

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 273
Finance

(Senator Kramer)

Electronic Smoking Device Regulation Act of 2021

This bill limits the sale of electronic smoking devices (ESD) in the State to in-person transactions by licensed vape shop vendors. Accordingly, the bill repeals the ESD retailer license, limits the scope of vape shop vendor and manufacturer licenses, and repeals an exemption from ESD licensure that applies to cigarette and other tobacco products (OTP) licensees. Various requirements and restrictions are placed on vape shop vendors; among these, a vape shop vendor may not sell specified flavored ESD and must file specified statements about components and ingredients with the local health department (LHD) and the Alcohol and Tobacco Commission (ATC). The bill authorizes testing of ESD components and adoption of regulations establishing permissible ingredients and components. Applicants for a vape shop vendor license must also register with and pay an additional fee to their LHD. “Smoking” is expanded under the Clean Indoor Air Act (CIAA) to include the inhalation and exhalation of vapor from ESD. ATC must provide notice of the bill’s provisions to licensees and clerks of the circuit courts. **The bill generally takes effect January 1, 2022; specified provisions take effect July 1, 2021.**

Fiscal Summary

State Effect: General fund revenues decrease, potentially significantly, beginning in FY 2022 due to a reduction in sales and use tax revenue collected, as discussed below. General fund expenditures for the Maryland Department of Health (MDH) increase by \$182,600 in FY 2022 only. Also, general fund revenues and expenditures, as well as special fund revenues to the Cigarette Restitution Fund, increase to the extent existing penalties are imposed, beginning in FY 2022.

Local Effect: LHD revenues increase minimally due to registration fees; LHD enforcement can likely be handled with existing resources and the additional fee revenues. Montgomery County revenues likely decrease beginning in FY 2022 due to a decrease in

e-cigarette excise tax revenues. Minimal increase in other local government revenues and expenditures due to imposition of existing penalties.

Small Business Effect: Meaningful.

Analysis

Bill Summary: The bill expresses legislative intent that, beginning January 1, 2022:

- no person may sell ESD through the mail, a computer network, a telephonic network, or another network to consumers in the State;
- the only consumer sales of ESD allowed in the State must be made by a licensed vape shop vendor selling directly to consumers on the premises of the licensed business; and
- a licensed vape shop vendor may not sell any products that are not ESD.

Electronic Smoking Devices Licensure Modifications

Effective January 1, 2022, the bill repeals the ESD retailer license, limits the scope of the vape shop vendor license to authorize the *exclusive* sale of ESD and related accessories to consumers but only *on the premises of the place of business*, and makes various conforming changes. An applicant for a vape shop vendor license with the clerk of the circuit court must also register with and pay a fee to their LHD. MDH must set the fee in the amount necessary to carry out its duties under the Business Regulation Article relating to ESD. All license fees collected by the LHD must be used to enforce provisions relating to ESD and CIAA.

Further, the bill repeals an exemption from ESD licensure that allows persons licensed to manufacture, distribute, or sell cigarettes or OTP to manufacture, distribute, or sell ESD without obtaining the appropriate ESD license. Thus, a cigarette or OTP licensee must obtain an additional license in order to manufacture, distribute, or sell ESD. In addition, the bill repeals the authorization for licensed ESD manufacturers to sell ESD directly to consumers via mail or electronic network.

Restrictions on Sale of Flavored Electronic Smoking Devices

A vape shop vendor may not sell ESD that (1) are sealed and prefilled with vaping liquid in a container that affixes directly to the battery or heating mechanism of the ESD and (2) contain a natural or artificial flavor, other than tobacco.

A vape shop vendor may sell an ESD cartridge or pod that holds liquid that is to be aerosolized through product use containing a natural or artificial flavor other than tobacco only if the cartridge or pod (1) cannot be used alone to deliver aerosolized nicotine to an individual inhaling from the device and (2) is sold separately from an ESD that is designed to fit within or operate as part of the ESD.

Age Verification

A vape shop vendor must electronically scan a prospective consumer's government-issued identification (ID) before selling ESD to verify that the consumer may legally receive the ESD. Failure to electronically scan an ID obviates as a defense in a prosecution for selling ESD to an underage individual that the defendant examined the purchaser's or recipient's ID. Further, a vape shop vendor may not allow an individual who may not legally receive ESD to enter the premises of the licensed business.

Reporting and Testing of Electronic Smoking Devices Ingredients

Before a licensee may sell ESD in the State, the licensee must file a statement with the LHD and the Executive Director of ATC that lists all component parts and ingredients of the ESD. The Executive Director of ATC or MDH may test an ESD to ensure that it contains the ingredients listed in the statement. The Executive Director of ATC and MDH may jointly adopt regulations to establish permissible ingredients and components of ESD.

Current Law: "ESD" is defined as a device that can be used to deliver aerosolized or vaporized nicotine to an individual inhaling from the device. It 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 federal Food, Drug, and Cosmetic Act.

Electronic Smoking Devices Licensure

Title 16.7 of the Business Regulation Article governs the licensing of ESD manufacturers, wholesalers, retailers, and vape shop vendors. Beginning January 1, 2021, ESD manufacturer and wholesaler licenses are issued by ATC. ESD retailer and vape shop vendor licenses are issued by the clerks of the circuit courts.

A person generally may not act as an ESD manufacturer, wholesaler, retailer, or vape shop vendor without an appropriate ESD license. However, a person who is licensed under Title 16 (Cigarettes) or Title 16.5 (OTP) of the Business Regulation Article may

manufacture, distribute, or sell ESD in the same capacity as the person is licensed under that title and is not required to obtain a separate ESD license.

An ESD retailer license authorizes the licensee sell to ESD to consumers; buy ESD from an ESD wholesaler; if the licensee is also licensed to manufacture ESD, sell ESD manufactured under the manufacturer license at retail; and except when otherwise prohibited, distribute sample ESD to consumers in the State. A vape shop vendor license authorizes the licensee to sell ESD as a vape shop vendor, which is defined as a business that derives at least 70% of its revenues from the sale of ESD and related accessories. The annual fee for an ESD retailer or vape shop vendor license is \$25 payable to the clerk of the circuit court.

Minimum Age

Chapter 396 of 2019 generally raised the minimum age for the sale or purchase of tobacco products from 18 to 21, with specified exceptions for active-duty military members. The Act also established various signage requirements for tobacco product retailers and authorized MDH to conduct unannounced inspections of retailers. After Chapter 396 took effect in October 2019, federal legislation enacted in December 2019 raised the federal minimum age for sale of tobacco products from 18 to 21 without exception.

A person may not distribute tobacco products to an underage individual. In a prosecution for a violation, it is a defense that the defendant examined the purchaser's or the recipient's valid, government-issued ID that positively identified the purchaser or recipient as of legal age to purchase tobacco products. (As noted above, under the bill, a licensed vape shop vendor may assert this defense in a prosecution for the sale of ESD to an underage individual only if the licensee *electronically scanned* the ID.)

Direct Sale of Electronic Smoking Devices to Consumers

State law expressly authorizes a licensed ESD manufacturer to sell ESD directly to a consumer if the consumer purchases or orders the devices through the mail or an electronic network. Other ESD licensees are not expressly prohibited from selling ESD directly to a consumer via mail or electronic network.

Violations

A person may not act, attempt to act, or offer to act as an ESD manufacturer, retailer, wholesaler, or vape shop vendor in the State without an appropriate license. A violation is a misdemeanor punishable by a fine of up to \$1,000 and/or imprisonment for up to 30 days. Each day that a violation continues is a separate offense.

Except as otherwise specified, any other violation of Title 16.7 (ESD) of the Business Regulation Article is a misdemeanor punishable by a fine of up to \$1,000 and/or imprisonment for up to 30 days.

Monitoring and Enforcement

Pursuant to Chapter 12 of 2019 and Chapters 359 and 360 of 2020, alcohol and tobacco enforcement duties are transferred from the Field Enforcement Division of the Comptroller's Office to ATC effective January 1, 2021. The Comptroller's Office, however, retains duties related to enforcement of tobacco taxes.

Federal Regulation of Electronic Nicotine Delivery Systems

In 2019, FDA finalized a rule extending its regulatory authority over tobacco products to include electronic nicotine delivery systems (ENDS, now classified as ESD in Maryland). According to revised guidance issued in April 2020, FDA intends to prioritize enforcement against any ENDS product that is offered for sale after September 9, 2020, for which the manufacturer has not submitted a premarket application, as well as flavored, cartridge-based ENDS products (except for tobacco- or menthol-flavored products) sold without marketing authorization, regardless of whether a premarket application has been submitted to FDA.

Clean Indoor Air Act

Under CIAA, a person generally may not smoke in (1) an indoor area open to the public; (2) an indoor place in which meetings are open to the public; (3) a government-owned or -operated means of mass transportation; (4) an indoor place of employment; (5) a private home used by a licensed child care provider; or (6) a private vehicle used for public transportation of children or as part of health care or day care transportation. The prohibition includes bars, clubs, restaurants, pubs, taverns, retail establishments, theaters, concert halls, athletic facilities, financial service institutions, government buildings, educational institutions, museums, and libraries. However, the prohibition does not apply to (1) private homes or residences; (2) private vehicles; (3) a hotel or motel room as long as the total percent of rooms so used does not exceed 25%; (4) specified tobacco facilities and retail businesses; or (5) a laboratory for the purpose of conducting scientific research into the health effects of tobacco smoke. CIAA defines "smoking" as the burning of a lighted cigarette, cigar, pipe, or any other matter or substance that contains tobacco.

CIAA required MDH to adopt regulations that prohibit environmental tobacco smoke in indoor areas open to the public. A person who violates the MDH regulations is subject to a written reprimand for a first violation, a civil penalty of \$100 for a second violation, a civil penalty of \$500 for a third violation, and a civil penalty of \$1,000 for each subsequent

violation, unless otherwise waived by MDH after the department considers the seriousness of the violation and good faith measures. (Statute requires that the civil penalty for third and subsequent violations be at least \$250.) However, an employer who takes certain retaliatory actions against an employee (who has complained or taken other actions related to violations) is subject to a civil penalty of at least \$2,000 but no more than \$10,000 for each violation. All civil penalty revenue is paid to the Cigarette Restitution Fund.

State Revenues: The bill limits the sale of ESD to consumers in the State to sale by licensed vape shop vendors and prohibits the sale of specified flavored ESD products. ESD and their components are subject to the State sales and use tax but are not subject to a State excise tax. Thus, general fund revenues decrease, potentially significantly, beginning in fiscal 2022 due to lost sales and use tax revenue.

The extent of the decrease, however, depends on the extent to which sales of ESD decline as a result of the bill. In addition, there is uncertainty about the impact of FDA enforcement action relating to the sale of certain flavored and other vaping products on consumption of these products and, therefore, the potential revenue losses that would be observed in the absence of the bill. For these reasons, and the lack of readily available data on State sales and use tax revenues collected from the sale of ESD, the precise impact on State sales and use tax revenues cannot be reliably quantified.

General fund revenues are also affected, likely minimally, by the bill's repeal of the existing exemption from ESD licensure for cigarette and OTP licensees. Under the bill, a cigarette or OTP licensee must obtain an additional license (and pay the associated fee) in order to manufacture, distribute, or sell ESD. Beginning January 1, 2021, ESD manufacturer and wholesaler licenses are issued by ATC. The annual license fees for ESD manufacturer and wholesaler licenses are \$25 and \$150, respectively. To the extent that additional ESD manufacturer and wholesaler licenses are issued as a result of the bill's repeal of the specified licensure exemption, general fund revenues for ATC increase minimally. The impact on general fund revenue due to licenses issued by clerks of the court, as discussed below, is assumed to be negligible.

General fund revenue losses are further offset to the extent the bill's expanded application of existing monetary penalties for violations of Title 16.7 of the Business Regulation Article result in increased general fund revenues. Any such impact, however, is anticipated to be minimal.

In addition, the bill expands CIAA to apply to the use of ESD in specified indoor public spaces. Violations of CIAA are subject to various civil penalties, which are deposited in the Cigarette Restitution Fund. Thus, special fund revenues to the Cigarette Restitution Fund increase minimally due to the expanded application of existing CIAA penalties under the bill.

State Expenditures: MDH operates the Responsible Tobacco Retailer Initiative, which includes a website, retailer training program, educational media, and toolkits that are disseminated to licensed tobacco retailers and LHDs to provide guidance on remaining compliant with tobacco sales laws. In addition, MDH is generally charged with enforcing CIAA.

General fund expenditures for MDH increase by an estimated \$182,600 in fiscal 2022 to develop and distribute materials to licensed tobacco retailers in Maryland, develop and distribute materials to business owners across Maryland regarding the bill's changes to CIAA, and develop and implement a public awareness campaign targeted to business owners and the general public notifying them of the change to CIAA.

The bill authorizes - but does not require - MDH and ATC to set standards for permissible ingredients and components for ESD and to test samples of ESD products to ensure compliance with such standards. MDH advises that it does not have the expertise to set permissible standards for ingredients or components of ESD and relies on FDA to set these standards. According to MDH, as of January 2021, FDA has not set standards for ESD ingredients. To the extent that MDH opts to conduct testing of ESD as authorized under the bill, general fund expenditures for MDH increase to contract with a laboratory capable of testing ESD samples. A per-test cost estimate is not readily available.

General fund expenditures increase further due to the expanded application of an existing incarceration penalty for violations of Title 16.7 of the Business Regulation Article 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.

It is assumed that ATC, once transitioned from the Comptroller's Office and fully operational, can implement the bill's provisions with existing budgeted resources. However, sufficient information was not provided in time to fully analyze the impact of this legislation on ATC.

Local Revenues: Local revenues are affected by the bill's various modifications to ESD licensing provisions. Generally, 92% of the license fee revenue collected by the clerks of the circuit courts for tobacco retail licenses, including ESD retailer and vape shop vendor licenses, is distributed to local governments.

The bill repeals the ESD retailer license. Under current law, the annual fee for an ESD retailer license is \$25. MDH advises that, currently, there are approximately 50 active ESD retailer licenses. Thus, local government revenues decrease minimally as a result of the bill's repeal of the ESD retailer license. To the extent additional vape shop vendor licenses are issued (for example, to ESD manufacturers), revenues are offset slightly.

The bill also requires applicants for a vape shop vendor license to submit a fee to their LHD in an amount set by MDH. Thus, LHD revenues increase. The amount of the increase depends on the fee determined by MDH and the number of applicants for a vape shop vendor license. MDH advises that, currently, there are approximately 100 active vape shop vendor licenses. Any increase in LHD revenues is expected to be minimal.

Montgomery County imposes a 30% tax on the wholesale value of vaping products, which generated \$1.3 million in fiscal 2020 and is estimated to generate \$1.1 million in fiscal 2021. Under the bill, Montgomery County tax revenues decline beginning in fiscal 2022. The amount of the decline depends on the decrease in vaping products sold as a result of the bill.

Local Expenditures: Local expenditures increase due to the expanded application of an existing 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.

Expenditures for LHDs may increase for enforcement-related activities. However, LHDs can likely handle any such impact with existing resources and/or additional fee revenue realized under the bill.

Small Business Effect: As discussed above, the bill limits the sale of ESD to consumers in the State to sale by licensed vape shop vendors and prohibits the sale of specified flavored ESD products. Thus, sales decline for small businesses in Maryland that currently sell ESD in Maryland under an ESD retailer license or equivalent license, as such businesses are no longer authorized to sell ESD under the bill. Because retail establishments that are licensed to sell cigarettes or OTP may, under current law, sell ESD without a separate ESD license, the number of affected establishments is unknown.

Small business licensed vape shops may experience an increase in sales to the extent that the sale of ESD are redirected to these establishments. However, sales may also decline to the extent that the bill's prohibition on the sale of specified flavored ESD products decreases overall ESD sales.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Maryland Association of County Health Officers; Judiciary (Administrative Office of the Courts); Maryland Department of Health; U.S. Food and Drug Administration; Department of Legislative Services

Fiscal Note History: First Reader - January 28, 2021
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