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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/16/09  
 SPONSOR HFI LAST UPDATED 03/17/09 HB CS/CS/70/aSFC  
 SHORT TITLE Safer Cigarette and Fire Fighter Protection Act SB \_\_\_\_\_  
 ANALYST Hoffmann

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	See Narrative	Recurring	Fire-Safer Cigarette and Firefighter Protection Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
	See Narrative	\$0.1	Recurring	Fire-Safer Cigarette and Firefighter Protection Fund

(Parenthesis ( ) Indicate Revenue Decreases)

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$0.1	\$0.1		Recurring	Fire-Safer Cigarette and Fire Protection Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AGO)  
 Taxation and Revenue Department (TRD)  
 Public Regulation Commission (PRC)  
 Department of Health (DOH)  
 Health Policy Commission (HPC)

## SUMMARY

### Synopsis of SFC Amendment

The Senate Finance Committee amendment to the House Floor substitute for the House Judiciary Committee substitute for House Bill 70 changes language in the section related to the state fire marshal to read that the state fire marshal shall verify that the manufacture's certifications have been received. The amendment clarifies that the fire marshal receives them, but does not approve them.

### Synopsis of Original Bill

House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 requires that cigarettes sold in New Mexico be tested to ensure that they comply with flammability standards proposed by the Act. The goal of the Act is to require tobacco companies to produce cigarettes that have reduced ignition propensity, to reduce the incidence of cigarette-caused fires. The cigarette must meet the test, receive certification from the State Fire Marshal that it meets the standards, and the packaging must be marked in such a way as to indicate that the cigarette has met the standards set forth in the Act. One method that a cigarette manufacturer may use to meet this standard would be to include low fire permeability bands in the cigarette paper to prevent cigarettes from lighting other objects on fire.

## FISCAL IMPLICATIONS

House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 creates the “Fire-Safer Cigarette and Firefighter Protection Fund” in the State Treasury. The fund shall consist of appropriations, income from the investment of the fund, money otherwise accruing to the fund, certification fees paid under section 4 of the proposed act, and money recovered as penalties under section 6 of the proposed act. The money in the fund is appropriated to the State Fire Marshal for enforcement of the proposed act and to support fire safety and prevention programs. Disbursements shall be made on warrants signed by the Secretary of the Department of Finance and Administration pursuant to vouchers signed by the State Fire Marshal or an authorized representative.

The PRC states that it is unknown how much money would be collected by the certification filings and assessed penalties. Their office does believe that the revenues placed in the Fire-Safer Cigarette and Firefighter Protection Fund would be adequate to administer the program.

### Continuing Appropriations

House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 provides for the continuing appropriations of the revenues generated by the certification fees and any penalties collected from violations of the Fire-Safer Cigarette and Firefighter Protection Act.

## SIGNIFICANT ISSUES

The Attorney General’s Office<sup>1</sup> reports that in order to comply with the scheme of Tobacco legislation, some definitions in this bill should be changed to comport with existing definitions

and processes. The bill also does not reflect the AGO's directory, on which this information should be kept, and maintained and kept for public review. Section 4(F) should be revised to include the requirement that compliance with the Act be noted on the AGO's tobacco directory, as described in NMSA 1978, § 6-4-16(D) and NMSA 1978, § 6-4-18. In addition, the Act does not reflect the concept of contraband cigarettes in New Mexico. If House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 is adopted, it should include a provision whereby the tobacco products that don't comply with the Act are deemed contraband, under NMSA 1978, § 6-4-22(D).

Optimally, the requirements of this Act should be made a requirement for tobacco manufacturer certification in New Mexico, pursuant to NMSA 1978, § 6-4-17, and the information should be required by the AGO and TRD for inclusion on the AGO directory, and manufacturer certification by TRD. However, the Act lacks any rulemaking provisions, giving the authority to promulgate rules to affect this outcome.

While House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 provides for the inspection and seizure and destruction of products in violation of the Act, it does not provide a procedure for doing so, nor does it refer to the Forfeiture Act, NMSA 1978, §§ 31-27-1, et seq., incorporating the process provided under that statute. As written, House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 probably is in violation of the due process clause of the constitution (state and federal), by permitting destruction of property without due process. This could be cured by either a rule making clause, and rules that would address the procedures required, or by incorporating the Forfeiture Act, NMSA 1978, §§ 31-27-1, et seq., as the process provided. It requires a hearing and findings before the ultimate destruction of property.

The DOH notes that smoking is the number one cause of preventable home fire deaths in the United States. The principal victims of tobacco-caused fires are children, senior citizens and firefighters. U.S. fire departments responded to an estimated 142,900 smoking-material fires in 2006. These fires caused 780 deaths, 1,600 injuries, and \$606 million in direct property damage. One-fourth of the deaths were of non-smokers.

New Mexico's five neighboring states require fire-safe cigarettes (AZ, UT, CO, OK, TX), as well as 32 other states and Canada.

The PRC observes that tobacco manufacturers have already geared up to meet the requirements and thus the act would not be a financial burden to the companies.

### **ADMINISTRATIVE IMPLICATIONS**

House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 requires the AGO to maintain information regarding a cigarette brand's compliance with the section, to maintain records regarding manufacturers' compliance with the Act and to enforce the Act. Organizing and maintaining the records will require the time of non-lawyer staff. Enforcement of the Act will require the time of both lawyer staff and non-lawyer staff. This will require the time of a staff person to maintain the records and follow up on compliance with the Act, and it will require the time of an attorney to take civil action to enforce the provisions of the Act, if violated. Staff time required for the record keeping aspect will probably take the equivalent of .1 of a full time position

There is no appropriation to fund these activities at the AGO, and the duties could detract from other Tobacco Enforcement efforts that are already under staffed at this time. Since there is no appropriation for the duties associated with House Judiciary Committee Substitute Bill 70, the staff at the AGO would have to take time from their current responsibilities in Tobacco Enforcement to perform the new responsibilities. Since the Tobacco Enforcement section at the AGO is already heavily over burdened, placing new responsibilities on this section, without further funding for additional staff, places the states approximately \$40 million of Tobacco Settlement Fund at risk; New Mexico's settlement fund payment can be greatly or completely reduced if it is found that the AGO did not adequately enforce New Mexico's tobacco Statutes.

The TRD states that their Audit and Compliance Division will need to train employees on the new audit procedures. Notice to manufacturers and retailers will need to be developed through coordination between the Attorney General, State Fire Marshal, and Taxation and Revenue Department.

### **TECHNICAL ISSUES**

The AGO suggests that certain technical issues, described below, be considered to strengthen House Floor Substitute for House Judiciary Committee Substitute for House Bill 70.

House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 makes manufacturers responsible for compliance, but not distributors. In order to be more consistent with the Tobacco Escrow Fund Act in Title 6 (NMSA 1978, §§ 6-4-13 through 6-4-24) and the Cigarette Tax Act in Title & (NMSA 1978, §§ 7-12-1, et seq.) the drafter may want to consider whether a distributor who distributes cigarettes to be sold in New Mexico should also be subject to fines for selling cigarettes that don't comply with the Act, particularly if that information is included in the AGO directory.

House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 does not make a specific determination about the fund that the penalties should go to. To make collection under this Act easier, the Bill could contain the following clause providing for fees and costs in the event an enforcement action is necessary:

In an action brought by the state to enforce the provisions of the Fire-Safer Cigarette and Firefighter Protection Act, the state shall be entitled to recover the costs of investigation, costs of the action and reasonable attorney fees, if the state prevails.

The term "agent" is vague, and does not comport with the New Mexico Tax Fund Act. The only entities permitted to purchase and affix stamps are tobacco distributors certified with the Taxation and Revenue Department. House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 Section (2) (A) should read:

"agent" means a distributor of tobacco products required to affix stamps on cigarette packages pursuant to Section 7-12-5 NMSA 1978 or required to pay excise tax imposed on cigarettes pursuant to Section 7-12A-3 NMSA 1978, as defined by NMSA 1978, 6-4-16(E).

The definition of Cigarettes at section 2(B) does not match the definition of “cigarette” in the Tobacco Escrow Fund Act, at NMSA 1978, §§ 6-4-12(D):

“cigarette” means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition.

The definition of Tobacco Manufacturer does not comport with the existing definition at NMSA 1978, § 6-4-12(I):

“tobacco product manufacturer” means an entity that after the date of enactment of this act directly (and not exclusively through any affiliate):

(1) manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the master settlement agreement) that will be responsible for the payments under the master settlement agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the master settlement agreement and that pays the taxes specified in subsection II(z) of the master settlement agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

(2) is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(3) becomes a successor of an entity described in Paragraph (1) or (2) of this subsection.

The term “tobacco product manufacturer” shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within Paragraph (1), (2) or (3) of this subsection.

Section 4(F) of House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 could be easily amended to clarify that cigarettes that don’t conform to the requirements of the Act are to be considered Contraband, by adding a clause to the last sentence to the end of that section:

“and shall be considered contraband, as defined at NMSA 1978, § 6-4-22(D), and shall be subject to enforcement under the Tobacco Escrow Fund Act, NMSA 1978, §§ 6-4-12 through 6-4-24.”

Section 5(C) should be amended to better coincide with the language and terms used in the existing Tobacco Escrow Fund Act. As written, House Floor Substitute for House Judiciary Committee Substitute for House Bill 70 requires manufacturers to provide its Act certification to

Wholesale dealers and agents to whom it sells cigarettes, and that Wholesale dealers and agents and retail dealers shall permit inspection of the cigarette packages to confirm compliance with the Act. This section should include the term “distributors” in both parts of this section, and should state that these entities shall permit “random, unannounced” inspections, during regular business hours.

The AGO observes that there is no Severability Clause in case a party wishes to challenge one particular section of the bill.

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

New Mexico will be a member of a small minority of states that do not require that cigarettes be self-extinguishing.

CH/mt:svb

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<sup>1</sup> The Attorney General’s Office includes the following disclaimer:

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Opinion letter.

This is a staff analysis in response to the agency’s, committee’s or legislator’s request.