

Department of Legislative Services  
 Maryland General Assembly  
 2019 Session

FISCAL AND POLICY NOTE  
 First Reader

Senate Bill 708 (Senator Beidle, *et al.*)  
 Finance

Electronic Nicotine Delivery Systems - Prohibitions and Requirements

This bill (1) requires the Secretary of Health to adopt labeling and packaging standards for electronic nicotine delivery systems (ENDS) and vaping liquid, as specified; (2) prohibits ENDS licensees from targeting minors in the advertising or marketing of ENDS or vaping liquid, as specified; (3) specifies signage and display requirements for ENDS retailers and vape shop vendors; (4) specifies requirements for the online sale and shipment of ENDS and vaping liquid; and (5) alters penalties applicable to and specifies requirements for compliance with prohibitions against the distribution of tobacco products to minors.

Fiscal Summary

**State Effect:** General fund expenditures increase by \$41,200 in FY 2020. General fund revenues increase minimally due to expanded application and increased criminal fines under the bill.

(in dollars)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
GF Revenue	-	-	-	-	-
GF Expenditure	\$41,200	\$0	\$0	\$0	\$0
Net Effect	(\$41,200)	-	-	-	-

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

**Local Effect:** Local revenues increase minimally due to expanded application and increased civil penalties under the bill. Enforcement can be handled with existing resources.

**Small Business Effect:** Minimal.

## Analysis

### Bill Summary:

#### *Packaging Requirements*

The bill specifies that an ENDS manufacturer must ensure that ENDS and vaping liquid are packaged (1) with specified labeling and child resistant packaging standards adopted by the Secretary of Health and (2) in tamper-evident packaging. Prosecution for an improperly packaged ENDS precludes the issuance of a civil citation for a violation of specified provisions of the Health-General Article arising out of the same incident.

#### *Adoption of Standards for Packaging*

The Secretary of Health must adopt regulations to set standards for labeling and child resistant packaging for ENDS and vaping liquid. The standards must (1) be similar to the standards adopted for dangerous hazardous household substances, as specified; (2) protect children from using an ENDS or vaping liquid; and (3) comply with federal warning requirements for tobacco products, as specified.

#### *Advertising or Marketing to Minors*

The bill prohibits an ENDS licensee from taking any direct or indirect action to target minors in the advertising or marketing of ENDS or vaping liquid. A licensee is in violation of the prohibition if the licensee uses any of the following in the advertising, promoting, packaging, or labeling of an ENDS:

- a cartoon;
- a symbol or celebrity that is primarily associated with minors or media primarily directed to minors; or
- an image of an individual who appears to be younger than age 27.

#### *Signage*

ENDS retailers and vape shop vendors must display a sign with at least one of the following messages on their premises:

- “Unaccompanied Minors Are Not Allowed on the Premises”;
- “Products Are Not for Sale to Minors”; or
- “Underage Sales Prohibited.”

The required sign must be at least three inches by five inches in size; contain the required text in English, Spanish, and any other language required by the Federal Voting Rights Act; and be placed prominently.

#### *Display and Sale of ENDS and Vaping Liquid*

An ENDS retailer or vape shop vendor must place all ENDS and vaping liquid in a display that is not physically accessible to customers without the assistance of an employee.

An ENDS retailer or vape shop vendor who sells ENDS or vaping liquid through its website must make a good faith effort to verify that a consumer is not a minor. Before an ENDS or vaping liquid is shipped for delivery, an ENDS retailer or vape shop vendor must accept full payment from the purchaser through a check drawn on an account in the purchaser's name, a credit card issued in the purchaser's name, or a debit card issued in the purchaser's name. An ENDS retailer or vape shop vendor may not, when operating within the scope of the ENDS retailer or vape shop vendor license, ship an ENDS or vaping liquid to anyone other than a purchaser making the required payment as specified. An ENDS retailer or vape shop vendor may request the email address of a purchaser using its website.

#### *Prohibition against Sale of ENDS to Minors: Requirements for Compliance*

In order to comply with prohibition against the distribution of ENDS to a minor, an ENDS licensee must (1) verify the age of an individual who appears to be younger than age 27 by examining the individual's driver's license or other valid identification issued by an employer, governmental unit, or institution of higher education or (2) in the case of a distribution made through a computer, telephonic, or other electronic network, attempt to verify the age of the individual by using a third-party age verification service that uses information available from public records to establish an individual's age.

#### *Distribution of Tobacco Products to Minors: Criminal and Civil Penalties*

The bill raises maximum fines applicable to a violation of the criminal prohibition against the distribution of tobacco products, tobacco paraphernalia, coupons redeemable for tobacco products, and ENDS to minors. Specifically, the bill raises, from \$1,000 to \$2,500, the maximum fine for a second violation occurring within two years of the first violation and, from \$3,000 to \$5,000, the maximum fine for each subsequent violation occurring within two years after the preceding violation. The bill makes conforming changes to civil penalties applicable to the unlawful distribution of tobacco products, tobacco paraphernalia, coupons redeemable for tobacco products, and ENDS to minors.

The bill specifies that, in a prosecution for a criminal or civil violation of provisions pertaining to the sale of tobacco products, ENDS, and other specified products to minors,

it is a defense that the purchaser's or recipient's appearance was such that a reasonable person would believe the purchaser or recipient was at least 27 years old.

**Current Law/Background:**

*Electronic Nicotine Delivery Systems and Vaping Liquid*

“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 the U.S. Food and Drug Administration (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.

“Vaping liquid” means a liquid that (1) consists of propylene glycol, vegetable glycerin, or other similar substance; (2) may or may not contain nicotine; and (3) converts to vapor intended for inhalation when heated in an electronic device.

*Unlawful Sale of Tobacco Products and Electronic Nicotine Device Systems to Minors*

*Criminal Law Article Provisions:* Under provisions of the Criminal Law Article, 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 unless the minor is acting solely as the agent of his or her employer if the employer distributes tobacco products, tobacco paraphernalia, or ENDS for commercial purposes. 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.

The District Court advises that, in 2018, there were 176 violations of and 27 guilty dispositions for the unlawful distribution of tobacco products, tobacco paraphernalia, coupons redeemable for tobacco products, or ENDS to minors.

*Health-General Article Provisions:* Under provisions of the Health-General Article, a person may not distribute a tobacco product, tobacco paraphernalia, or a coupon redeemable for a tobacco product to a minor. 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.

#### *Standards for Child Resistant Packaging of Dangerous Household Substances*

*Definitions:* "Child resistant packing," as it applies to provisions of law pertaining to standards for packaging of dangerous household substances, means packaging that is designed so that (1) the average child younger than age five finds it significantly difficult to open the package or to obtain a harmful amount of the contents of the package within a reasonable time and (2) it is not difficult for a normal adult to open or use.

"Household substance" means any substance that is customarily used or stored by individuals in or about the household and that is (1) a hazardous substance as defined in the federal Hazardous Substances Act; (2) a pesticide as defined in the federal Insecticide, Fungicide, and Rodenticide Act; (3) a food, drug, or cosmetic as defined in the federal Food, Drug, and Cosmetic Act; or (4) a fuel that is intended for use in the heating, cooking, or refrigeration system of a house and is stored in a portable container.

*Rules and Regulations:* Any rule or regulation adopted by the federal government under the federal Poison Prevention Packaging Act (PPPA) is automatically adopted as a rule or regulation of the State. The Secretary of Health may adopt rules and regulations to set standards for labeling and child resistant packaging of any household substance if the Secretary finds that (1) the potential hazard to children from access to the household substance requires child resistant packaging to protect children from serious personal injury or illness, as specified and (2) child resistant packaging of the household substance is technically feasible, practicable, and appropriate. The Secretary may also prohibit specified dangerous household substances from being packaged in a manner that is deemed unnecessarily attractive to children. Standards set under rules and regulations so adopted

may not require specific packaging designs, product content, package quantity, or, with specified exceptions, labeling.

### *Federal Rules and Regulations Pertaining to Sale and Packaging of Electronic Nicotine Device Systems*

In 2016, FDA finalized a rule extending its regulatory authority over tobacco products to include ENDS. Accordingly, effective August 8, 2016, federal regulations prohibit retailers from selling ENDS to minors and require retailers to check the photo identification of any individual younger than age 27 who attempts to purchase ENDS. Further, retailers may not sell ENDS in vending machines or self-service displays (except in adult-only facilities) and may not give away free samples of ENDS, including components or parts. In addition, as of August 2018, a manufacturer or retailer may not sell or distribute ENDS without a health warning statement on the package and may not display an advertisement for ENDS without a health warning statement. In September 2018, FDA announced actions to target the sale and marketing of ENDS to minors.

### *Federal Poison Prevention Packaging Act*

Under PPPA, the U.S. Consumer Product Safety Commission (CPSC) sets standards for packaging of specified household substances. The federal Child Nicotine Poisoning Prevention Act of 2015 requires nicotine provided in liquid nicotine containers that is distributed or manufactured in the United States to be packaged in accordance with standards adopted by CPSC under PPPA. According to a February 2019 letter to industry, CPSC plans to issue guidance pertaining to these requirements in March 2019.

### *Rise in Youth E-cigarette 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.

**State Expenditures:** General fund expenditures for the Maryland Department of Health (MDH) increase by \$41,172 in fiscal 2020. This estimate reflects the cost for MDH to hire one contractual health policy analyst for nine months to assist with drafting regulations for child-resistant packaging standards for ENDS and vaping liquid, coordinate the development of materials for retailers and enforcement agencies, and manage communications with industry and government stakeholders. It includes a salary, fringe

benefits, and operating expenses, including the cost of mailing notifications to ENDS retailers. This estimate assumes termination of the contractual position on June 30, 2020.

Contractual Position	1.0
Salary and Fringe Benefits	\$30,423
Mailings	5,390
Other Operating Expenses	<u>5,359</u>
<b>Total FY 2020 State Expenditures</b>	<b>\$41,172</b>

This estimate does not include any health insurance costs that could be incurred for specified contractual employees under the State's implementation of the federal Patient Protection and Affordable Care Act.

The Comptroller's Office advises that the bill's provisions can be enforced with existing resources.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** HB 1185 (Delegate Carey, *et al.*) - Economic Matters and Health and Government Operations.

**Information Source(s):** Maryland Department of Health; Comptroller's Office; Judiciary (Administrative Office of the Courts); Maryland Association of County Health Officers; U.S. Food and Drug Administration; U.S. Consumer Product Safety Commission; U.S. Department of Health and Human Services; Department of Legislative Services

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