The Honorable Robert A. Zirkin  
Miller Senate Office Bldg., 2 West Wing  
Annapolis MD 21401

Dear Senator Zirkin:

You have requested advice about the impact of Senate Bill 91 on establishments popularly known as hookah lounges. Specifically, you asked whether a hookah lounge would still be allowed to operate under the bill. It is my view that a hookah lounge whose primary activity is the sale of tobacco products and accessories would be exempt from the bill, as amended. In addition, a restaurant that offers hookahs, among other things on its menu, may qualify for a waiver, depending on the waiver criteria of the county in which the restaurant is located.

The hookah is a waterpipe used to smoke tobacco. The smoke is filtered through a water base, which sometimes also contains juice. Most hookah establishments call their tobacco mix shisha, which is tobacco mixed with fruit molasses. The shisha is sold in a variety of flavors. The shisha is heated in a small bowl that sits on top of a pipe that goes into the bowl of water. As the shisha is heated, smoke is passed through the pipe into the water, then the person using the hookah draws and inhales the rising smoke through a hose and mouthpiece. Some establishments cater only to hookah users while other restaurants offer hookahs to customers in addition to food and drink.

Senate Bill 91 seeks to “protect the public and employees from involuntary exposure to environmental tobacco smoke in indoor areas open to the public...” (S.B. 91, page 9 at lines 4 - 6.) Nothing in the language of Senate Bill 91 explicitly refers to hookahs or hookah establishments. A hookah, however, does produce “environmental tobacco smoke” and a hookah lounge is an “indoor area open to the public.” Nonetheless, the bill as amended provides that the prohibitions do not apply to a business “in which the primary activity is the retail sale of tobacco products and accessories; and the sale of other products is incidental.”¹

¹ The House version of the Clean Indoor Act of 2007, House Bill 359, uses very similar language by exempting an establishment that “derives its primary revenue from the sale of tobacco products and tobacco-related products and tobacco-related products and accessories and derives only incidental revenue from the sale of nontobacco-related products.”
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In other jurisdictions, hookah lounges are exempted in different ways. The District of Columbia, for example, exempts “tobacco bars,” which is defined as “a restaurant, tavern, brew pub, club, or nightclub” where at least 10 percent of its revenue is earned through on-site sale of tobacco products, excluding sales from vending machines or rental of on-site humidors. D.C. Code § 7-741 and § 7-743(2). New York City also exempts “tobacco bars” from its smoking ban; the threshold is 10 percent from on-site sale of tobacco products. N.Y.C. Administrative Code § 17-502. In New Jersey, the threshold is at least 15 percent. N.J. Stat. § 26:3D-59. Rhode Island exempts “smoking bars,” which are “establishments whose business is primarily devoted to the serving of tobacco products for consumption on the premises, in which the annual revenues generated by tobacco sales are greater than fifty percent (50%) of the total revenue for the establishment and the serving of food or alcohol is only incidental to the consumption of such tobacco products.” R.I. Gen. Laws § 23.20.10-2(15)(a). Although Senate Bill 91 does not define “primary activity,” in my opinion, a hookah lounge that generates nearly all of its revenue from the sale of tobacco or shisha that is to be smoked, as well as payment for use of the hookah itself, would meet the exemption.

A restaurant that merely offers hookahs in addition to food and drink, however, may not be able to show that its “primary activity” is the retail sale of tobacco products and accessories. In that case, to allow hookahs in that establishment would require that some sort of waiver be granted. Senate Bill 91 allows a county health officer to grant a waiver from the smoking ban if compliance with it “causes undue financial hardship” or for “other factors..that render compliance...unreasonable.”

In sum, in my opinion, a hookah lounge whose primary activity is the sale of tobacco products and accessories would be exempt from Senate Bill 91 as amended. A restaurant that offers hookahs on its menu in addition to food or drink may qualify for a waiver, depending on the waiver criteria of the jurisdiction, if any, in which the restaurant is located.

Please let me know if you have any other questions or concerns.

Sincerely,

Sandra Benson Brantley
Assistant Attorney General

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2 Black’s Law Dictionary defines primary as “first, principal; chief; leading.”

3 House Bill 359 allows the Secretary of the Maryland Department of Health and Mental Hygiene, in consultation with the Comptroller, to grant a waiver for the same reasons.