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FISCAL AND POLICY NOTE
First Reader

Senate Bill 990
Finance

(Senator Jennings)

Electronic Smoking Devices - Prohibitions and Requirements

This bill establishes various requirements and prohibitions relating to the manufacture, sale, and distribution of electronic smoking devices (ESDs) in the State, including restrictions on the display, advertising, promotion, and marketing of ESDs and the amount of ESDs that may be sold to a consumer in a single transaction. By October 1, 2022, each manufacturer of an ESD that is sold or intended to be sold in the State must execute and deliver a specified attestation to the Executive Director of the Alcohol and Tobacco Commission (ATC), who must develop and maintain a specified directory of manufacturers and product listings. Beginning January 1, 2023, a person may not knowingly manufacture, sell, barter, or furnish an “illicit ESD” in the State; a violation of this prohibition is a misdemeanor subject to specified monetary penalties. In general, a violation of the bill’s provisions is a misdemeanor subject to existing penalties as provided under current law. **The bill takes effect July 1, 2022.**

Fiscal Summary

State Effect: General fund revenues potentially decrease beginning in FY 2023 due to forgone sales and use tax revenues, as discussed below. General fund revenues and expenditures increase minimally to the extent that penalties are imposed, beginning in FY 2023. General fund expenditures for ATC potentially increase beginning in FY 2023 to develop and maintain the required directory; however, sufficient information was not available in time to include further analysis of the fiscal impact of this legislation.

Local Effect: Minimal increase in local government revenues and expenditures to the extent penalties are imposed, as discussed below. Montgomery County revenues potentially decrease beginning in FY 2023 due to forgone e-cigarette excise tax revenues, as discussed below.

Small Business Effect: Meaningful.

Analysis

Bill Summary: Except as otherwise specified, a violation of the bill's provisions is a misdemeanor subject to a fine of up to \$1,000 and/or up to 30 days imprisonment, as provided under existing law.

Restrictions on Display and Sale of Electronic Smoking Devices

In order to require a consumer seeking access to an ESD at a retail business to ask for assistance from an ESD retailer, an ESD retailer may not display for sale an ESD unless the device is located (1) behind a counter in an area accessible only to the retailer and employees of the retailer or (2) within a locked case. An ESD retailer must limit the amount of ESD that can be purchased during a single transaction to up to (1) one ESD product that does not include vaping liquid and four separate finished vaping liquid product packages or (2) four self-contained, single-use ESD.

Restrictions on Advertisements and Promotions

A person may not advertise ESDs in any outdoor area (other than on the premises of a retail business where ESDs are sold or offered for sale) within 1,000 feet of any public or private elementary or secondary school or public park. A person may not advertise or promote an ESD in a newspaper, magazine, periodical, or other print or digital publication distributed in the State for which more than 15% of the readership comprises individuals who are younger than 21 as measured by competent and reliable survey evidence.

Prohibition on Marketing to Underage Individuals

A person may not knowingly market ESDs to individuals younger than 21 by the use of packaging or labeling (1) resembling packaging or labeling used for children's juice boxes, milk cartons, candies, and cookies or (2) that contains words or graphics depicting or referencing a consumer product designed or intended primarily for children (as specified), comics or superheroes, an athlete or celebrity, or a video game, movie, or animated television show.

Required Attestations

By October 1, 2022, each manufacturer of an ESD that is sold or intended to be sold in the State, whether directly or through a wholesale distributor, retailer, or similar intermediary, must execute and deliver an attestation under penalty of perjury to the Executive Director of ATC certifying that, as of the date of the attestation:

- the ESD was on the market in the United States as of August 8, 2016, the manufacturer has applied for a marketing order for the ESD by submitting a premarket tobacco product application by September 9, 2020, to the U.S. Food and Drug Administration (FDA), and the application remains pending with FDA; or
- the manufacturer has received a marketing granted order or other authorization from FDA, as specified.

The manufacturer must notify the Executive Director within 30 days after any material change to the attestation, including if FDA has issued a marketing granted order or other authorization, issued a marketing denial order, or ordered the manufacturer to remove the ESD, either temporarily or permanently, from the U.S. market.

Required Directory

The Executive Director of ATC must develop a directory of manufacturers of ESDs that have provided attestations in accordance with the bill and ESDs that are listed in the manufacturer attestations. By January 1, 2023, the Executive Director must make the directory available for public inspection on the ATC website and update the directory as necessary. Beginning January 1, 2023, a person may not knowingly, directly or indirectly, manufacture, distribute, sell, barter, or furnish in the State any ESD that is not included in the directory.

Prohibition on Manufacture, Sale, Bartering, and Furnishing of Illicit Devices

Beginning January 1, 2023, a person may not knowingly manufacture, sell, barter, or furnish an “illicit ESD” in the State. “Illicit ESD” means (1) a counterfeit ESD; (2) an ESD that was not manufactured, prepared, compounded, or processed by a person registered with FDA; or (3) an ESD not listed in the directory maintained by the Executive Director. “Counterfeit ESD” means any ESD that (1) without authorization, bears the trademark, trade name, or other identifying mark, imprint, design, or any likeness thereof, of a legally marketed ESD or (2) is not manufactured by the manufacturer indicated on the product packaging, label, or container.

A violation of the above prohibition is a misdemeanor subject to a fine of (1) \$2,500 for the first offense; (2) \$5,000 for a second offense; and (3) \$10,000 for a third or subsequent offense. Each sale of an illicit ESD in the State constitutes a separate offense.

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” does not include a drug,

device, or combination product authorized for sale by FDA under the Food, Drug, and Cosmetic Act or a battery or battery charger when sold separately.

“ESD retailer” means a person that sells ESDs to consumers, holds ESDs for sale to consumers, or, unless otherwise prohibited, distributes sample ESDs to consumers in the State.

Licensing of Electronic Smoking Device Businesses

Title 16.7 of the Business Regulation Article governs licensing of ESD manufacturers, wholesalers, retailers, and vape shop vendors. A person may not act as an ESD manufacturer, wholesaler, retailer, or vape shop vendor without an appropriate license. A person who is licensed under Title 16 (Cigarettes) or Title 16.5 (OTP) of the Business Regulation Article may manufacture, distribute, or sell ESDs in the same capacity as the person is licensed under that title without obtaining a separate ESD license.

ATC is responsible for monitoring and enforcement activity related to ESD licenses and directly issues ESD manufacturer and wholesaler licenses. ESD retailer and vape shop vendor licenses are issued by the clerks of the circuit courts. Subject to hearing provisions, the Executive Director of ATC may deny a license to an applicant, reprimand a licensee, or suspend or revoke a license for specified violations, including a violation of federal, State, or local law regarding the sale of ESDs.

In general, a person that violates any provision of Title 16.7 of the Business Regulation Article is guilty of a misdemeanor and subject to a fine of up to \$1,000 and/or up to 30 days imprisonment.

Minimum Age

Chapter 396 of 2019 raised the minimum age for the sale or purchase of tobacco products (including ESDs) 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 the Maryland Department of Health to conduct unannounced inspections of retailers. Federal legislation enacted in December 2019 raised the federal minimum age for sale of tobacco products from 18 to 21 without exception.

A person who unlawfully distributes a tobacco product (including an ESD) to an underage individual is subject to various civil and criminal penalties under State law.

Taxation of Electronic Smoking Devices

ESDs and their components are subject to the State sales and use tax but are not subject to a State excise tax. Chapter 37 of 2021 increased the sales and use tax rate that generally

applies to these products to 12% and increased the sales and use tax rate for vaping liquid sold in a container that contains up to 5 milliliters of vaping liquid to 60% of the taxable price. Montgomery County imposes a 30% tax on the wholesale value of vaping products.

Federal Regulation of Electronic Nicotine Delivery Systems

The federal Family Smoking Prevention and Tobacco Control Act, enacted in June 2009, established a new chapter under the federal Food, Drug, and Cosmetic Act granting FDA with regulatory authority over tobacco products. Among other things, the chapter establishes premarket review requirements for new tobacco products (tobacco products that were not commercially marketed in the United States as of February 15, 2007) and registration and product listing requirements for persons who own or operate an establishment engaged in the manufacture, preparation, compounding, or processing of tobacco products.

In 2016, FDA issued a final rule extending FDA's tobacco product authority to all products, other than accessories of deemed tobacco products, that meet the statutory definition of "tobacco product" under the Food, Drug, and Cosmetic Act, and clarifying that all electronic nicotine delivery systems (including e-cigarettes, e-hookah, e-cigars, vape pens, advanced refillable personal vaporizers, and electronic pipes) are subject to FDA's tobacco product authority. Pursuant to a federal court order, all deemed new tobacco products on the market as of August 8, 2016, for which premarket authorization applications are not filed by September 9, 2020, are subject to FDA enforcement action. In October 2021, FDA issued a final rule setting forth requirements for premarket tobacco product applications and requiring manufacturers to maintain records establishing that their tobacco products are legally marketed.

State Revenues: The bill establishes various restrictions relating to the sale of ESDs in the State, including limitations on the amount of ESDs that may be sold to a consumer in a single transaction. As noted above, ESDs and their components are subject to the State sales and use tax. To the extent that the bill reduces overall sales of ESDs in the State, general fund revenues decrease beginning in fiscal 2023 due to forgone sales and use tax revenue. However, the precise impact cannot be reliably estimated.

General fund revenues increase to the extent that monetary penalties are assessed in the District Court for violations of the bill's provisions. Any such impact cannot be reliably estimated but is anticipated to be minimal.

State Expenditures: It is assumed that general fund expenditures for ATC may increase in fiscal 2023 and future fiscal years due to any one-time and/or ongoing expenses related to the development and maintenance of the required directory in accordance with the bill. However, sufficient information was not provided in time to fully analyze the impact of this legislation on ATC.

General fund expenditures increase minimally due to the expanded application of an existing incarceration penalty for ESD-related violations to the extent more people are committed to State correctional facilities for convictions in Baltimore City.

Local Revenues: Local revenues increase minimally to the extent monetary penalties are assessed by the circuit courts for violations of the bill’s prohibition on the manufacture, sale, bartering, or furnishing of illicit ESDs. In addition, Montgomery County e-cigarette excise tax revenues decrease beginning in fiscal 2023 to the extent that the bill reduces overall sales of ESDs in the county. However, the precise impact cannot be reliably estimated.

Local Expenditures: Local expenditures increase minimally 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 \$90 to \$300 per inmate in recent years.

Small Business Effect: Small businesses that sell and/or manufacture ESDs in the State are subject to various requirements and restrictions under the bill and may be subject to penalties for noncompliance. Small businesses that sell ESDs in the State may experience a decline in sales to the extent the bill reduces consumption of ESDs in the State.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Maryland Association of County Health Officers; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland Department of Health; U.S. Food and Drug Administration; Department of Legislative Services

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