HB 541

Department of Legislative Services

Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 541 (Delegate Hayes, *et al.*)
Health and Government Operations

Cigarette Restitution Fund - Establishment of Behavioral Health Treatment Account and Funding for Substance Use Treatment Services

This bill establishes a separate behavioral health treatment account in the Cigarette Restitution Fund (CRF) to be used for (1) substance use treatment, with priority given to specified services and (2) rate adjustments for specified community-based agencies or programs funded by the Behavioral Health Administration (BHA) or Medicaid. The account must contain payments received by the State from litigation by participating manufacturers related to the State's diligent enforcement of its qualifying statute for the Master Settlement Agreement (MSA). Up to $10.0 million may be appropriated from the account in any fiscal year.

The bill takes effect July 1, 2017.

Fiscal Summary

State Effect: General fund expenditures for the Department of Health and Mental Hygiene (DHMH) may increase by approximately $15.2 million in FY 2018, while special fund expenditures decrease correspondingly, under the assumptions discussed below. Special fund expenditures for DHMH may increase by as much as $10.0 million annually beginning in FY 2019. Federal fund expenditures may also increase beginning in FY 2019, to the extent additional funds are used for Medicaid services and programs; if so, federal fund revenues increase correspondingly.

($ in millions)	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
FF Revenue	$0	-	-	-	-
GF Expenditure	$15.2	$0	$0	$0	$0
SF Expenditure	($15.2)	$10.0	$10.0	$10.0	$10.0
FF Expenditure	$0	-	-	-	-
Net Effect	$0.0	($10.0)	($10.0)	($10.0)	($10.0)

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

Local Effect: Local core service agencies and addiction authorities may receive increased funding for qualifying services.

Small Business Effect: Potential meaningful for small business community providers that receive rate adjustments under the bill.

Analysis

Bill Summary: Funding priority for substance use treatment under the new account is given to residential treatment services, recovery support housing, and crisis response services for individuals with substance use disorders. Rate adjustments are for community-based agencies or programs funded by BHA or Medicaid that serve individuals with mental disorders, substance-related disorders, or a combination of both.

Additionally, the bill specifies that, in fiscal 2018 and 2019, the Governor may transfer a minimum of $2.5 million and a maximum of $5.0 million from CRF (as opposed to the newly established account) to BHA. This funding may not supplant existing State funding.

Current Law/Background:

Cigarette Restitution Fund: Chapters 172 and 173 of 1999 established CRF, which is supported by payments made under MSA. Through MSA, the settling manufacturers pay the litigating parties – 46 states, 5 territories, and the District of Columbia – substantial annual payments in perpetuity. The distribution of MSA funds among the states is determined by formula, with Maryland receiving 2.26% of MSA monies, which are adjusted for inflation, volume, and prior settlements. In addition, the State collects 3.3% of monies from the Strategic Contribution Fund, distributed according to each state's contribution toward resolution of the state lawsuits against the major tobacco manufacturers; however, this payment ends in fiscal 2017.

The use of CRF is restricted by statute. Activities funded through CRF include the Tobacco Use Prevention and Cessation Program; the Cancer Prevention, Education, Screening, and Treatment Program; substance abuse treatment and prevention; the Breast and Cervical Cancer Program; Medicaid; tobacco production alternatives; legal activities; and nonpublic school textbooks.

Nonparticipating Manufacturer Adjustment: Among other conditions, MSA required states to take steps toward creating a more "level playing field" between participating manufacturers (PM) to MSA (those subject to annual payments and other restrictions) and nonparticipating manufacturers (NPM) to MSA. PMs have long contended that NPMs have avoided or exploited loopholes in state laws that give them a competitive advantage in the pricing of their products. If certain conditions are met, MSA provides a downward

adjustment to the contribution made by PMs based on their MSA-defined market share loss multiplied by three. This adjustment is known as an NPM adjustment. The agreement also allows PMs to pursue this adjustment on an annual basis.

Under MSA, PMs must meet three requirements in order to prevail and reduce their MSA payments: (1) have a demonstrable loss of market share of more than approximately 2%; (2) show that MSA was a significant factor contributing to that loss of market share; and (3) show a state was not diligently enforcing its qualifying statute.

The qualifying statute is intended to create a more level playing field with regard to the price between PMs and NPMs. Originally included in MSA as a model statute, Maryland's qualifying statute was enacted in 1999. Litigation regarding the NPM adjustment started in 2005, beginning with the NPM adjustment for sales year 2003. Arbitration regarding the "diligent enforcement" issue for 2003 commenced in July 2010. In September 2013, the arbitration panel found that Maryland did not diligently enforce its statute, resulting in penalization. Maryland then appealed the arbitration ruling. On October 2, 2015, the Court of Special Appeals upheld the arbitration ruling on the diligent enforcement issue but ordered MSA's independent auditor, Price Waterhouse Coopers, to recalculate the amount of the 2003 NPM adjustment that Maryland must bear. The recalculation resulted in $53.2 million for Maryland in fiscal 2016, with $40.0 million of these funds dedicated to Medicaid. On February 22, 2016, the Court of Appeals denied a petition for *writ of certiorari* that PMs filed to challenge the Court of Special Appeals' decision. In October 2016, the Supreme Court of the United States also declined to hear the PMs' appeal, thereby ending litigation for sales year 2003.

However, the NPM adjustment is also in dispute for future years; thus, unless it is settled or Maryland's diligence is not contested, there will be future arbitrations assessing Maryland's enforcement for future years. PMs have sought a multistate arbitration related to sales year 2004 for Maryland and those other states that did not settle the 2003 sales year litigation. Arbitration regarding Maryland's diligent enforcement during sales year 2004 is expected to begin in calendar 2017. Further, for each disputed year since 2004, an amount has been withheld and deposited into a disputed payments escrow account. The fiscal 2018 budget assumes that the $16.0 million currently held in escrow from sales year 2004 will be timely released; however, this ultimately depends on the arbitration decision. In order for the decision to have an effect on revenues in fiscal 2018, the decision must be reached by the scheduled payment date of April 15, 2018.

Exhibit 1 shows the disputed payments held in escrow (and that are subject to release) for fiscal 2004 through 2013. Amounts actually released and the timing of their receipt depend on the outcomes of future litigation.

Exhibit 1
Disputed Payments from NPM Adjustment
Fiscal 2004-2013
($ in Millions)

	Fiscal Year									
	2004	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Total	$16.0	$0	$11.0	$12.0	$20.0	$19.0	$20.0	$17.0	$18.0	$19.0

Notes: Numbers are approximate. Fiscal 2005 payments have already been received as part of the 2003 arbitration. Payment information for fiscal 2014 has yet to be determined.

Source: Office of the Attorney General

State Expenditures: The bill directs disputed payments that are released from escrow to a new account within CRF and authorizes an appropriation of up to $10.0 million in each fiscal year from the account for specified substance use treatment services and rate adjustments. As shown in Exhibit 1, disputed payments in escrow currently total $152.0 million. Arbitration for the 2004 payments is expected to begin in calendar 2017; thus, the *earliest* the State may receive any released payments is April 2018. Further, the State may also choose to settle payments from multiple years at one time, resulting in the release of a lump sum to the State. However, it is also possible that Maryland receives no portion of these funds. As noted previously, the portion and timing of payment release depend on the outcome of future litigation.

The bill does not affect the amount or timing of any such special fund revenues that may be received. It simply redirects such revenues to a separate account and specifies how they may be used. The fiscal 2018 budget assumes that the $16.0 million held in escrow from the 2004 sales year is timely released in April 2018. The bill redirects these funds to the newly created account in CRF and requires the funds to be used for specified purposes, which may not supplant existing State funding. The projected CRF balance for fiscal 2018, assuming receipt and use of the amount held in escrow, is $800,000. Therefore, this analysis assumes that general funds must be used to backfill for funding reallocated from CRF programs to the new account under the bill. Thus, general fund expenditures for DHMH increase by approximately $15.2 million in fiscal 2018, and special fund expenditures decrease by a corresponding amount as the monies are instead directed to the new account. (The Department of Legislative Services notes that, if the $16.0 million currently held in escrow is not timely released, or if the State loses the arbitration decision, general fund expenditures for DHMH still increase by $15.2 million in fiscal 2018 in order to backfill for CRF monies that were appropriated in the fiscal 2018 budget, regardless of the bill. Likewise, special fund expenditures decrease by the same amount.)

This analysis also assumes that the maximum amount of authorized spending from the new account occurs each year beginning in fiscal 2019. Thus, special fund expenditures for DHMH may increase by as much as $10.0 million beginning in fiscal 2019 and each fiscal year thereafter. This analysis recognizes that the State may receive some portion of disputed payments beginning in fiscal 2018, but it assumes that the funds are not appropriated from the newly created account within CRF until fiscal 2019. This analysis also assumes that the account has sufficient funds for an appropriation in each fiscal year. Actual expenditures may vary depending on the magnitude and timing of released payments and fund balances subject to carryover in each fiscal year.

The funding may be used for rate adjustments in the Medicaid program and must supplement, rather than supplant, funds otherwise available. Thus, to the extent the funding is used for this purpose, federal fund expenditures for Medicaid also increase (along with federal fund revenues) beginning in fiscal 2019, when funds from the newly created account are appropriated.

Finally, the bill *authorizes* the Governor to transfer at least $2.5 million and as much as $5.0 million in fiscal 2018 and 2019 from CRF to BHA. However, the projected fund balance for CRF is $3.9 million in fiscal 2017 and only $800,000 in fiscal 2018. Moreover, as noted above, the $800,000 projected fund balance assumes the monies held in escrow accrue to CRF. Under the bill, they are redirected to the new account, resulting in a $0 fund balance for CRF. Therefore, this analysis assumes that sufficient fund balance is not available for the Governor to exercise this authorization in either year.

Additional Information

Prior Introductions: HB 1618 of 2016 passed the Senate and the House with amendments, but no further action was taken. Its cross file, SB 1144, received a hearing in the Senate Budget and Taxation Committee, but no further action was taken.

Cross File: SB 474 (Senator Guzzone, *et al.*) - Budget and Taxation and Finance.

Information Source(s): Comptroller's Office; Department of Budget and Management; Department of Health and Mental Hygiene; Department of Legislative Services

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