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FISCAL AND POLICY NOTE
First Reader

Senate Bill 456
Finance

(Senator Kelley, *et al.*)

Tobacco Products - Minimum Age and Civil Fines

This bill raises the minimum age to purchase tobacco products or paraphernalia and electronic smoking devices (ESDs) from age 18 to age 21. The bill also alters the definition of “tobacco products” to include ESDs.

Fiscal Summary

State Effect: General fund revenues decrease significantly from foregone tax revenue beginning in FY 2019, which may be slightly offset by an increase in fine revenues. Medicaid expenditures also likely decrease from reduced health care costs. Enforcement can be handled with existing resources.

Local Effect: Local revenues likely increase minimally from fine revenues. Enforcement can be handled with existing resources.

Small Business Effect: Meaningful.

Analysis

Bill Summary: 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. References to “minor” or “18” are modified to be “an individual under the age of 21 years,” “underage,” or “21.”

The bill repeals the definition of “tobacco paraphernalia” and associated references and alters the definition of “tobacco product” to mean a product that is (1) intended for human inhalation, absorption, ingestion, or any other manner of consumption that is made of,

derived from, or contains tobacco or nicotine or (2) an accessory used in the inhalation, absorption, ingestion, or any other manner of consumption of such a product. “Tobacco product” includes (1) electronic cigarettes, vaporizers, pens, and other electronic smoking devices and (2) filters, rolling papers, pipes, and liquids used in electronic cigarettes and other ESDs regardless of tobacco or nicotine content.

Further, the bill specifies that a person may not distribute a tobacco product without examining the government-issued photographic identification of a purchaser or recipient whom the distributor reasonably believes to be younger than age 30.

The bill repeals existing provisions regarding the civil offense of distributing tobacco products to minors and instead merges this offense with the existing civil offense of distributing ESDs to minors. Under the bill, the distribution of tobacco products (including ESDs) to minors is a civil offense subject to civil penalties of \$300 for a first offense and \$500 for any violation occurring within 24 months of a previous offense (such penalties currently only apply to the distribution of ESDs to minors).

The bill also repeals existing requirements (1) for the Maryland Department of Health (MDH) to collaborate with the Comptroller’s Office, local health departments (LHDs), and local law enforcement agencies to develop ongoing strategies to enforce criminal prohibitions against distributing tobacco products to minors and the use or possession of tobacco products by minors; (2) for MDH to annually report on the development of such strategies and tobacco retailer training; and (3) for LHDs to report civil violations of distributing tobacco products to minors to the Comptroller’s Office.

The bill *does not* alter the reference under the Criminal Law Article prohibiting a *minor* from using or possessing a tobacco product or cigarette rolling paper or from using false forms of identification to obtain tobacco products or cigarette rolling paper, including one that identifies someone other than the minor. However, under the bill, “tobacco product” includes ESDs.

Current Law:

Criminal Law Article: Restricts individuals from selling tobacco products to minors, restricts minors from purchasing or possessing tobacco products, and establishes fines and punishments for individuals who violate the statute.

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 purpose). 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.

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. Additionally, a minor is 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.

Health-General Article: Establishes funding levels and subject matter for State activities aimed at reducing tobacco use in Maryland, establishes the sale and distribution of ESDs and tobacco products to minors as a civil offense.

Funding

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

Electronic Smoking Devices

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.

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.

Tobacco Products

Chapter 773 of 2017 establishes civil penalties for persons who distribute tobacco products, tobacco paraphernalia, or coupons redeemable for tobacco products to minors, and it authorizes county health officers and specified designees of county health officers to issue civil citations for violations. Violators are subject to a civil penalty of up to \$300 for a first violation, up to \$1,000 for a second violation that occurs within 24 months after the first violation, and up to \$3,000 for each subsequent violation occurring within 24 months after a preceding violation. 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 that arises out of the same violation, and vice versa.

Chapter 773 also requires MDH to collaborate and consult with the Comptroller’s Office, LHDs, and local law enforcement agencies to develop ongoing strategies for enforcement of *criminal* laws prohibiting the sale or distribution of tobacco products to minors and prohibiting a minor’s use or possession of tobacco products or obtaining tobacco products with false identification. MDH must report to the General Assembly, by October 1 of each year, on the development of enforcement strategies as well as training and assistance to tobacco retailers to improve compliance.

Chapter 773 also requires the Comptroller’s Office to annually report, by October 1 of each year, on (1) the aggregate number of licensed tobacco retailers that committed a violation of the criminal law prohibiting the distribution of tobacco products to a minor; (2) the aggregate number of minors who committed a violation of the criminal law prohibiting a minor’s use or possession of tobacco products or obtaining tobacco products with false identification; (3) the number of prior violations for these retailers and minors; and (4) the

subsequent action taken by the Comptroller's Office against each violator and, for each action taken, the number of violations committed by the violator.

Local Government Article: Restricts the sale and distribution of tobacco products to a minor in certain counties and establishes punishment and fines for those who violate the law.

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: Establishes the Cigarette Restitution Fund and designates how the fund will be used.

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: According to the thirty-second Surgeon General's report, *The Health Consequences of Smoking – 50 Years of Progress*, smoking rates among teens and adults are less than half what they were in 1964. However, 42 million American adults and 3 million middle and high school students continue to smoke. Further, even though smokers consume fewer cigarettes than 50 years ago, changes in the design and composition of cigarettes put smokers at a higher risk of developing lung cancer. The Surgeon General estimates that the economic costs attributable to smoking and exposure to tobacco smoke from both direct medical costs and lost productivity approach \$300 billion annually.

According to the Campaign for Tobacco-Free Kids, as of January 2018, five states (California, Hawaii, Maine, New Jersey, and Oregon) have raised the minimum age to purchase tobacco to 21, along with at least 285 localities (including New York City, Chicago, San Antonio, Boston, and Cleveland).

According to the U.S. Centers for Disease Control and Prevention (CDC), the percentage of individuals age 18 or older who smoked cigarettes in Maryland was 19.1% in 2011. The rate across all states and the District of Columbia ranged from 11.8% to 29.0%. The percentage of adults who used smokeless tobacco in Maryland was 2.1% during that same time, with a range of 1.4% to 9.8% across all states and the District of Columbia. Maryland had the eleventh-lowest and eighth-lowest percentages across the states in cigarette and smokeless tobacco use, respectively.

CDC reports that, in 2011, the percentage of Maryland youth in grades 9 through 12 who were current smokers was 12.5% and the percentage of youth who were current smokeless tobacco users was 7.2%. In 2015, 8.7% of high school students in Maryland were current smokers and 5.8% were current smokeless tobacco users.

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 (OTP) 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 2017, cigarette tax revenues totaled \$348.8 million, and OTP tax revenues totaled \$38.1 million.

State Revenues: The bill raises the minimum age to purchase tobacco products or paraphernalia from age 18 to 21. Based on estimates of the continued use among a portion of this cohort and the tax revenues apportioned to their current use, general fund revenues may decrease by as much as \$4.8 million in fiscal 2019 due to a decrease in the collection of the various taxes imposed on such products (cigarette and OTP excise taxes and sales tax). **Exhibit 1** shows the *potential* revenue loss resulting from the bill in fiscal 2019 through 2023; the estimate for fiscal 2019 reflects the bill's October 1, 2018 effective date.

Exhibit 1
Projected Revenue Decreases Due to the Bill
Fiscal 2019-2023
(\$ in Millions)

	<u>FY 2019</u>	<u>FY 2020</u>	<u>FY 2021</u>	<u>FY 2022</u>	<u>FY 2023</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. Fiscal 2019 information reflects the bill's October 1, 2018 effective date.

Source: Comptroller's Office

This estimate is based on the following facts and assumptions:

- The Comptroller's Office advises that the excise tax rate for OTP 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 estimates that 25% of individuals ages 18 through 20 will *continue* to consume tobacco products – with purchase in Maryland – in fiscal 2019. 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 bases this estimate on CDC data regarding youth cigarette use and population projections.
- The Comptroller's Office notes that population estimates show that the affected population is decreasing and that the rate of smoking is also decreasing compared to prior years.

Given that the rate of tobacco product use has declined in recent years, the exact impact on use (and, for purposes of this fiscal and policy note, associated tax revenues) of raising the minimum age to 21 is unclear, particularly in future years. Further, in addition to moderating use among young adults, the bill likely changes the initiation age. 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.*, ESDs) on future smoking and tobacco use rates.

The bill also raises the minimum age to purchase ESDs from age 18 to 21. The State does not currently tax ESDs as tobacco products. Maryland-specific sales data for ESDs is not readily available.

The bill also alters several monetary penalty provisions. By altering the definition of “tobacco products” under the Criminal Law Article, the bill establishes that the use or possession of ESDs by a minor is subject to civil fines. The distribution of ESDs to minors is currently only a civil offense; however, the bill establishes that the distribution of such products (to those younger than age 21) is also a criminal offense punishable by specified fines. Finally, under the bill, the distribution of tobacco products to those younger than age 21 is subject to a maximum civil fine of \$500 for a subsequent violation (rather than the current \$3,000 maximum for distribution to minors); these fine revenues are distributed to the county where the offense occurred. Presumably, criminal fines from distribution to individuals younger than age 21 increase and slightly offset tax revenue losses. However, any such impact cannot be reliably estimated.

State Expenditures: The Maryland Association of County Health Officers has historically advised that the bill 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, the Department of Legislative Services (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.

The bill also repeals specified reporting requirements for MDH. Thus, to the extent MDH no longer must collect and report specified information, general fund expenditures for MDH may decrease minimally.

Local Fiscal Effect: Currently, the District Court is required to remit civil citation penalties collected for the distribution of ESDs and tobacco products to minors to the

county in which the violation occurred. Additionally, in Carroll, Cecil, Garrett, and St. Mary's counties, the District Court is also required to remit civil citation penalties collected for the distribution of tobacco products to minors to the county in which the violation occurred. Therefore, local revenues likely increase minimally, to the extent additional civil citations are issued under the bill due to expansion of the prohibition to age 21; this impact may be offset slightly by the lower maximum civil penalty for distribution of tobacco products to minors.

DLS also notes that Montgomery County recently imposed its own excise tax on ESDs, effective August 2015. The county tax applies to any dealer of electronic cigarette products, including components and parts. The tax rate is 30% of the wholesale price. The county previously estimated \$325,000 in revenue in fiscal 2016 and \$338,300 in fiscal 2017. Therefore, to the extent the bill results in reduced sales of ESDs, revenues for Montgomery County decrease. The extent of this decrease cannot be reliably estimated at this time.

The bill also repeals the requirement that LHDs report civil violations of distributing tobacco products to minors to the Comptroller's Office. Thus, expenditures for LHDs may decrease minimally.

Small Business Effect: To the extent that small businesses in Maryland currently sell cigarettes, OTP, and ESDs to young adults between the ages of 18 and 21, sales decline. These businesses are subject to civil and criminal penalties if they continue to do so.

Additional Comments: The bill specifies that a person may not distribute a tobacco product without examining the government-issued photographic identification of a purchaser or recipient whom the distributor reasonably believes to be younger than age 30. Federal law requires retailers to check the photographic identification of anyone younger than age 27 who attempts to purchase tobacco products, including ESDs (federal law also requires a minimum age of 18 to purchase tobacco products, including ESDs).

Additional Information

Prior Introductions: SB 669 of 2017, a similar bill, received an unfavorable report from the Senate Finance Committee. Similar legislation was also introduced in the 2016 and 2014 sessions. HB 775 of 2016 and HB 278 of 2014 both received an unfavorable report from the House Judiciary Committee.

Cross File: HB 953 (Delegate Morales, *et al.*) - Economic Matters and Health and Government Operations.

Information Source(s): Maryland Association of County Health Officers; Carroll, Harford, Montgomery, Queen Anne's, and St. Mary's counties; Comptroller's Office; Judiciary (Administrative Office of the Courts); Maryland Department of Health; Campaign for Tobacco-Free Kids; U.S. Centers for Disease Control and Prevention; U.S. Surgeon General; Department of Legislative Services

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