

CAROLYN A. QUATTROCKI
Chief Deputy Attorney General

LEONARD J. HOWIE III
Deputy Attorney General

CARRIE J. WILLIAMS
Deputy Attorney General

ZENITA WICKHAM HURLEY
*Chief, Equity, Policy, and
Engagement*



**STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL**

ANTHONY G. BROWN
Attorney General

PETER V. BERNIS
General Counsel

CHRISTIAN E. BARRERA
Chief Operating Officer

ANNA MACCORMACK
Assistant Attorney General

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TO: The Honorable C.T. Wilson
Chair, Economic Matters Committee

FROM: Anna MacCormack
Assistant Attorney General, Office of the Attorney General

RE: House Bill 1441 – Business Regulation – Electronic Smoking Devices
Manufacturers – Certifications

The Office of Attorney General urges this Committee to report favorably on House Bill 1441 – Business Regulation – Electronic Smoking Devices Manufacturers – Certifications.

House Bill 1441 brings much-needed improvements to Maryland’s electronic smoking devices (“ESDs”) law, Business Regulation Title 16.7. There have been many changes since Title 16.7 was enacted in 2017, including significant growth in the market and an explosion in the number and type of ESDs. House Bill 1441 strengthens the licensing and regulatory systems for ESDs in the State and incorporates improvements recommended by the Comptroller’s 2020 Task Force on Electronic Smoking Devices to Maryland’s ESD market.

Since 2017, ESD use has grown, particularly among young people, and many new products have flooded the market. Between 2019 and 2023, ESD sales grew nationally by 47%, from 210.5 million units to 390.4 million units.¹ Analysis of retail sales data shows that in the last six months of 2023, the total number of ESD products sold in the United States reached 6,323 products, a

¹ CDC Found. & Truth Initiative, *Monitoring E-Cigarette Trends in the United States*, 9 (Nov. 21, 2024), <https://tobaccomonitoring.org/reports/trends-report-2024/>.

dramatic increase from 2021, when sales data showed only 453 ESD products sold.² In Maryland, between February 2, 2020, and December 31, 2023, monthly ESD unit sales increased 11.8%, from 223,600 to 249,900 units, driven by significant growth in sales of disposable devices, which increased by 378.8%.³ And while tobacco-flavored ESD sales decreased by 35.6% in that time period, non-tobacco-flavored ESDs increased by 27.4%, driven by increases in menthol and especially in other flavors.

ESDs are the second largest nicotine product category after traditional combustible cigarettes for adult users, but for youth, ESD use is higher than cigarettes: the 2022 Maryland High School Survey reports that while 3.2% of high school students smoked cigarettes, 14.3% of high school students currently used ESDs.⁴ A national survey confirms that in 2024, ESDs are the most commonly used tobacco product among U.S. youth.⁵ Nicotine is highly addictive and can harm developing brains, and early nicotine exposure can prime the brain for addiction to other drugs. Nearly 90% of adults who smoke daily started smoking by age 18, and 98% by age 25. As an analysis of the National Youth Tobacco Survey noted, “multiple factors continue to influence tobacco product use and initiation among youth including availability of youth-appealing flavored products, marketing, harm misperceptions, the emergence of new flavor types...and product features.”⁶ It is clear that certain flavors are particularly attractive to youth: the Survey found that 87.6% of middle and high school students who reported using ESDs used flavored products, the most popular of which were fruit, candy, and mint flavors.⁷

House Bill 1441 would improve Maryland’s ESD industry in two main ways. First, House Bill 1441 would establish an ESD directory similar to the cigarette directory that Maryland has had for twenty years. Through the certification process, the Office of the Attorney General (“OAG”) will receive information about the ESD manufacturer and the products it seeks to sell in Maryland. This includes information about the ESDs the manufacturer sells and has sold, the products it seeks to list on the directory, what its ESDs look like, the marketing and advertising for the ESD products, and whether the products and/or their advertising are designed to appeal to youth or are deceptive. The OAG’s assessment will look at many factors, including whether the products come in youth-appealing flavors; whether the marketing and advertising includes cartoons or other images that are aimed at youth, or feature youth-appealing sponsorships or tie-ins; and whether

² *Id.* at 16.

³ CDC Found., *Monitoring U.S. E-Cigarette Sales: State Trends*, 18 (Apr. 2024), https://www.cdcfoundation.org/QuarterlyECigaretteSalesDataBrief_12.31.2023.pdf?inline.

⁴ Maryland Dep’t of Health, *Youth Risk Behavior Survey/Youth Tobacco Survey (YRBS/YTS) 2022–2023*, <https://health.maryland.gov/phpa/ccdpc/Reports/Documents/2022%20YRBS%20YTS%20Reports/2022MDH%20Summary%20Tables.pdf> (QN33 & QN36).

⁵ CDC, A. Jamal *et al.*, “Tobacco Product Use Among Middle And High School Students—National Youth Tobacco Survey, United States, 2024,” *Morbidity & Mortality Weekly Report*. vol.73 no. 41, 917–24 (Oct. 17, 2024), <https://www.cdc.gov/mmwr/volumes/73/wr/pdfs/mm7341a2-H.pdf>.

⁶ *Id.* at 924.

⁷ CDC Found. & Truth Initiative, *Monitoring E-Cigarette Trends in the United States*, at 21.

the ESD incorporates games or interactive designs; and whether the physical design is meant to obscure or hide that it is an ESD, for example because it looks like a smartwatch, highlighter, phone case, or other object. This evaluation is not a flavor ban but rather would consider whether, taken as a whole, the applicant ESD is meant to appeal to legal adult consumers or is aimed at youth.

This approach continues the State's long-standing interest in opposing nicotine-containing products that target youth through marketing, advertising, or design. This began with Maryland's case against Big Tobacco in the late 90s, which resulted in the tobacco Master Settlement Agreement in 1998, a landmark public health agreement. The State's commitment to protecting youth and consumers continued in suits brought in the mid-2000s to enforce the MSA's advertising bans and restrictions. More recently, the OAG brought a case against JUUL, alleging that JUUL willfully engaged in an advertising campaign that appealed to youth. Maryland has also acted legislatively, passing the ban on sales of ESDs to anyone under the age of 21 in 2019 and removing the military exemption last year.

By establishing an ESD directory, House Bill 1441 will enable law-abiding licensees to be confident they are selling legal products. Only ESDs listed on the directory will be legal for sale in Maryland—all other products will be deemed contraband and subject to seizure by the Alcohol, Tobacco, and Cannabis Commission ("ATCC"). The ATCC will be authorized to conduct unannounced inspections of ESD business, just as it does for traditional combustible cigarettes. House Bill 1441 also gives the Department of Health the ability to refer violations of the law to ATCC for further enforcement action.

The costs of the certification would be borne through application fees paid by the ESD manufacturers, which must pay a fee of \$1,000 for each product they seek to list on the directory. Furthermore, applicants to the directory must either register to do business in Maryland or appoint an agent for service of process, enabling the State to find these manufacturers if there are any violations of the law, as is required for cigarette manufacturers. The OAG will receive regular reports from wholesalers of their ESD sales to ensure that only products on the directory will be sold in Maryland, just as wholesalers report their cigarette sales. The Bill also provides a process for products that are removed from the directory: the OAG may not remove an ESD or manufacturer from the directory until at least 15 days after notice is given to the manufacturer, and retailers and vape shop vendors have 15 days to remove the product from inventory and return it to the manufacturer. Finally, because ESDs contain toxic chemicals (nicotine and lithium in most cases), they require special handling to store and dispose. House Bill 1441 adds a requirement that manufacturers deposit funds into an escrow account that can be used by the ATCC to cover unpaid costs of collection and disposing of any ESDs that are taken off the directory or which violate federal, state, or local law.

The second way in which House Bill 1441 improves Maryland's ESD industry is by making important improvements to Maryland's existing ESD law. Right now, many entities selling ESDs are exempted from obtaining ESD licenses because they already have cigarette or other tobacco products licenses. House Bill 1441 requires that all businesses obtain a separate ESD license, enabling the State to know what businesses are buying and selling ESDs in Maryland. House Bill 1441 also requires that all sales be made by and to businesses with Maryland ESD licenses, as is required for traditional tobacco products.

House Bill 1441 would also close a significant loophole in the current law that allows ESD manufacturers to sell their products over the internet or by mail directly to consumers. Online sales are not allowed for cigarettes or most other tobacco products, and House Bill 1441 removes this exception for ESDs. House Bill 1441 requires that all purchases by consumers be face-to-face, which can better prevent illegal, underage sales.

The Bill revises the penalties for violations of the law, providing the State with tools to effectively enforce the Directory by enabling the ATCC to seek monetary penalties, as well as suspension or revocation of a license. Sales of off-directory products would also be deemed an unfair and deceptive trade practice in violation of the Consumer Protection Act. There is an exception to these penalties for individuals with \$100 or less worth of ESDs meant for personal use.

The provisions in House Bill 1441 come from the State's long experience with traditional tobacco products, as well as the recommendations of the Comptroller's Task Force on Electronic Smoking Devices.⁸ The Task Force, which was established in 2019, was made up of 40 appointed members from every region of the State, comprised of educators, ESD retailers, public health experts, concerned parents, and local and state elected officials. After holding four public meetings and soliciting feedback from both industry and the public, the Task Force's 2020 Report made two recommendations found in House Bill 1441: banning all direct-to-consumer internet and mail order sales of ESDs and requiring separate ESD licenses with higher fees. The Report also recommended obtaining more information from manufacturers to better "know precisely what e-liquids and ESD devices contain before these products ever reach consumers." House Bill 1441 improves on that by establishing a certification process through which the OAG can receive and review information about ESD manufacturers and their products before they can be sold in Maryland.

For the foregoing reasons, the Office of the Attorney General urges a favorable report on House 1441.

cc: Committee Members

⁸ Comptroller's Task Force on Electronic Smoking Devices, *Electronic Smoking Devices in Maryland: A Safer Path Forward* (2020), <https://mdlaw.ptfs.com/awweb/pdfopener?md=1&did=31028>.