


MEMORANDUM

November 13, 2015

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Action:** Bill 41-15, Health – Distribution of Tobacco Products to Minors – Penalties

Health and Human Services Committee recommendation (3-0): enact the Bill as introduced.

Bill 41-15, Health – Distribution of Tobacco Products to Minors – Penalties, sponsored by Lead Sponsor Councilmember Rice and Co-Sponsors Council President Leventhal, Council Vice President Floreen, and Councilmembers Elrich, Navarro, Hucker, Katz, Riemer, and Berliner was introduced on September 29, 2015. A public hearing was held on October 20 and a Health and Human Services Committee worksession was held on November 5.

Background

Distributing a tobacco product to a minor already violates County law. The current maximum penalty is a Class A civil violation, punishable by a fine of \$500 for a first offense and \$750 for a subsequent offense. Md. Local Gov't Code, §10-202(b) authorizes the County to enforce a County law by a civil fine not exceeding \$1000. Bill 41-15 would increase the maximum civil fine for distributing a tobacco product to a minor to \$1000 for a first offense and \$1000 for a subsequent offense.

Distributing a tobacco product to a minor is also a misdemeanor under Md. Criminal Law Code, §10-107, punishable by a fine of \$300 for a first offense, \$1000 for a second offense, and \$3000 for each subsequent offense within 2 years after the preceding offense. An enforcement official would have the option of citing a violator under the State Criminal Law or under the County law.

The County Attorney's Office issued a bill review memorandum raising a potential State implied preemption issue for the existing County law prohibiting the distribution of tobacco, but ultimately concluded that the Bill is probably not preempted by State law. See ©5-7. Council staff agrees with this conclusion.

Public Hearing

There were no speakers at the October 20 public hearing.

November 5 HHS Worksession

Dr. Ulder Tillman, Health Officer, and Clark Beil, Department of Health and Human Services, Licensure and Regulatory Services, represented the Executive branch. Josh Hamlin, Legislative Attorney represented Council staff.

The Committee discussed the Bill and recommended its approval (3-0). The Committee also directed Council staff to draft a Board of Health Regulation and work with the Council President on scheduling its consideration and adoption, so that the provisions of the Bill will apply in all municipalities in the County.

Issues

1. What is the fiscal and economic impact of the Bill?

OMB estimated that the Bill would increase revenue from fines from \$21,000 per year to \$42,000 per year. Finance estimated that the Bill would not have a significant economic impact. See ©11-14.

2. Would the Bill apply in all municipalities?

Section 24-9C, Distribution of Tobacco Products to Minors, was first enacted in Emergency Bill 13-98 on June 30, 1998. In order to ensure that the Bill would apply in each municipality in the County, the Council, acting as the County Board of Health, adopted the law as a Board of Health Regulation. A copy of Resolution No. 13-1410, adopting the Bill as a Health Regulation, is at ©8-10. This resolution adopts Bill 13-98 as it was enacted in 1998. Therefore, the higher fine that would be established by Bill 41-15 may not apply in each municipality unless the Council later adopts Bill 41-15 as a Board of Health Regulation.

Md. Code, Health-General Art. §3-202 authorizes the Council, sitting as the County Board of Health, to adopt health regulations applicable in each municipality in the County. County Code §2-65 implements this authority:

Sec. 2-65. Board of health designated.

- (a) The County Council is, and may act as, the County Board of Health.
- (b) When meeting as the Board of Health, the County Council has all the powers delegated to a local board of health under State and County law.
- (c) The County Council, meeting as the Board of Health, may adopt any regulation which a local board of health is authorized to adopt. *Before it adopts a regulation, the Board must hold a public hearing after giving reasonable notice, as specified in the Council Rules of Procedure, to each municipality in the County and the public.* (emphasis added)

If the Council wants to ensure that the increased fines are applicable in each municipality, the Council could follow enactment of this Bill with a Board of Health Regulation adopted after notice to each municipality and the public. **Committee recommendation (3-0):** enact the Bill as introduced and adopt it as a health regulation to make it applicable in all municipalities.

This packet contains:

Bill 41-15
Legislative Request Report
County Attorney Bill Review Memorandum
Resolution No. 13-1410
Fiscal and Economic Impact Statement

Circle #

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Bill No. 41-15
Concerning: Health – Distribution of Tobacco Products to Minors – Penalties
Revised: 10-20-15 Draft No. 5
Introduced: September 29, 2015
Expires: March 29, 2017
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Rice
Co-Sponsors: Council President Leventhal, Council Vice President Floreen, and Councilmembers Elrich, Navarro, Hucker, Katz, Riemer, and Berliner

AN ACT to:

- (1) increase the maximum civil fine for distributing a tobacco product to a minor; and
- (2) generally amend the law prohibiting the distribution of a tobacco product to a minor.

By amending

Montgomery County Code
Chapter 24, Health and Sanitation
Section 24-11

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Section 24-11 is amended as follows:**

2 **24-11. Distribution of tobacco products to minors.**

3 (a) Definitions. In this Section the following words have the meanings
4 indicated.

5 (1) Tobacco product means any substance containing tobacco,
6 including cigarettes, cigars, smoking tobacco, snuff, or smokeless
7 tobacco.

8 (2) Distribute means to:

9 (A) give away, sell, deliver, dispense, or issue;

10 (B) offer to give away, sell, deliver, dispense, or issue; or

11 (C) cause or hire any person to give away, sell, deliver,
12 dispense, or issue or offer to give away, sell, deliver,
13 dispense, or issue.

14 (b) Unlawful distribution.

15 (1) A person engaged in the business of selling or otherwise
16 distributing tobacco products for commercial purposes must not:

17 (i) distribute any tobacco product to a minor, unless the minor
18 is acting solely as the agent of the minor's employer who
19 is engaged in the business of distributing tobacco products;

20 (ii) distribute cigarette rolling papers to a minor; or

21 (iii) distribute to a minor a coupon redeemable for any tobacco
22 product.

23 (2) A person, who is not a person described under paragraph (b)(1),
24 must not:

25 (i) buy for or sell to a minor any tobacco product; or

26 (ii) deliver or sell to a minor cigarette rolling papers.

- 27 (c) Subsection (b) does not apply to the distribution of a coupon which is
28 redeemable for any tobacco product when the coupon is contained in a
29 newspaper, a magazine, or any other type of publication in which the
30 coupon is incidental to the primary purpose of the publication, or sent
31 through the mail.
- 32 (d) A person has not violated this Section if:
- 33 (1) that person examined a driver's license or another valid
34 identification issued by an employer, a government entity, or an
35 institution of higher education; and
- 36 (2) that license or other identification positively identified the buyer
37 or recipient of a tobacco product as at least 18 years old.
- 38 (e) If a minor bought a tobacco product from a vending machine, this
39 Section does not apply to the owner of the vending machine or any
40 other person with control over the vending machine.
- 41 (f) A person who violates this Section is liable for a [class A] civil
42 violation. The maximum civil fine is \$1000 for a first offense and
43 \$1000 for each subsequent offense.

44 *Approved:*

45

George Leventhal, President, County Council

Date

46 *Approved:*

47

Isiah Leggett, County Executive

Date

LEGISLATIVE REQUEST REPORT

Bill 41-15

Health – Distribution of Tobacco Products to Minors – Penalties

- DESCRIPTION:** Bill 41-15 would increase the civil fine for a violation of County law from \$500 for a first offense and \$750 for a subsequent offense to \$1000 for each offense.
- PROBLEM:** The penalties under County law are too low.
- GOALS AND OBJECTIVES:** Eliminate the distribution of tobacco products to minors in the County.
- COORDINATION:** Police, Department of Liquor Control
- FISCAL IMPACT:** To be determined.
- ECONOMIC IMPACT:** To be determined.
- EVALUATION:** n/a
- EXPERIENCE ELSEWHERE:** To be researched.
- SOURCE OF INFORMATION:** Robert H. Drummer, Senior Legislative Attorney
- APPLICATION WITHIN MUNICIPALITIES:** To be researched.
- PENALTIES:** \$1000 for each offense.



Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

OFFICE OF THE COUNTY ATTORNEY

MEMORANDUM

TO: Uma Ahluwalia, Director, DHHS

FROM: Kristen Kalaria, Assistant County Attorney, OCA *KK/EBZ*

VIA: Edward Lattner, Chief, Division of Government Operations, OCA *EBZ*

DATE: October 12, 2015

RE: Bill 41-15 Distribution of Tobacco Products to Minors - Penalties CORRECTED

Summary

Bill 41-15 raises the maximum civil fine for distributing a tobacco product to a minor in violation of County Code § 24-11 from \$300 to \$1000. As described in further detail below, the proposed amendment does not raise any legal issues. While a court could find that § 24-11 itself is preempted because the Court of Appeals recently concluded that “state law comprehensively regulates the packaging, sale, and distribution of tobacco products, including cigars, and thus preempts this field,” we believe, on balance, that § 24-11 is probably not preempted.

Clarity

Bill 41-15 is clear.

Liability Exposure

Bill 41-15 does not expand the County’s exposure to liability, except as noted below under “Preemption.”

Constitutionality

As tobacco is heavily regulated by the state and federal governments, it is necessary to consider the possibility that local regulation in the area may be preempted. Preemption may be either express or implied. Neither the state nor federal government expressly prohibits local regulation of tobacco sales. Implied preemption, however, is a significant concern. Preemption will be implied where the state or federal government has regulated a field so forcibly that its

Uma Ahluwalia
October 12, 2015
Page 2

intent to occupy the entire field must be inferred. *Mayor and City Council of Baltimore v. Sitnick*, 254 Md. 303, 323 (1969). As described below, it is unlikely that a court would find that Bill 41-15, and the underlying Section 24-11, is preempted by state law.

Section 24-11 is Not Preempted by Federal Law

Federal law prohibits sale of cigarettes to persons under 18 and requires retailers to check photo identification for persons under the age of 26. 21 C.F.R. 1140.14. According to the Food and Drug Administration's most recent guidance document for retailers, the penalty for violation of Part 1140.14 varies based on the number of violations within a four year period. The penalty could range from a warning letter for the first violation to \$11,000 for six or more violations within four years. Preemption by federal law is not a concern. The Supreme Court has held that federal law does not preempt local regulation of tobacco sales to minors. *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 552 (2001).

Section 24-11 Is Probably Not Preempted by State Law

State law also prohibits the sale of cigarettes to minors. The state prohibition is found in § 10-107 of the Criminal Law Article, Maryland Code. Section 10-107 is almost identical to the existing county law, § 24-11 of the County Code. Like § 24-11, § 10-107 prohibits distribution of tobacco products, paraphernalia, or coupons redeemable for tobacco products to minors. Both sections also prohibit other individuals from buying tobacco products on behalf of minors. The laws differ only regarding the penalties: the state law provides penalties not exceeding \$300 for a first offense, \$1000 for a second offense within two years, and \$2000 for a third offense within two years. The existing county law is punishable by a fine not exceeding \$500 for a first offense and \$750 for a subsequent offense. Bill 41-15 would increase the fine to \$1000 for a first offense and \$1000 for each subsequent offense. A separate provision prohibits possession or use of tobacco products by a minor. Md. Code Criminal Law §10-108

The Court of Appeals recently struck down a Prince George's County ordinance requiring cigars to be sold in packages of at least five, finding that the ordinance was preempted by extensive State regulation in the field. *Altadis U.S.A. Inc. v. Prince George's County*, 431 Md. 307, 309 (2013). The Court specifically held that "state law comprehensively regulates the packaging, sale, and distribution of tobacco products, including cigars, and thus preempts this field." *Altadis* at 316. This is not the first time the Court has struck down a local tobacco regulation on the basis of preemption. In *Allied Vending v. City of Bowie*, 332 Md. 279 (1993), the Court invalidated two municipal ordinances restricting the placement of state-licensed cigarette vending machines in an effort to make them less accessible to minors. The Court held that the comprehensive state regulation "manifested an intent for the state to completely occupy the field of the sale of cigarettes through vending machines." *Allied Vending* at 310.

Uma Ahluwalia
October 12, 2015
Page 3

But it is possible to draw some distinctions between § 24-11 and the ordinances invalidated by *Altadis* and *Allied Vending*. Both cases relied primarily on the comprehensive state regulation of tobacco retailers found in Titles 16 and 16.5 of the Business Regulations Article, Maryland Code. In contrast, the sale of cigarettes to minors is regulated in the Criminal Law Article. Thus, it could be argued that this provision is not part of the comprehensive civil regulatory scheme considered by *Altadis*. Also, because the county law differs from the state law only in penalties assessed, one could argue that there is no potential for confusion if different municipalities have different penalties because the prohibited acts are still identical. The potential for confusion created by different municipal requirements was one of the concerns cited by the court in *Allied Vending*.

In addition, after the County enacted § 24-11 in 1998, the General Assembly amended § 10-107 (Laws of Maryland 2007, Ch. 218), and it did not disapprove or even make any reference to the preexisting County law. The Maryland Court of Appeals has previously concluded that the General Assembly does not intend to impliedly preempt a field containing preexisting local legislation and the General Assembly takes no action to "oust" that preexisting local legislation. *National Asphalt v. Prince George's County*, 292 Md. 75, 79, 437 A.2d 651, 653 n.4 (1981). In such cases, the General Assembly is charged with knowledge of the preexisting local law and is said to have acquiesced to the presence of local legislation in the field.¹

Other issues

Section 24-11 does not apply to e-cigarettes. This is not a problem, but the Council may consider amending § 24-11 to include e-cigarettes, as it recently expanded Section 24-9 (the smoking ban) to do the same. If you have any concerns or questions concerning this memorandum please call me.

cc: Bonnie Kirkland, Assistant CAO
Robert H. Drummer, Senior Legislative Attorney
Marc P. Hansen, County Attorney

¹ The Fourth Circuit concluded that § 10-107, then codified at Md. Ann. Code art. 27, §§ 404 & 405, did not impliedly preempt a Baltimore City law prohibiting cigarette advertising on billboards located in designated zones. *Penn Adver. of Baltimore, Inc. v. Mayor & City Council of Baltimore*, 63 F.3d 1318, 1324, 1995 WL 530257 (4th Cir. 1995) cert. granted, judgment vacated sub nom. *Penn Adver. of Baltimore, Inc. v. Schmoke*, 518 U.S. 1030, 116 S. Ct. 2575, 135 L. Ed. 2d 1090 (1996) and adopted as modified, 101 F.3d 332 (4th Cir. 1996).

Resolution No.: 13-1410
Introduced: July 28, 1998
Adopted: August 4, 1998

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: County Council

Subject: Adoption of Emergency Bill 13-98, Tobacco - Distribution to Minors, as a Board of Health Regulation

Background

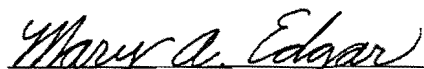
1. On June 30, 1998, the County Council enacted Emergency Bill 13-98, Tobacco - Distribution to Minors. The bill added Section 24-9C, Distribution of Tobacco Products to Minors, to Chapter 24, Health and Sanitation of the Montgomery County Code.
2. Maryland Health-General Code §3-202(d) authorizes the Board of Health to adopt rules and regulations regarding any nuisance or cause of disease in the County.
3. The Board of Health finds that prohibiting the distribution of tobacco products to minors is necessary to protect the public health and safety in the County.

Action

The County Council for Montgomery County, Maryland, sitting as the Board of Health for Montgomery County, approves the following resolution:

Montgomery County Code Section 24-9C, Distribution of Tobacco Products to Minors, as enacted in Emergency Bill 13-98, is adopted as a Board of Health regulation. A copy of Section 24-9C is attached.

This is a correct copy of Council action.



Mary A. Edgar, CMC
Secretary of the Council

24-9C. Distribution of Tobacco Products to Minors.

(a) Definitions. In this Section the following words have the meanings indicated.

(1) Tobacco product means any substance containing tobacco, including cigarettes, cigars, smoking tobacco, snuff, or smokeless tobacco.

(2) Distribute means to:

(A) give away, sell, deliver, dispense, or issue;

(B) offer to give away, sell, deliver, dispense, or issue; or

(C) cause or hire any person to give away, sell, deliver, dispense, or issue or offer to give away, sell, deliver, dispense, or issue.

(b) Unlawful distribution.

(1) A person engaged in the business of selling or otherwise distributing tobacco products for commercial purposes must not:

(i) distribute any tobacco product to a minor, unless the minor is acting solely as the agent of the minor's employer who is engaged in the business of distributing tobacco products;

(ii) distribute cigarette rolling papers to a minor; or

(iii) distribute to a minor a coupon redeemable for any tobacco product.

(2) A person, who is not a person described under paragraph (b)(1), must not:

(i) buy for or sell to a minor any tobacco product; or

(ii) deliver or sell to a minor cigarette rolling papers.

(c) Subsection (b) does not apply to the distribution of a coupon which is redeemable for any tobacco product when the coupon is contained in a newspaper, a magazine, or any other type of publication in which the coupon is incidental to the primary purpose of the publication, or sent through the mail.

(d) A person has not violated this Section if:

(1) that person examined a driver's license or another valid identification issued by an employer, a government entity, or an institution of higher education; and

(2) that license or other identification positively identified the buyer or recipient of a tobacco product as at least 18 years old.

- (e) If a minor bought a tobacco product from a vending machine, this Section does not apply to the owner of the vending machine or any other person with control over the vending machine.
- (f) A person who violates this Section is liable for a class A civil violation.



ROCKVILLE, MARYLAND

MEMORANDUM

November 3, 2015

TO: George Leventhal, President, County Council

FROM: Jennifer A. Hughes, Director, Office of Management and Budget
Joseph F. Beach, Director, Department of Finance

SUBJECT: FEIS for Bill 41-15, Health – Distribution of Tobacco to Minors – Penalties

Please find attached the fiscal and economic impact statements for the above-referenced legislation.

JAH:fz

cc: Bonnie Kirkland, Assistant Chief Administrative Officer
Lisa Austin, Offices of the County Executive
Joy Nurmi, Special Assistant to the County Executive
Patrick Lacefield, Director, Public Information Office
Joseph F. Beach, Director, Department of Finance
Uma Ahluwalia, Director, Department of Human Health Services
Alex Espinosa, Office of Management and Budget
Rachel Silberman, Office of Management and Budget
Felicia Zhang, Office of Management and Budget
Naeem Mia, Office of Management and Budget

**Fiscal Impact Statement
Council Bill 41-15 Health,
Distribution of Tobacco to Minors - Penalties**

1. Legislative Summary.

Bill 41-15 would increase the maximum penalty for distributing a tobacco product to a minor from \$500 for a first offense and \$750 for a subsequent offense to \$1,000 for a first offense and \$1,000 for a subsequent offense.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

Bill 41-15 is not expected to change County expenditures. The County currently conducts tobacco compliance inspections and collects fines. Between FY09 and FY15, the Montgomery County Department of Liquor Control (DLC) conducted an average of 330 tobacco compliance inspections resulting in 73 violations on average. However, the number of inspections and violations has steadily declined since FY09 from 559 and 117 respectively, to 350 and 49 in FY15. Revenues are expected to double: \$21,600 was collected by the County Attorney's Office in FY15, which would increase to \$42,000 under Bill 41-15.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

Bill 41-15 is not expected to change County expenditures. Assuming the number of violations remains constant, revenue collected from citations issued for tobacco sales to minors would remain steady at \$42,000 per year (a \$20,400 increase over FY15 citation collections), with an estimated six year total of \$252,000.

4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

Not applicable.

5. An estimate of expenditures related to County's information technology (IT) systems, including Enterprise Resource Planning (ERP) systems.

Not applicable.

6. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

Not applicable, Bill 41-15 does not authorize future spending.

7. An estimate of the staff time needed to implement the bill.

No additional staff time is required to implement the bill. The County currently conducts tobacco compliance inspections and fine collection.

8. An explanation of how the addition of new staff responsibilities would affect other duties.

Not applicable.

9. An estimate of costs when an additional appropriation is needed.

Not applicable.

10. A description of any variable that could affect revenue and cost estimates.

The variables that could affect revenues are the number of locations inspected by DLC, the number of violations, and the compliance rate. Because of the constant number of locations inspected, the high compliance rate, and the low number of violations in FY15, it is assumed that revenues will not increase significantly beyond those estimated in #2 of this fiscal impact. The bill does not affect cost estimates.

11. Ranges of revenue or expenditures that are uncertain or difficult to project.

Not applicable.


12. If a bill is likely to have no fiscal impact, why that is the case.

Not applicable.

13. Other fiscal impacts or comments.

14. The following contributed to and concurred with this analysis:

Rachel Silberman, OMB


Jennifer A. Hughes, Director
Office of Management and Budget

10/28/15
Date

Economic Impact Statement
Bill 41-15, Health – Distribution of Tobacco to Minors - Penalties

Background:

The distribution of tobacco products to minors violates County law. This legislation would increase the maximum civil fine for distributing tobacco products to a minor from \$500 for the first offense and \$750 for a subsequent offense to \$1,000 for the first offense and to \$1,000 for a subsequent offense.

1. The sources of information, assumptions, and methodologies used.

Source of information: Montgomery County Department of Liquor Control (DLC). DLC is responsible for conducting tobacco compliance inspections. Between FY09 and FY15, there were an average of 73 violations at an average of 330 locations. Since FY09, the number of violations has steadily declined from 117 in FY09 to 49 in FY15. Of the number of inspections at various retail stores, there was an average of a 78 percent compliance rate with State law under Md. Criminal Law Code §10-107 and a maximum compliance rate of 86 percent in FY15. In FY15, the County Attorney's office collected \$21,600 in fines.

2. A description of any variable that could affect the economic impact estimates.

The variables that could affect the economic impact estimates are the number of locations inspected by DLC, the number of violations, and the compliance rate. Because of the constant number of locations inspected, the high compliance rate, and the low number of violations in FY15, Finance assumes that those figures will not change in estimating the economic impact under Bill 41-15.

3. The Bill's positive or negative effect, if any on employment, spending, savings, investment, incomes, and property values in the County.

Based on the assumptions in paragraph #2 and the increase in the fine from \$500 to \$1,000 for the first offense, the amount of collections by the County Attorney would double from \$21,000 to \$42,000. This would represent a loss of business income to retail stores. However, because of the low amount of loss to business income compared to the total amount of total proprietor's income in the County - \$90.8 million in calendar year 2013 (Source: Bureau of Economic Analysis, U.S. Department of Commerce) – the economic impact of Bill 41-15 is insignificant.

4. If a Bill is likely to have no economic impact, why is that the case?

Bill 41-15 would have no significant impact on total business income in the County.

5. The following contributed to or concurred with this analysis: David Platt, Mary Casciotti, and Rob Hagedoorn, Finance.



Joseph F. Beach, Director
Department of Finance

10/22/15

Date