Department of Legislative Services

Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader - Revised

Senate Bill 410 (Senator Kramer, *et al.*)
Finance

Electronic Smoking Devices - Flavor Prohibition

This bill prohibits a person from selling an electronic smoking device (ESD) that contains a natural or artificial flavor other than tobacco. A violation is a misdemeanor subject to maximum penalties of a $1,000 fine and/or 30 days imprisonment. A violator is also subject to disciplinary action by the Comptroller (effective June 1, 2020, the Alcohol and Tobacco Commission (ATC)), as under existing State law.

Fiscal Summary

State Effect: General fund revenues decrease significantly beginning in FY 2021 due to a reduction in sales tax revenues collected, as discussed below. 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.

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 expanded application of existing penalties. Enforcement by local health departments can be handled with existing resources.

Small Business Effect: Meaningful.

Analysis

Current Law: "Electronic smoking device" means a device that can be used to deliver aerosolized or vaporized nicotine to an individual inhaling from the device. ESD 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 the U.S. Food and Drug Administration (FDA) under the Food, Drug, and Cosmetic Act.

Shipment, Import, and Sale of ESDs

A person may not ship, import, or sell into or within the State any ESDs unless the person holds an appropriate license. A person who ships, imports, or sells ESDs into or within the State must (1) comply with any federal and State requirements concerning the placement of warning labels or other information on the containers or individual packages of ESDs and (2) ensure that containers or individual packages of ESDs do not contain any information or markings that are false, misleading, or contrary to federal or State trademark laws.

A violation is a misdemeanor subject to maximum penalties of a $1,000 fine and/or 30 days imprisonment. In addition, a violator is subject to license denial, reprimand, suspension, or revocation by the Comptroller (effective June 1, 2020, ATC, as discussed below), as specified.

Monitoring, Enforcement, and Transfer of Duties to ATC

The Comptroller's Office is generally responsible for monitoring and enforcement activity related to tobacco and other business licenses. The Field Enforcement Division (FED) within the Comptroller's Office enforces State revenue and licensing laws pertaining to alcohol, tobacco, trader's, and transient vendor's licenses, the sales and use tax, and motor fuel, among others.

Chapter 12 of 2019, which takes effect June 1, 2020, establishes ATC and transfers duties of FED pertaining to alcohol and tobacco enforcement to ATC. The Comptroller's Office, however, retains duties related to enforcement of alcohol and tobacco taxes.

Background:

Taxation of ESDs

ESDs and their components are subject to the State sales and use tax but are not subject to a State excise tax. Montgomery County imposes a 30% tax on the wholesale value of vaping products. Montgomery County estimates that the tax generated $1.3 million in fiscal 2019 and projects that revenues will total $1.9 million in fiscal 2020.

Rise in Youth Use of E-cigarettes

According to the National Youth Tobacco Survey, in 2018, 1 in 5 high school students (20.8%) and 1 in 20 middle school students (4.9%) reported using electronic cigarettes (e-cigarettes) at least once in the previous 30 days, an increase of 78% and 48% since 2017, respectively. Among high school students currently using e-cigarettes, use of flavored e-cigarettes increased by 11.3% from 2017 to 2018. The 2019 Monitoring the Future Survey also found significant increases in youth vaping, noting that vaping among grades 8, 10, and 12 more than doubled from 2017 to 2019. According to FDA, increased youth vaping is likely attributable to the popularity of USB-flash-drive-like e-cigarettes that have a high nicotine content, appealing flavors, and the ability to be easily concealed and used discreetly.

Other States' Action to Restrict Access to Flavored E-cigarette Products

In response to alarming health concerns related to e-cigarette use, several states have taken action through emergency regulations or rulemaking to ban or restrict the sale of flavored e-cigarette products.

As of January 2020, two states – Massachusetts and New Jersey – have enacted legislation banning the sale of flavored vaping products. The Massachusetts legislation, signed into law in November 2019, restricts the sale and consumption of flavored nicotine vaping products and flavored cigarettes and other tobacco products (as defined in that state), including menthol cigarettes and flavored chewing tobacco, to licensed smoking bars, among other things. The New Jersey legislation, signed into law in January 2020, bans the sale and distribution of flavored vaping products, including menthol flavored products.

For more information on policies to address youth vaping, see *Issue Papers, 2020 Legislative Session*, Department of Legislative Services (DLS), pgs. 79-81 ("Addressing Youth Vaping") (December 2019).

Federal Action to Restrict Flavored E-cigarette Products

On January 2, 2020, FDA announced a policy to ban some, but not all, flavored e-cigarettes. According to FDA, the policy is intended to limit the rise in the use of e-cigarettes by teens – who overwhelmingly prefer flavors – while balancing the potential benefits to adults who already smoke flavored products other than tobacco and menthol.

The policy prohibits the production, distribution, and sale of all flavored cartridge-based e-cigarettes, with the exception of menthol and tobacco flavors, after February 1, 2020. After that date, a manufacturer must show that an unauthorized flavored cartridge is "appropriate for the protection of public health" and receive FDA approval.

The regulation applies to cartridges, or disposable pods, that are enclosed units that hold vaping liquid, which when heated in an e-cigarette is aerosolized into a breathable vapor. The policy does not apply to tank-style vapes, which are larger and run on refillable e-liquids that are customizable at vape shops.

Recent Action by the Comptroller's Office to Restrict Flavored E-cigarette Products

On February 10, 2020, the Comptroller announced action to prohibit the sale of certain disposable flavored ESDs not covered by the recent FDA policy. According to the Comptroller's Office, FED is prioritizing enforcement action against cartridge-based and disposable ESDs with flavors other than tobacco or menthol.

State Revenues: General fund revenues decrease significantly beginning in fiscal 2021 due to lost sales tax revenue under the bill's prohibition. The amount of revenue loss depends on the amount of menthol and other flavored ESDs that are currently consumed in the State and the extent to which consumers substitute other taxable tobacco products. Data on the total State sales taxes collected on vaping products, including menthol and other flavored products prohibited under the bill, is unavailable. In addition, DLS advises that there is considerable uncertainty about the impact recent FDA restrictions and recently announced enforcement action by the Comptroller's Office will have on the consumption of ESDs in the State and, therefore, the potential revenue losses that would be observed in the absence of the bill.

Under one illustrative scenario, which does not take into account the potential impact of the recently announced FED enforcement action on the consumption of ESDs, the revenue loss may total *roughly* \$1.5 million in fiscal 2021 and at least \$2.1 million annually thereafter, which accounts for the bill's October 1, 2020 effective date. This estimate is based on available data on vaping product sales in other states and in Montgomery County, adjusted for Maryland. It assumes that menthol and other flavored products comprise a significant percentage of vaping product sales. However, given the limited availability of data and the unknown factors discussed above, the bill's impact on sales tax revenues cannot be reliably estimated.

The revenue loss is offset minimally to the extent that the bill's monetary penalty provision results in increased general fund revenues. Any such impact, however, is anticipated to be minimal, even in light of enhanced enforcement action announced by FED.

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 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.

The Comptroller's Office and, when established, ATC can enforce the bill's provisions with existing 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 ESD and other tobacco use in the State.

Local Revenues: As noted above, Montgomery County imposes a 30% tax on the wholesale value of vaping products, which generated $1.3 million in fiscal 2019 and is estimated to generate $1.9 million in fiscal 2020. 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 that will result from recent FDA and FED action on these products.

Local Expenditures: Local expenditures increase as a result of the bill's 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 ESD products.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Maryland Association of County Health Officers; Comptroller's Office; Maryland Department of Health; Montgomery County; Massachusetts; New Jersey; U.S. Food and Drug Administration; U.S. Department of Health and Human Services; Campaign for Tobacco Free Kids; NPR; *The Capital*; *The Washington Post*; Department of Legislative Services

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