MEMORANDUM: LOCAL AUTHORITY TO REGULATE HOOKAH

Question Presented
Does Baltimore County have the authority to regulate hookah use to a greater extent than it is currently regulated under state and federal law?

Short Answer
Yes. The Maryland Clean Indoor Air Act ("CIA") expressly allows localities to create more stringent measures to protect the public from hookah use indoors, and the federal Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act") allows states and localities to regulate the sale and distribution of tobacco products including hookah.

Discussion

I. Introduction

Over the past few years, there has been an upward trend in hookah use, particularly among youth, and a proliferation of establishments selling and allowing hookah use indoors. Almost 1 in 5 high school seniors, and about 1 in 10 of all high school students, now report using hookah within the past year. In the previous 7 years, the number of hookah bars in the state has risen 383 percent from 6 to at least 29 locations. More than half of these locations are within 2 miles of a college campus.

The increased visibility and use of hookah among youth is troubling because it coincides with a decrease in youth cigarette smoking. Although many young people do not think hookah smoke is as harmful and addictive as cigarette smoke, smoke inhaled in an average hookah smoking session of about 45 minutes is about 150 times that of a single cigarette and delivers 10 times the carbon monoxide content. Hookah use is significantly associated with lung cancer, respiratory illness, low birth-weight, and periodontal disease. The increased presence of hookah use and availability suggest regulation is required to stem this emerging public health threat.

II. Current Regulatory Framework

a. Maryland’s Clean Indoor Air Act

Smoking hookah indoors falls under the Maryland CIA. The CIA was passed to “preserve and improve the health, comfort, and environment of the people of Maryland by limiting exposure to
environmental tobacco smoke." The CIA prohibits smoking in indoor areas open to the public except in limited circumstances. The CIA specifically prohibits smoking in public meeting places, public transportation vehicles, private homes used to provide health or daycare services, and indoor places of employment. It also prohibits smoking in any establishments licensed or permitted under Maryland law to sell or possess alcohol. All prohibitions are subject to certain exemptions discussed below.

b. Primary Activity Exemption

The CIA exempts certain establishments—homes, automobiles, hotels, motels, and tobacco retail businesses—from its prohibition on smoking indoors. In order to be considered a tobacco retail business, and by extension exempt from the CIA’s prohibition on smoking indoors, “the primary activity [of the business must be] the retail sale of tobacco-containing products and accessories; and (2) the sale of other products [must be] incidental.” The Maryland Department of Health and Mental Hygiene (DHMH) has construed this provision to mean that the sale of tobacco products and accessories must comprise nearly all of an establishment’s revenue in order to meet the standards for exclusion. Hookah bars and lounges claim to meet the definition of a retail tobacco establishment, and by extension claim to be exempt from the CIA’s prohibition on smoking indoors.

III. Potential Regulatory Options

a. Enforcement

The primary option for Baltimore to reduce the impact of hookah on public health is enforcement of existing limitations on hookah bars. Local health departments have authority to investigate and address complaints of CIA violations. If violations of the law and regulations are found during the investigation, the business owner will be notified by mail, and will receive a letter of reprimand or a fine. Owners are also required to correct the violations that are found, and send a letter to the local health department certifying that corrections were made. Violations of the CIA are punishable by fines ranging from $100 for a second violation to $1000 for fourth or subsequent violations. Baltimore County also has authority to raise these fines. Because each subsequent violation of the CIA’s penalty provisions results in increased penalties, routine audits of required reporting of revenue for licenses and regular checks for compliance with alcohol and guest restrictions are the most important aspect of any regulatory scheme designed to catch recidivists or serial offenders.

b. Clarifying Primary Activity Exemption
Baltimore County may also consider clarifying its interpretation of the CIA’s primary activity exemption as applying only to establishments that do not serve food on the premises. The CIA expressly allows county and municipal governments to “enact and enforce more stringent measures to protect the public from involuntary exposure to environmental tobacco.”\textsuperscript{xix} Baltimore County could accomplish restricting the primary activity exemption in two ways. The Baltimore County Council could pass legislation specifically excluding establishments that serve food and drink from the primary activity exemption. The Baltimore County Board of Health could also announce its interpretation of the primary activity exemption to exclude establishments that serve food and drink. San Francisco recently applied its local law prohibiting smoking inside enclosed workplaces to hookah establishments, prohibiting “smoking of any tobacco products, plants, or other weeds in all restaurants, bars, lounges, and outdoor dining areas even when food is no longer served in the dining areas.”\textsuperscript{xx} San Francisco passed this restriction in spite of California having the first and one of the most comprehensive clean indoor air statutes in the country.

\textbf{c. Signage Requirements}

Baltimore County may also consider requiring signage, both to warn potential patrons that smoking is occurring inside and to warn potential hookah users of the harmful effects of hookah use. Under the CIA, hotel and motel rooms exempt from the CIA are required to have signs posted prominently that say “Smoking Permitted in this Room.” As discussed above, the CIA expressly allows localities to impose additional requirements to protect the public from secondhand smoke.\textsuperscript{xxi} Accordingly, Baltimore County could consider extending the signage requirement in existence for hotels and motels to all businesses exempt from the CIA.

\textbf{d. Sanitation Requirements}

Baltimore County may also consider taking steps to mitigate the unique health risks posed by communal hookah use. Baltimore County, through the Express Powers Act, has the home rule authority “[t]o prevent, abate and remove nuisances; to prevent the introduction of contagious diseases into such county; and to regulate […] any and all places where offensive trades may be carried on, or which may involve or give rise to unsanitary conditions or conditions detrimental to health.”\textsuperscript{xxii} Shared hookah mouthpieces increase the risk of spreading communicable diseases like tuberculosis, hepatitis, and herpes, and more common viruses like a cold or the flu.\textsuperscript{xxiii, xxiv} To diminish this risk, Baltimore County could require use of disposable rubber mouthpieces. Baltimore County could also regulate the frequency with which water in the hookah vase is changed, cleaning procedures for the stem and hose, and methods and frequency for changing the mouthpiece attached to the end of the hose, and require recordkeeping for the above.
Conclusion

Baltimore County has greater authority to regulate hookah than it is currently exercising. Baltimore County has existing authority to enforce provisions of the CIA, and has authority to assess existing fines and legislatively increase the penalty structure. In addition, Baltimore County may take steps to clarify and narrow its interpretation of the primary activity exemption from the CIA, to require smoking and health warnings, and to ensure proper sanitation of hookah paraphernalia. Given the proliferation in use and availability of these products, additional regulation may be prudent.

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6 Aljarrah, K., et al., Perceptions of hookah smoking harmfulness: predictors and characteristics among current hookah users. Tobacco Induced Diseases (2009), http://www.tobaccoinduceddiseases.com/content/5/1/16


8 Peyton Jacob, et al., Comparison of Nicotine and Carcinogen Exposure with Water Pipe and Cigarette Smoking. J. Cancer Epidemiol Biomarkers Prev 1158 (March 5, 2013), http://cebp.aacrjournals.org/content/early/2013/03/05/1055-9965.EPI-12-1422.abstract


10 Md. Code Ann., Health-Gen. § 24-501 et seq. (West)


12 COMAR 10.19.04.04

13 Id.

14 Id.; Md. Code Ann., Health-Gen. § 24-510 (West)

15 COMAR 10.19.04.03


17 MD Attorney General Opinion Letter from Sandra Benson Brantley, Mar. 27, 2007: “Although [the Clean Indoor Air Act] does not define “primary activity,” in my opinion, a hookah lounge that generates nearly all of its revenue from the sale of tobacco or sisha that is to be smoked, as well as payment for use of the hookah itself, would meet the exemption.”

18 COMAR 10.19.04.08

19 Md. Code Ann., Health-Gen. § 24-510 (West); see COMAR 10.19.04.01

20 San Francisco City and County Dept. of Public Health, Smoking Prohibition Enforcement Alert, http://www.sfdph.org/dph/files/EHSdocs/AirQuality/SmokingEnforcementAlert.pdf (accessed Nov. 6, 2013); See also American

xxi Md. Code Ann., Health-Gen. § 24-510 (West)

xxii The express powers of charter counties originally provided for in Art. 25A of the Maryland Code were recodified in the 2013 legislative session at Md. Code, Local Gov’t Art., §10-101 et seq, effective Oct 1, 2013. The bill’s revisions, transfers, restatements, and recodifications are intended as nonsubstantive. Local Government Article, 2013 Maryland Laws Ch. 119 (H.B. 472)(eff. Oct. 1, 2013).

xxiii Tobacco Free U, *supra* n. 2 at 3.


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