptroller advises that the supplemental fee can be determined using existing resources; however, the Comptroller would need to obtain information relating to the Synar penalty from DHMH and would need to obtain information relating to the number of licensed retailers and the aggregate amounts collected from license fees from the clerks of the circuit courts.

Exhibit 2
Mandated Appropriation Calculation
Fiscal 2017-2020
(\$ in Millions)

	<u>FY 2017</u>	<u>FY 2018</u>	<u>FY 2019</u>	<u>FY 2020</u>
Total License Revenue ¹	\$1.5	\$1.5	\$1.5	\$1.5
80% of Total License Revenue²	<u>1.2</u>	<u>1.2</u>	<u>1.2</u>	<u>1.2</u>
Supplemental Fees ³	3.0	3.0	3.0	3.0
100% of Total Supplemental Fees	<u>3.0</u>	<u>3.0</u>	<u>3.0</u>	<u>3.0</u>
Total Mandated Appropriation	\$4.2	\$4.2	\$4.2	\$4.2

¹Assumes the number of retailers remains constant from fiscal 2017 through 2020. Reflects *total* revenue collected from retailers, rather than only additional revenue collected under the bill.

²The bill specifies that the Governor must appropriate *at least* 80% of retailer licensing revenue to the Responsible Tobacco Retailing Program.

³Assumes additional Synar-related expenditures decrease from the anticipated fiscal 2016 level of \$4.0 million and remain constant at \$3.0 million from fiscal 2017 through 2020. Supplemental fees must be set to cover expenditures.

Note: Numbers may not sum to total due to rounding.

Source: Department of Legislative Services

Local Effect: Local revenues increase significantly due to the bill’s civil citation penalty provisions, to the extent of enforcement. The bill authorizes local health officers or their designees to issue civil citations to a person who distributes tobacco products, ESDs or ESD paraphernalia to minors, and for failure to examine the identification card of any person under the age of 27 or failure to complete required web-based retailer training. The bill requires that, pursuant to § 1-1208 of the Local Government Article, civil citation penalties are remitted to the county in which the violation occurred. The bill establishes a penalty of between \$300 and \$600 for a first violation; between \$1,000 and \$1,500 for a second violation within 24 months; and between \$3,000 and \$5,000 for subsequent violations within 24 months. Violators who distribute flavored cigars are subject to additional penalties (following the same penalty structure).

Although the Local Government Article establishes civil citations for the distribution of tobacco products to minors in four counties (Carroll, Cecil, Garrett, and St. Mary’s counties), the bill expands the categories of products that may not be distributed to minors, HB 1015/ Page 10

establishes significantly higher penalties for subsequent violations, and applies the prohibitions statewide.

As noted above, DHMH advises that \$1.3 million will be allocated to local health departments in fiscal 2016 to support their enhanced enforcement efforts. Similar funding is anticipated in future years.

Small Business Effect: Retailers of cigarettes and OTP/tobacconists are subject to significantly higher licensing fees under the bill. All cigarette retailers with licenses that are effective October 1, 2015, must renew their licenses twice in fiscal 2016. ESD retailers and flavored tobacco product retailers must also obtain licenses that were previously not required.

Retailers of cigarettes, OTPs, ESDs, and flavored tobacco products must also undergo required training from DHMH. Although the training is free to retailers, retailer licensure is contingent on the completion of successful training; failure to do so may result in disciplinary action and/or civil penalties.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Kent, Montgomery, Washington, and Worcester counties; Baltimore City; Department of Budget and Management; Department of Health and Mental Hygiene; Comptroller's Office; Judiciary (Administrative Office of the Courts); Maryland Association of County Health Officers; U.S. Food and Drug Administration; U.S. Surgeon General; Department of Legislative Services

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