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H.B. 849
(1_136_1260-5)
136th General Assembly

Fiscal Note & Local Impact Statement

[Click here for H.B. 849's Bill Analysis](#)

Version: In House Public Safety

Primary Sponsors: Reps. Plummer and Salvo

Local Impact Statement Procedure Required: No

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Highlights

- The bill requires the Ohio Investigative Unit (OIU) within the Department of Public Safety to administer and enforce electronic smoking (e-smoking) product manufacturer certification, maintain and update a directory of manufacturers and their products, and conduct inspections. OIU is likely to incur additional costs, including the need to hire additional staff. Filing fee and civil penalty revenue generated from e-smoking product violations and credited to the new Electronic Smoking Products Enforcement Fund may help to offset these costs.
- The costs for the Office of the Attorney General's Consumer Protection Section to investigate and enforce new violations of the Consumer Sales Practices Act (CSPA) will depend on the number of complaints filed/reported, investigations performed, and enforcement actions taken, however, will likely be minimal. The collection of civil penalties credited to the Consumer Protection Enforcement Fund (Fund 6310) may offset these costs to some degree.
- Certain local criminal justice systems may experience a small increase in the number of misdemeanor cases to adjudicate and offenders to sanction, the costs of which may be offset by the collection of additional fine revenue.
- The bill extends licensing requirements to retail dealers, increasing license fee revenue and administrative costs for the Department of Taxation.
- The bill may increase educational service center (ESC) and school district workload to enforce the bill's tobacco and nicotine prohibitions and discipline individuals for violations.

Detailed Analysis

The bill creates new regulatory requirements for sellers, distributors, and manufacturers of tobacco products, alternative nicotine products, electronic smoking products, and vapor products, and makes various changes to Ohio's tobacco laws. It also allows schools and other public educational institutions to ban smoking in any facility under their control. These changes and the corresponding fiscal effects are summarized below.

Ohio Investigative Unit – administrative and enforcement duties

Department of Public Safety

Under the bill, the Department of Public Safety (DPS), through its Ohio Investigative Unit (OIU), is required to (1) administer and enforce electronic smoking product (“e-smoking products”) manufacturer certification, including the collection of a \$1,000 annual filing fee for each brand family of e-smoking products, plus \$100 for each brand style of that product, (2) maintain and update a public directory, available on the DPS website of e-smoking product manufacturers and their products (“ESP-directory”), (3) conduct inspections, including unannounced annual compliance checks, of the premises of persons licensed to do business distributing or selling at retail tobacco products, alt-nicotine products, e-smoking products, and vapor products to determine compliance with the bill and existing law and rules that are related to distributor license and retail license holders, and (4) process any product deemed to be contraband. The bill also requires OIU to provide reports to the General Assembly every six months regarding the ESP-directory and enforcement activities.

The bill's requirements are likely to result in additional costs, including necessitating the hiring of additional staff in order to carry out these new duties. OIU enforces Ohio's alcohol, tobacco, and food stamp fraud laws. The bill adds to this authority. The new Electronic Smoking Products Enforcement Fund, as described below, will offset a portion, if not all, of these additional costs. Until revenue is generated to the new fund however, it is likely that other DPS operating funds will be needed to supplement OIU's activities. Additionally, there will likely be indeterminate one-time costs to construct the ESP-directory and make publicly available online.

Civil penalties

The bill allows OIU to impose a civil penalty ranging from \$500 to up to \$1,500 per day (based on the number of previous violations within a 12-month period) on a distributor, wholesale dealer, retail dealer, or any other person selling or offering to sell contraband for each individual e-smoking product offered for sale in violation of the bill. The bill also allows OIU to impose a civil penalty of \$10,000 on a manufacturer for each individual e-smoking product offered for sale in violation of the bill's provisions.

The bill specifies that each day a noncompliant product is sold constitutes a separate violation subject to additional civil penalties. Revenue generated from the civil penalty is to be credited to the Electronic Smoking Products Enforcement Fund, which the bill creates. The amount of revenue generated from such penalties will depend on the number and type of violations for which a civil penalty is imposed, and the amount ultimately collected.

Electronic Smoking Products Enforcement Fund

The bill creates the Electronic Smoking Products Enforcement Fund administered by the Department of Public Safety to consist of fees and penalties collected from the enforcement of

the bill's provisions, including the filing fees for certification and civil penalty revenue. Such revenue is required to be used by OIU to administer and enforce the bill's provisions, including allocating funds to the Department of Taxation to fund inspection and enforcement actions. The additional revenue generated for use by OIU will help offset to some degree the additional costs incurred related to carrying out the bill's additional duties.

Attorney General – consumer protection enforcement

The bill declares any violation of the bill's provisions regarding the ESP-directory or manufacturer certification process is an "unfair or deceptive act or practice" in violation of Ohio's Consumer Sales Practices Act (CSPA).

There are two civil remedies for handling alleged violations of the CSPA. The first such remedy is available to the Attorney General, who is authorized to investigate violations, seek a declaratory judgment, an injunction or other equitable relief, or organize and bring a class action. The second remedy permits a private individual to initiate a civil action.

If the Attorney General's Office successfully pursues a civil remedy, depending upon the nature of the violation, the court is permitted to impose a civil penalty of up to between \$5,000 and \$25,000. Pursuant to current law, the civil penalties are distributed as follows: three-fourths, or 75%, to the state's existing Consumer Protection Enforcement Fund (Fund 6310) and one-fourth, or 25%, to the treasury of the county where the AGO's action is brought. The timing and magnitude of this potential revenue stream is uncertain. Typically, the AGO will try to negotiate a settlement and take a matter to trial as a last resort.

Under the bill and the CSPA, a consumer has a private right of action and can sue the alleged violator to recover the consumer's actual economic damages plus up to \$5,000 in noneconomic damages. If the violation is an act or practice that has already been declared deceptive or unconscionable by the AGO or by a court, then the consumer may sue to recover three times the amount of the consumer's actual economic damages.

Overall, the number of additional AGO or consumer-initiated civil actions is expected to be relatively small in the context of a court's total caseload. Any costs, likely minimal, would be absorbed utilizing existing staff and resources and partially offset if any civil penalties are assessed and recouped.

Criminal penalties

The bill creates a prohibition against negligently selling an e-smoking product that is accompanied by, uses, or has advertising, labeling, packaging, trade dress, trademarks, branding, or product design that depicts, imitates, includes symbols or images of, or has features of, material typically marketed towards minors. A violation is a third degree misdemeanor, which is subject to a possible jail term of not more than 60 days, a fine of up to \$500, or both. Additionally, the bill specifies that knowingly presenting false information in a certificate for inclusion in the ESP-directory is a fourth degree misdemeanor, which is subject to a jail term of not more than 30 days, a fine of up to \$250, or both.

The bill's criminal penalties may generate a small number of additional cases for certain municipal and county courts to adjudicate and offenders to sanction. Any increase in workload or sanctioning costs is expected to be minimal and absorbed utilizing existing resources and may

be offset by the collection of additional fine revenue, which is generally retained by the county in which the violation occurred.

Licensure

Department of Taxation

Under the current law, distributors of tobacco and vapor products must be licensed by the Department of Taxation (TAX). The bill expands this existing framework by requiring retail dealers of “alternative nicotine products” as defined by the bill, e-smoking products, and vapor products to obtain an annual license from TAX, unless they already hold a cigarette sales license. Retailers must report all physical locations, compliance with state and federal law, and pay a \$125 fee per location (prorated for durations shorter than 12 months with a \$25 minimum charge). The bill imposes a \$25 fee for license transfers and replacements. TAX is authorized to levy penalties of up to \$1,000 for operating without a retail license and requires TAX to coordinate inspection and enforcement activities with DPS.

Nicotine Products Licensing Enforcement Fund

The bill creates the Nicotine Products Licensing Enforcement Fund administered by TAX and used for administering and enforcing the duties prescribed to them under the bill. Revenue will be generated via the new licensing requirements to retail dealers and annual fees as described above. Although TAX already administers a licensing system under current law for distributors, the addition of retail licensing increases administrative costs, by application processing, compliance verification, and coordinated inspections, which would be partially offset by added license fees and penalties. The number of retail dealers that is expected to apply for the license is uncertain. Potentially, there are thousands of retailers across Ohio, but only those that do not already sell cigarettes must register. TAX currently licenses 484 wholesale distributors of other tobacco products and vapor products under current law.

Smoking in schools

The bill expands provisions of existing law that prohibit students from smoking, using tobacco, or possessing any substance containing tobacco in any area under the control of a school district or an educational service center (ESC), or at any school-sponsored activity, to also include any substance containing nicotine, including e-smoking devices and vapor products. The bill also allows a school district, ESC, or other public school to declare school property or school facilities as a nonsmoking place and explicitly specifies that such entities are not prohibited from enacting policies to implement the prohibition against students smoking, using tobacco, or possessing any substance containing tobacco or nicotine. As a result of the bill, there may be an increase in school district and ESC workload to enforce the prohibitions and discipline individuals for violations.

Synopsis of Fiscal Effect Changes

The substitute bill (I_136_1260-5) establishes the amount of the certification filing fee and civil penalties that the Ohio Investigative Unit (OIU) may impose for violations of the bill rather than requiring the Department of Public Safety (DPS) to set those amounts by rule as in the As Introduced version. The substitute bill sets those amounts as follows:

- \$1,000 for each brand family of e-smoking products certified, plus \$100 for each brand style of that product.
- Civil penalties ranging from \$500 to \$1,500 per day on a distributor, wholesale dealer, retail dealer, or any other person selling or offering to sell contraband for each individual e-smoking product offered for sale in violation of the bill.
- \$10,000 civil penalty on manufacturers for each individual e-smoking product offered for sale in violation of the bill's provisions.

The substitute bill also allows cigarette sales license holders to sell alternative nicotine, e-smoking, and vapor products without obtaining an additional license, resulting in lower expected license fee revenue compared to the As Introduced version.

The substitute bill directs application fees for tobacco or vapor distributor licenses to be deposited into the Cigarette Tax Enforcement Fund (current law) rather than the Nicotine Products Licensing Enforcement Fund as under the As Introduced version.