

**Department of Legislative Services**  
Maryland General Assembly  
2020 Session

**FISCAL AND POLICY NOTE**  
**First Reader**

Senate Bill 876 (Senator Feldman)  
Finance and Budget and Taxation

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**Electronic Smoking Devices - Regulation and Taxation**

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This bill places various restrictions on the in-person and online sale and distribution of vaping liquid and electronic smoking devices (ESDs) and the advertisement and marketing of vaping liquid and ESDs. With respect to the unlawful sale or distribution of tobacco products or tobacco paraphernalia to underage individuals, the bill increases monetary penalties for second and subsequent violations and requires the Comptroller (or, as discussed below, the Alcohol and Tobacco Commission (ATC)) to revoke the tobacco license of a license holder who commits four or more violations within a 24-month period. In addition, the bill sets a 12% sales and use tax rate for ESDs. Beginning in fiscal 2022, the Governor must include an appropriation of at least 50% of the sales tax revenue generated from the sale of ESDs for the Tobacco Use Prevention and Cessation Program in the annual budget bill. **The bill takes effect June 1, 2020.**

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**Fiscal Summary**

**State Effect:** General fund revenues increase significantly beginning in FY 2020, as discussed below. General fund expenditures for the Comptroller's Office increase by \$40,000 in FY 2020 only. General fund expenditures for the Maryland Department of Health (MDH) increase annually beginning in FY 2022 as a result of the bill's mandated appropriation. **The bill increases a mandated appropriation beginning in FY 2022.**

**Local Effect:** Local revenues and expenditures may increase beginning in FY 2022 due to increased funding for the Tobacco Use Prevention and Cessation Program. Local revenues may increase further as a result of the bill's monetary penalty provisions.

**Small Business Effect:** Meaningful.

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## Analysis

### **Bill Summary:**

#### *Restrictions on In-person Sales*

The in-person sale or distribution of vaping liquid by an ESD retailer or a vape shop vendor may only occur in age-restricted areas. In addition, an ESD or vaping liquid that contains more than 50 milligrams of nicotine per milliliter may only be sold or distributed (by an ESD retailer or vape shop vendor) in-person and within an age-restricted area; thus, sales meeting or exceeding that threshold for nicotine concentration may not be made online. “Age-restricted area” means a retail establishment or space within a retail establishment that an individual may not enter unless the individual is (1) at least age 21 or (2) an active-duty member of the military who is at least age 18 and presents a valid military identification.

In addition to other signage required under State law, an ESD retailer or vape shop vendor that sells or distributes vaping liquid must post a sign that is clearly visible to the public at the entrance of each age-restricted area that states that unaccompanied minors are not allowed on the premises, products are not for sale to minors, and underage sales are prohibited, as specified.

#### *Restrictions on Online Sales*

A person who holds an ESD license and sells ESDs through a website must use a third-party age verification service to verify that a consumer purchasing an ESD is at least age 21 or at least age 18 and an active-duty member of the military. No more than two ESDs or five packages containing vaping liquid may be sold through a website in a single transaction.

#### *Restrictions on Advertisements and Marketing*

A person who holds an ESD license is prohibited from directly or indirectly advertising or marketing ESDs or vaping liquid to minors. The bill specifies the various actions that constitute a violation, such as the use of specified images in the advertising, promotion, packaging, or labeling of an ESD or the promotion or advertisement of ESDs in specified media or at specified events.

#### *Penalties for Unlawful Distribution of Tobacco Products to Underage Individuals*

With respect to the unlawful sale or distribution of tobacco products, tobacco paraphernalia, or coupons redeemable for tobacco products to underage individuals, the

maximum monetary penalty for a second violation committed within two years of the first violation increases from \$1,000 to \$2,500, and the maximum monetary penalty for a third or subsequent violation committed within two years of the preceding violation increases from \$3,000 to \$5,000. The Comptroller (beginning June 1, 2020, or the effective date of Chapter 12 of 2019, ATC) must revoke the license of a cigarette, other tobacco products, or ESD license holder who commits four or more violations in a 24-month period.

### *ESD Sales Tax Rate and Use of Funding*

The bill establishes a 12% sales and use tax rate for ESDs. Beginning in fiscal 2022, the Governor must include an appropriation of at least 50% of the sales tax revenue generated from the sale of ESDs for the Tobacco Use Prevention and Cessation Program in the annual budget bill.

**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.

### *Minimum Age*

Chapter 396 of 2019 generally raised the minimum age for an individual to purchase or be sold tobacco products from 18 to 21 with specified exceptions for active-duty military members at least age 18 who present valid military identification. In addition, recent federal legislation raised the federal minimum age for a person to purchase or be sold tobacco products from 18 to 21 *without exception*.

### *Distribution of Tobacco Products to Underage Individuals*

The distribution of tobacco products to underage individuals (under State law, an individual younger than age 21 or younger than age 18, if an active-duty member of the military) is generally prohibited under provisions of the Criminal Law and Health-General articles. A violator is subject to various civil or criminal penalties. Chapter 396 of 2019 authorized MDH to conduct unannounced inspections of licensed tobacco retailers to ensure compliance with minimum age provisions and other specified requirements of State law.

Under the Criminal Law Article, a commercial tobacco distributor may not distribute a tobacco product, tobacco paraphernalia, or a coupon redeemable for a tobacco product to an underage individual. However, the prohibition does not apply to the distribution of a tobacco product or tobacco paraphernalia to an underage individual who is acting solely as the agent of his or her employer if the employer distributes such products for commercial purposes. Likewise, someone else may not purchase for, sell to, or distribute to an underage individual a tobacco product or tobacco paraphernalia. A person who 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.

Under the Health-General Article, a commercial tobacco distributor who unlawfully distributes a tobacco product, tobacco paraphernalia, or a coupon redeemable for a tobacco product to an underage individual, or a person who unlawfully sells, distributes, or offers for sale an ESD to an underage individual, is subject to maximum civil penalties of \$300 for a first violation, \$1,000 for a second violation occurring within 24 months after the first violation, and \$3,000 for each subsequent violation occurring within 24 months after the preceding violation. A county health officer or a designee of a county health officer may issue a citation for a violation. Pursuant to Chapter 396 of 2019, if a violation is committed by a person acting on behalf of a retailer, the civil penalty must be paid by the retailer. A civil citation issued for a violation precludes a criminal prosecution arising out of the same violation, and vice versa.

### *Taxation of ESDs*

ESDs and their components are subject to the general 6% State sales tax rate 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.

### *Tobacco Use Prevention and Cessation Program*

The Tobacco Use Prevention and Cessation Program aims to reduce the use of tobacco products and to reduce the burden of tobacco-related morbidity and mortality in the State through various activities, such as media campaigns, enforcement of minimum age restrictions, promotion and implementation of smoking cessation programs, and implementation of school-based tobacco education programs. The Governor is required to include at least \$10.0 million in annual funding for the program.

## **Background:**

### *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.

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.

In addition, the policy prioritizes enforcement action against e-cigarette products (1) for which manufacturers have failed to take adequate measures to prevent access by minors, such as adequately monitoring retailer compliance with age-verification and sales restrictions and (2) that are targeted or marketed to minors, including products marketed with labeling or advertising resembling foods or other products that are generally marketed toward or appealing to youth or depicting characters or media figures popular among youth.

### *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.

In October 2019, the Comptroller created the e-facts Task Force on Electronic Smoking Devices to study the public health and safety impacts of ESDs and to recommend regulatory and legislative action. The task force issued its final [report](#) on February 17, 2020.

**State Revenues:** The bill establishes a 12% sales tax rate for ESDs, which are currently subject to the general 6% sales tax rate. Accordingly, general fund revenues increase significantly beginning in fiscal 2020. The extent of the increase depends on ESD sales in the State and the extent to which the increased sales tax applied to these products reduces overall ESD sales. Data on the total State sales taxes collected on ESDs 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. Given the factors discussed above, the bill's impact on sales tax revenues cannot be reliably quantified at this time. Nevertheless, the portion of the sales tax attributed to this bill in a fiscal year (at least the additional 6% being collected above the current 6% rate) is to be distributed to the Tobacco Use Prevention and Cessation Program in the following fiscal year, beginning in fiscal 2022.

Further, general fund revenues may increase minimally as a result of the bill's increased maximum monetary penalties for second and subsequent violations of existing prohibitions related to the distribution of tobacco products to underage individuals. The Judiciary advises that, in fiscal 2019, there were 55 violations and 14 guilty dispositions for unlawful distribution of tobacco products, tobacco paraphernalia, or coupons redeemable for tobacco products to underage individuals. It is not readily known how many of these violations were second or subsequent violations.

**State Expenditures:** Beginning in fiscal 2022, the Governor must include an appropriation of at least 50% of the State sales tax revenue generated from the sale of ESDs in the previous fiscal year for the Tobacco Use Prevention and Cessation Program in the annual budget bill. Accordingly, general fund expenditures for MDH increase significantly beginning in fiscal 2022. MDH advises that increased funding will be expended on grants and contracts for statewide tobacco prevention and control activities, grants to local health departments, health communication activities, evaluation activities, and related administrative expenses. MDH may hire additional staff to support these expanded program activities. This analysis assumes the mandated appropriation is in addition to the \$10.0 million already required (rather than a means of meeting the existing requirement).

General fund expenditures for the Comptroller's Office increase by \$40,000 in fiscal 2020 only for necessary changes to sales and use tax forms.

**Local Fiscal Effect:** Local health departments may receive additional funding beginning in fiscal 2022 due to the increased funding for the Tobacco Use Prevention and Cessation

Program. Further, local revenues may increase minimally as a result of the bill's increased monetary penalties from those cases heard in the circuit courts.

**Small Business Effect:** Small businesses that sell ESDs are negatively impacted by the bill's proposed tax change. The impact depends on the extent to which the higher sales tax rate applicable to ESDs decreases sales and the extent to which the tax increase is passed on to consumers. Small businesses that sell ESDs may incur limited expenses to comply with the bill's requirements for in-person and online sales.

**Additional Comments:** As noted above, Chapter 396 of 2019 raised the minimum age for an individual to purchase or be sold tobacco products from 18 to 21 with specified exceptions for active-duty military members who are at least age 18 and present valid military identification. Recent federal legislation, however, raised the federal minimum age for an individual to purchase or be sold tobacco products from 18 to 21 without exceptions for active-duty military personnel.

DLS advises that the timing associated with determining the amount of the mandated appropriation in the bill is problematic. The bill requires at least 50% of the sales tax revenue raised due to the 12% rate on ESDs in the "previous fiscal year" to be included by the Governor in the annual budget bill as an appropriation to the Tobacco Use Prevention and Cessation Program. When the Governor introduces the fiscal 2022 budget (which will occur in January 2021), the amount of sales tax revenue collected in the previous fiscal year (fiscal 2021 – July 2020 through June 2021) will not yet be known. If the bill is interpreted as applying to the fiscal year *before* the budget bill is *introduced* (in this example, fiscal 2020), then the appropriation for fiscal 2022 would only equate to one month (from June 2020) of additional sales tax revenues due to the higher rate for ESDs.

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### Additional Information

**Prior Introductions:** None.

**Designated Cross File:** None.

**Information Source(s):** Comptroller's Office; Judiciary (Administrative Office of the Courts); Maryland Department of Health; Baltimore City; Harford, Montgomery, Talbot, and Wicomico counties; Maryland Association of Counties; Maryland Association of County Health Officers; 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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Analysis by: Elizabeth J. Allison

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510