

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1414 (Delegate Fair)
Economic Matters and Ways and Means

Electronic Smoking Devices - Licensure, Indoor Use, and Taxation - Alterations

This bill expands the scope of the Clean Indoor Air Act (CIAA) and other provisions of law relating to indoor smoking to prohibit the use of electronic smoking devices (ESDs) in specified areas and increases the sales and use tax rate imposed on ESDs (other than vaping liquid sold in a container that contains up to 5 milliliters of vaping liquid) from 12% to 30%. The bill also authorizes the Executive Director of the Alcohol, Tobacco, and Cannabis Commission (ATCC) to take specified disciplinary action against an ESD business licensee or license applicant that sells an ESD that has not been approved by the U.S. Food and Drug Administration (FDA). **The bill takes effect July 1, 2024.**

Fiscal Summary

State Effect: General fund and Blueprint for Maryland’s Future Fund (BMFF) revenues increase by an indeterminate but potentially significant amount beginning in FY 2025, as discussed below. Potential minimal increase in Cigarette Restitution Fund (CRF) revenues and special fund revenues for the Public Service Commission due to the expanded application of existing penalty provisions. Implementation and enforcement can be handled with existing budgeted resources; however, to the extent ATCC utilizes the authority granted under the bill, ATCC operations are potentially affected.

Local Effect: Potential decrease in Montgomery County e-cigarette excise tax revenues to the extent the bill affects sales of ESDs in the county. Local health departments can conduct enforcement activities under the expanded CIAA with existing resources.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary/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. It does not include a drug, device, or combination product authorized for sale by FDA or a battery or battery charger when sold separately.

Electronic Smoking Device Regulation, Business Licensing

Title 16.7 of the Business Regulation Article governs the sale and distribution of ESDs and the licensing of ESD businesses. The Executive Director of ATCC may deny a license to an applicant, reprimand a licensee, or suspend or a revoke a license under specified circumstances, including if an applicant or licensee violates federal, State, or local law regarding the sale of ESDs. *Under the bill*, the Executive Director may take such action against a licensee or applicant that sells an ESD that has not been approved by FDA.

Taxation of Electronic Smoking Devices

ESDs and their component parts are subject to the State sales and use tax but are not subject to a State excise tax. After making certain other distributions, the Comptroller pays a percentage of sales and use tax revenues to BMFF (11.3% in fiscal 2025) and the remainder to the general fund.

Chapter 37 of 2021 increased the sales and use tax rate imposed on the sale of ESDs to 12% of the taxable price (60% for vaping liquid sold in a container that contains up to 5 milliliters of vaping liquid.) *Under the bill*, the sales and use tax rate imposed on the sale of ESDs (other than specified vaping liquid) is increased to 30% of the taxable price.

Clean Indoor Air Act

CIAA generally prohibits smoking in indoor areas open to the public, indoor places in which meetings are open to the public, government-owned or -operated means of mass transportation, and indoor places of employment. The Act does not apply to (1) private homes or residences, unless being used by a licensed child care provider to provide child care; (2) private vehicles, unless being used for the public transportation of children or as part of health care or child care transportation; (3) hotel or motel rooms, so long as the total percent of hotel or motel rooms so used does not exceed 25%; (4) specified retail tobacco businesses in which the primary activity is the retail sale of tobacco products and

accessories; (5) specified facilities of tobacco product manufacturers, importers, wholesalers, or distributors or tobacco leaf dealers or processors; or (6) research or educational laboratories for the purpose of conducting scientific research into the health effects of tobacco smoke.

Under the bill, the definition of “smoking” as it applies to CIAA is altered to include the inhalation or exhalation of vapor from an ESD. Similarly, the definition of “environmental smoke” is altered to include the complex mixture formed from the escaping vapor of an ESD or vapor exhaled by a user of an ESD. The bill makes a conforming change to existing exemptions under CIAA to exempt any facility of a manufacturer, importer, wholesaler, or distributor of ESDs in which employees of the ESD manufacturer, importer, wholesaler, or distributor work or congregate.

Consistent with existing CIAA penalty provisions, a violation of the bill’s expanded indoor smoking prohibition is subject to written reprimand for a first violation, a civil penalty of \$100 for a second violation, and a civil penalty of at least \$250 for each subsequent violation. Any penalties collected are paid to CRF. Existing affirmative defenses available under CIAA apply to alleged violations of the bill’s expanded indoor smoking prohibition.

Smoking in Indoor Places of Employment

Section 5-608 of the Labor and Employment Article requires the Maryland Department of Labor (MDL) to adopt regulations that prohibit environmental smoke, as defined under CIAA, in indoor places of employment. (*Under the bill*, the expanded definition of “environmental smoke” under CIAA applies to this provision.) A violation of a regulation adopted by MDL pursuant to this provision is subject to a written reprimand for a first violation, a civil penalty of \$100 for a second violation, and a civil penalty of at least \$250 for each subsequent violation. Any penalties collected are paid to CRF.

Smoking in Hospitals, Nursing Homes, Health Clinics, and Physicians’ Offices

Section 24-205 of the Health-General Article requires every director of a nursing home, health clinic, or physician’s office to make and carry out a plan that adequately protects the health of nonsmoking patients by regulating the smoking of tobacco products on the premises. Subject to specified exceptions, an individual generally may not smoke in any area of a hospital, and the hospital director must provide for the posting and placement of conspicuous signs that clearly indicate that smoking is not permitted in the hospital. *Under the bill*, “smoking,” as it applies these provisions, includes the inhalation or exhalation of vapor from an ESD.

Smoking on Motor Carriers

Section 9-206 of the Public Utilities Article requires the owner of an intrastate motor bus carrier to prohibit the smoking of tobacco products while the bus is in public service and prohibits a person from smoking tobacco products on a bus of an intrastate motor bus carrier. A violation is subject to a civil penalty of up to \$25. *Under the bill*, these prohibitions and the related civil penalty also apply to the use of ESDs on intrastate motor bus carriers.

State Revenues: As discussed above, the bill increases the sales and use tax rate imposed on the sale of ESDs (other than vaping liquid sold in a container that contains 5 milliliters or less of vaping liquid) from 12% to 30% of the taxable price. Thus, general fund and BMFF revenues increase by a potentially significant amount beginning in fiscal 2025.

However, the precise effect on general fund revenues cannot be reliably estimated at this time due to data limitations. Data on current sales and use tax collections from the sale of ESDs and their components are currently unavailable, and other recent, reliable consumer spending data by ESD product type are not readily available. Absent such data – and given volatility in the ESD market and uncertainty regarding the effect of ongoing and future FDA regulatory action – there is considerable uncertainty regarding the volume of affected sales.

It is assumed that most prefilled cartridge sales are unaffected by the bill's sales and use tax alterations – as noted above, certain vaping liquid is subject to a separate sales and use tax rate of 60% – and that prefilled cartridge sales account for a significant portion of taxable ESD sales. Among other ESD products, the bill's change does apply to sales of disposable e-cigarette products, which, according to the Comptroller's Office, are subject to the existing 12% sales and use tax rate regardless of the amount of vaping liquid contained in the device. A 2023 report published by the U.S. Centers for Disease Control and Prevention (CDC) indicates that, nationally, unit sales of disposable e-cigarettes surged – and unit shares of prefilled cartridges declined – following FDA's January 2020 announcement that it would prioritize enforcement against unauthorized cartridge-based products in flavors other than tobacco or menthol. However, a data brief published by the CDC Foundation suggests that the national trend was not observed in Maryland, which took action to prohibit the sale of disposable ESDs with flavors other than tobacco or menthol not covered by FDA's 2020 enforcement policy. According to the brief, between February 2020 and October 2022, four-week unit sales of disposable devices in Maryland decreased from 23,700 to 15,900; however, the data do not reflect sales from vape shops or online retailers. The sales captured in the aforementioned data brief *alone* do not suggest a significant increase in sales and use tax collections from the sale of disposable products under the bill.

The Department of Legislative Services also examined reports published by the Federal Trade Commission (FTC) on nationwide e-cigarette sales as reported by the six largest domestic e-cigarette manufacturers. However, the most recent year covered by the reports is 2020; further, in its 2022 *E-Cigarette Report for 2019-2020*, FTC noted that the 2019-2020 period saw a number of new market entrants, and that data from the reporting manufacturers provide an incomplete picture of disposable sales.

Small Business Effect: Small business ESD retailers are negatively impacted by the increased sales and use tax rate imposed on specified ESDs. The actual impact on affected small businesses depends on the extent to which the tax increase affects sales of these products and the extent to which the tax increase is passed on to consumers.

To the extent that small business ESD retailers currently sell products that have not been approved by FDA, they may be subject to disciplinary action by ATCC under the bill.

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: None.

Information Source(s): Comptroller's Office; Alcohol, Tobacco, and Cannabis Commission; Maryland Department of Health; Maryland Department of Labor; Maryland Department of Transportation; Public Service Commission; Maryland Association of County Health Officers; U.S. Centers for Disease Control and Prevention; U.S. Food and Drug Administration; Federal Trade Commission; CDC Foundation; Department of Legislative Services

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