The Honorable Chris Van Hollen, Jr.
3514 Farragut Avenue
Kensington, MD 20895-2132

Dear Senator Van Hollen:

The Attorney General asked me to respond to your letter of May 15, 2002, asking questions about the circumstances in which a tobacco retailer or vending machine operator may be issued a citation for selling tobacco to a minor. Specifically you asked:

1. Can a police officer issue a citation to a Title 16 license holder if an employee under the license holder’s control sells a tobacco product to a minor?

2. If a minor buys a tobacco product from a tobacco vending machine not operated with a token, card, or similar device that an individual can only obtain or purchase from the owner or an employee or agent of the owner, can the owner or person in charge of the vending machine receive a fine under Article 27, §405?

3. If a Title 16 license holder or a clerk in his/her employ sells a token, card or similar device to a minor so that he/she can operate a tobacco product vending machine, can the Title 16 license holder and/or the person who operates an establishment in which the vending machine is located be cited under Article 27, §405?

As explained below, in the circumstance of a direct purchase, a law enforcement officer may issue a citation to an employee who makes an underage tobacco sale as well as to the tobacco retailer licensee who employs the selling clerk. With respect to vending machines, if a minor purchases a tobacco product from a vending machine that does not operate by token, the person who holds the license on the vending machine and any employee or agent of the licensee may be subject to criminal citation for the youth sale as well as for allowing the machine to operate without the use of a token. Similarly, if a person holding a license on a vending machine or the agent or employee of that licensee sells a token to a minor enabling the minor to purchase a tobacco product from the vending machine, the licensee and the employee or agent may be issued a criminal citation.
Legal Framework for Tobacco Sales in Maryland

Two forms of license are required to sell cigarettes at retail in Maryland. Section 16-301 of the Business Regulations Article (BR) requires that a retailer must obtain a county license to sell cigarettes in that county. BR §16-302. A tobacco retailer license issued through the Comptroller is also required. BR §16-202. The holder of a tobacco retailer license may sell cigarettes via a vending machine if that licensee operates machines on fewer than forty premises. BR §16-201(j). To operate machines on forty or more premises, a vending machine operator license, issued by the Comptroller, is required. BR §16-201(o).

It is illegal in Maryland to distribute or sell a tobacco product to a person less than eighteen years of age:

(1) A person engaged in the business of selling or otherwise distributing tobacco products for commercial purposes, including persons licensed under Title 16 of the Business Regulations Article, may not:
   (i) Distribute any tobacco product to a minor.

(2) A person not described under paragraph (1) of this subsection may not:
   (i) Purchase for or sell to a minor a tobacco product.

Article 27, §404(b). Subsection (1) makes clear that the prohibition against the distribution of tobacco to minors applies to a Title 16 licensee and any other person in the business of selling tobacco products. Subsection (2) prohibits youth sales by any other individual. Clearly the General Assembly intended to foreclose all avenues of tobacco sales to minors.

Because Title 16 licensees and others in the business of selling tobacco products are prohibited from distributing tobacco, important in answering your questions is the definition of the term distribute.

“Distribute” means to:
   (i) Give away, sell, deliver, dispense, or issue;
   (ii) Offer to give away, sell, deliver, dispense, or issue; or
   (iii) Cause or hire any person to give away, sell, deliver, dispense, or issue or offer to give away, sell, deliver, dispense, or issue.

Art. 27, §404(a)(3). This definition encompasses but is much broader than the term sell, again making clear the General Assembly’s intent to stop the flow of tobacco to minors regardless of the manner of distribution. The definition also makes clear that the tobacco licensee or business owner is responsible for youth sales made personally or through an agent or employee.
Complementary to the criminal provisions prohibiting youth access to tobacco are significant restrictions that apply to selling tobacco products through vending machines:

A person may not sell or dispense or offer to sell or dispense a tobacco product through a vending machine, unless the vending machine:

1. Is located in an establishment that minors are prohibited by law from entering or an establishment that is a bona fide fraternal or veterans organization; or
2. Can only be operated with a token, card, or similar device that an individual can only obtain or purchase from the owner or an employee or agent of the owner.

BR §16-3A-02. It is a misdemeanor punishable by fine to operate a vending machine that does not conform to this section. BR §16-3A-03. These provisions were enacted to reduce youth access to tobacco by introducing a face-to-face exchange before a sale can be made through a vending machine. See 2000 Md. Laws ch. 247 (purpose clause); Floor Report, S.B. 271 (2000)("The bill is intended to restrict youth access to tobacco products.").

Interestingly, when enacting the provisions governing the operation of tobacco vending machines, the General Assembly also repealed an exemption from youth sales penalties that previously had shielded tobacco vending machine owners or those in control of such machines. Prior to the 2000 change, an owner or person in control of a tobacco vending machine could not be held liable for youth sales made through a vending machine if the machine carried a label describing the prohibitions on and penalties for youth sales. See S.D. 271 (2000); former Art. 27, §405(b); BR 16-209(b)(2)(ii). The Floor Report for Senate Bill 271 of 2000 explains that, at that time, “Maryland and Missouri [were] the only states that absolve owners from liability if a minor purchases tobacco from a properly labeled machine.” By repealing the exemption, the General Assembly clearly intended to bring the full force and effect of Article 27, §404 and §405 on owners or those in control of tobacco vending machines.

The language of the relevant statutes and the legislative history of these tobacco control provisions allow for unequivocal answers to your questions. Keep in mind that “in construing all statutes, the paramount objective is to ascertain and give effect to the intent of the legislature.” Marriott Employees v. Motor Vehicle Administration, 346 Md. 437, 444 (1997). Where “the plain meaning of . . . statutory language is clear and unambiguous, and consistent with . . . the broad purposes of the legislation,” the inquiry need go no further. Id.; see Bretienbach v. N.B. Handy Co., 366 Md. 467 (2001). The plain language of the statutes at issue here, as well as the apparent intent of the legislature, lead to the inescapable conclusions set forth below.

A law enforcement officer may issue a citation under Article 27, §404 and §405 to a Title 16 licensee for a youth tobacco sale made by the licensee’s employee.

The structure of Article 27 §404(b) and the definition of distribute make clear that with respect to an in-person sale, the tobacco retailer licensee and the sales clerk may be charged with
a violation of §404 if a sale is made to a minor. A tobacco retailer licensee is by necessity in the
business of selling tobacco at retail and is specifically identified as a person subject to liability
under §404(b)(1) for distributing tobacco to minors. The licensee cannot escape responsibility
simply because an employee made the offending sale. Not only would that conflict with the
purpose of the statute, the definition of distribute specifically includes “cause or hire any person
to give away, sell, deliver, dispense, or issue or offer to give away, sell, dispense, or issue” tobacco.
Therefore, there can be no doubt that an owner or licensee can be held responsible for an
employee’s offending sale under §404(b). That the sales clerk can also be held responsible for the
violation is evident from §404(b)(1) or (b)(2). Section 404(b)(1) applies to any person in the
business of selling tobacco at retail; it would be reasonable to include a sales clerk in that definition.
In any case, certainly a sales clerk would be prohibited from making the sale under §404(b)(2),
which prohibits the sale of tobacco to minor by any person not covered by §404(b)(1). Further,
there is nothing in the statute or elsewhere that would limit a law enforcement officer’s ability to
cite both the offending clerk and the licensee who employs the clerk for a single youth sale.

The licensee or person in control of a vending machine may be defined under Article 27,
§404 and §405 if a minor purchases a tobacco product from a vending machine, regardless of
whether the vending machine operates as required by BR §16-3A-02.

The plain language of Article 27, §404 as well as the legislative history of that section make
clear that a licensee or other person in control of a tobacco vending machine can be held liable for
youth sales violations made through the machine. First, §404 explicitly states that Title 16 licensees
and others who distribute tobacco for commercial purposes are subject to liability for the
distribution of tobacco products to minors. Given the broad definition of the term distribute in
§404(a)(3), it is without doubt that selling tobacco via a vending machine is a form of distribution
invoking the youth sales prohibitions. Further, all persons are prohibited from selling tobacco to
or buying tobacco for minors. Art. 27, §404(b)(2). Selling tobacco through a vending machine,
directly or by use of a token, must constitute conduct subject to the restrictions of §404. The plain
language of the statute compels this result. The legislative history also aids in reaching the
conclusion that sales through a vending machine are subject to the prohibitions and penalties of
§404 and §405. Prior to the 2000 change, §405 relieved owners and those in control of tobacco
vending machines from liability if certain conditions were met. Implicit in that exemption was the
fact that owners and those in control of tobacco vending machines were otherwise subject to
liability under §404. A conclusion to the contrary would run counter to the purpose of the youth
access prohibitions and would encourage tobacco retailers to use vending machines to avoid
penalties for youth tobacco sales. Such a result would be absurd.

This answer and analysis are the same regardless of whether the vending machine is
operated by a token or by cash. If a vending machine is operated in violation of BR §16-3A-02 and
a minor is able to purchase a tobacco product from the vending machine with cash, the licensee or
individual in control of the vending machine could be penalized under Article 27, §405 for making
the youth sale and under BR §16-3A-03 for operating the machine without required use of a token.
The relatively minor penalty for the vending machine violation, a maximum $100 fine, does not
foreclose imposing the more substantial penalties in Article 27, §405. If an owner or person in control of a vending machine that does comply with BR §16-3A-02 sells a token to a minor, the owner or person in control are subject to the penalties in Article 27, §405. Had the General Assembly intended compliance with BR§16-3A-02 to excuse a youth sale, they would have added a provision to the existing exemption in Article 27, §405 for owners or those in control of vending machines who properly display the required notices explaining the youth sales prohibitions. Instead, they removed all of the exemptions, placing owners or those in control of vending machines in the same position as all other licensees or sellers of tobacco.

**Conclusion**

As explained above, all of your questions are answered in the affirmative. Penalties for youth tobacco sales, whether made personally, through an employee or through a vending machine, may be imposed on the Title 16 licensee. I hope that this letter is responsive to your questions. Please do not hesitate to contact me should you have any questions about this advice or if you require further information or advice.

Very truly yours

Carmen M. Shepard
Deputy Attorney General

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