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FISCAL IMPACT REPORT

SPONSOR Thomson/Ferrary/
Trujillo, J./Lopez ORIGINAL DATE 2/3/2020 LAST UPDATED 2/13/2020 HB 195/aHTRC
SHORT TITLE Tobacco Products Act SB _____

ANALYST Chilton

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY20	FY21		
-	\$350.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY20	FY21	FY22		
-	Uncertain; See fiscal implications		Recurring	Tobacco Products Administration Fund (NEW)

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Uncertain; See fiscal implications			Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Related to HB66; Conflicts with HB23, SB9, SB54, and SB91
Identical to SB131.

SOURCES OF INFORMATION

LFC Files

Responses Received From

NM Department of Health (DOH)
Administrative Office of the Courts (AOC)
Department of Public Safety (DPS)
Office of the Attorney General (NMAG)
Taxation and Revenue Department (TRD)

Responses Received From the following regarding identical SB131:
Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of HTRC Amendment

The first House Taxation and Revenue Committee amendment makes the following changes to the original bill:

- 1) Substitutes a more inclusive definition of “retailer.”
- 2) Reduces the maximum fees for manufacturers, distributors, and retailers of tobacco products: for initial applications to \$850 for each location and for annual renewals, to \$500 per location.
- 3) Specifies that licensing is to begin January 1, 2021.
- 4) Specifies that all fees (application and renewal) under the Act are to be deposited into the tobacco products administration fund.
- 5) Adds tribal entities to those governmental entities that could issue valid documents of age of a tobacco purchaser.
- 6) Adds a provision that cigar sales and displays cannot be allowed anywhere that minors are not permitted.
- 7) Limits misdemeanor penalties to retailers (not manufacturers or distributors), and misdemeanor penalties are eliminated for those providing free samples of tobacco products and those failing to post the prescribed sign (in Section 17).
- 8) Redirects the \$350 thousand appropriation to the Alcoholic Beverage Control Division of RLD rather than to the tobacco products administration fund.
- 9) Changes the effective date of the Tobacco Control Act (for all but the appropriation) to January 1, 2021.
- 10) Changes Section 27, which deals with preemption of county and municipal ordinances and regulations regarding tobacco products. It now states that any municipality or county regulations and ordinances must be consistent with the provisions of the Act.

Synopsis of Original Bill

House Bill 195, the Tobacco Control Act, revises many provisions in statute regulating the tobacco industry and decreasing children’s and teens’ access to tobacco products. The task of regulating the Tobacco Practice Act is to be placed with the Alcoholic Beverage Control Division (ABCD) of the Regulation and Licensing Department.

Following is a table of contents of the act

Section of HB 195	Summary of Provisions
1	Names the act
2	New definitions, including that “minor” is someone less than 21 years of age. “Delivery sale” is one made by telephone or internet and delivered to a purchaser’s home. “Tobacco product” includes all products containing nicotine, including cigarettes, flavored cigarettes, e-cigarettes, hookahs, etc. “Person” is defined as an individual, a corporation or other business entity.
3	Person shall not sell tobacco products to minors or sell tobacco products in packaging attractive to minors. They must not change manufacturer packaging, and products must be in child-proof containers.

4	Manufacturers, distributors, and retailers of tobacco products are to be licensed by the Alcohol Beverage Control Division (ABCD) for periods of one year. Licenses would be denied if the potential licensee had been convicted of misdeeds in New Mexico or another state, or if within 300 feet of a school or church (for new applicants) or if zoning restrictions were violated.
5	Manufacturer license requirements are listed, and a license application fee of up to \$1 thousand per location is prescribed.
6	Tobacco distributor license requirements are listed, and a license application fee of up to \$1 thousand per location is prescribed.
7	Tobacco retailer license requirements are listed, and a license application fee of up to \$1 thousand per location is prescribed.
8	Licensees must notify the ABCD of address changes within ten business days.
9	Reasons for denial of a license include not meeting provisions of the act or regulations issued regarding the act, and ABCD must notify the applicant of acceptance or reasons for denial.
10	Licenses may be transferred from one location to another with ABCD approval, but not from person to person.
11	A “tobacco products administration fund” is created, to receive appropriations, license fees, administrative penalties and other income.
12	Reiterates that license fees and administrative penalties are to be deposited into the fund.
13	Hearings can be requested regarding a denied license, revocation of a license, or administrative penalties.
14	States identification needed by consumers to be allowed to purchase tobacco products.
15	Tobacco products cannot be sold in vending machines other than in places off limits to minors.
16	No tobacco product may be provided as a free sample to anyone other than with respect to a Native American ceremonial use of that product.
17	Signs at point of sale must be posted to state the penalty of up to \$1 thousand for selling tobacco products to a minor.
18	Delivery sales can only be pre-paid, and must be made only to those whose ages have been verified.
19	Misdemeanor criminal penalties for violation of the act may be added to administrative penalties.
20	Those manufacturing, distributing or engaged in retail sales of tobacco products without a license are committing a misdemeanor.
21	Licensees violating the Tobacco Control Act, may be penalized up to \$10 thousand; their licenses may be suspended or revoked. If four violations of the Act occur within three years, the license must be revoked.
22	ABCD or the Department of Public Safety (DPS) may inspect licensees for compliance with the Tobacco Practice Act.
23	DPS will have jurisdiction over enforcement activities of the act, and will report citations to local law enforcement and to the ABCD.
24	ABCD will have jurisdiction over license issues and will cooperate with DPS on these issues.
25	Regarding licenses, the director of the ABCD may subpoena records or testimony of licensees.
26	ABCD will issue appropriate regulations, rules, orders, and directives in order to carry out the provisions of the act.
27	County and municipal tobacco ordinances are superseded only if less stringent than those in the state act.
28	Provisions of the act do not apply to FDA-approved products prescribed to minors for tobacco cessation.
29	A reverting and recurring \$350 thousand appropriation is made each year to

	the tobacco products administration fund.
30	Repeals current statutes: Sections 30-49-1 through 30-49-13 NMSA 1978 (being Laws 1993, Chapter 244, Sections 1 through 12 and Laws 2015, Chapter 98, Section 12, as amended)
31	The act would take effect July 1, 2020.

FISCAL IMPLICATIONS

This bill creates a new fund and provides for continuing appropriations. LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the Legislature to establish spending priorities. However, this particular issue could be resolved with an amendment – see the *technical issues* section below.

The bill creates the tobacco products administration fund for monies generated by licensing fees, administrative penalties, and the recurring appropriation mentioned in the next paragraph. The amount of fees generated from licensure application and renewal is difficult to calculate because the number of retailers, manufacturers and distributors is difficult to estimate.

The appropriation of \$350 thousand contained in this bill is a recurring expense to the general fund. The appropriation is made to the newly created tobacco products administration fund and any unexpended or unencumbered balance remaining at the end of a fiscal year does not revert to the general fund.

DPS comments extensively on its need for additional resources to regulate and enforce the provisions in the Tobacco Control Act:

This bill grants authority to DPS which mirrors the delegation of alcohol enforcement authority provided in the Liquor Control Act. In this new proposed Tobacco Products Act the DPS is specifically given power over all investigation and enforcement activities, except for those related to licensing, and the ABCD may request DPS to investigate activities that it believes are in contravention of the Act, including its licensing requirements. While on its face the new law would not require the DPS to exercise its authority, nor is the ABCD required to request the DPS to investigate or enforce, in reality these duties are likely to become mandatory because of the express delegation of authority to DPS. If the intent is to delegate administrative enforcement duties to the DPS, this could result in significant fiscal implications for DPS as it does not currently conduct regulatory enforcement for tobacco. Tobacco product enforcement is only undertaken as part of overtime operations funded by a grant through the New Mexico Human Services Department. The current grant is limited to \$117,000 for annual overtime expenses specifically for tobacco-related minor compliance operations. At a minimum, this added enforcement would require additional overtime funding for minor compliance operations, which could be paid for out of the newly created Tobacco Products Administration Fund, which is established in Section 11 of this bill.

Citing establishments administratively as part of the DPS' normal criminal enforcement minor compliance operations would likely not have a significant fiscal impact. However, any assignment of regularly occurring duties as it relates to premise inspections for administrative violations or postings, which DPS handles for alcohol, could have a very

considerable fiscal impact. If the responsibility for premise inspections (and postings or similar) is assigned purely to DPS, it would require additional personnel so as not to dramatically diminish its alcohol enforcement operations. Section 22 of this bill gives the responsibility for monitoring compliance to Regulation and Licensing Department (RLD) in addition to DPS, which DPS feels is more appropriate for RLD to handle in most situations, since compliance monitoring is a completely administrative function with no criminal component. RLD has stated they could utilize personnel for compliance and only require DPS to assist with these duties, as needed, for particular circumstances. This should prevent a need for additional DPS personnel.

AOC notes that there would be a small expense for the courts in updating changes in statutes.

TRD indicates uncertainty on revenue increases or decreases according to the proposed Tobacco Control Act. On the one hand, limiting teenagers' access to tobacco would result in decreased sales and decreased taxes; on the other hand licensure and enforcement activities might help to prevent evasion of taxes on tobacco products, thereby increasing tax collections. TRD lists a number of funds that would be impacted by any increase or decrease in tobacco tax revenue: the General Fund, the General Fund Credit Enhancement Account, the UNM Cancer Center, the UNM Health Sciences Center, the Rural County Cancer Treatment Fund, and the Department of Health facilities. TRD predicts that the number of retailers may decrease slightly, as smaller tobacco retailers cease selling tobacco products when confronted with the license application and renewal fees.

SIGNIFICANT ISSUES

New Mexico is one of 11 states that does not currently have some kind of tobacco retailer licensing law. This bill creates a licensing structure for all tobacco retailers, manufacturers, and distributors and includes a broader definition of "tobacco product".

Additionally, no state currently has enacted a comprehensive e-cigarette regulatory bill. If passed, New Mexico would be the first state to create such a framework for e-cigarettes.

According to the NM Department of Health (DOH), this bill proposes comprehensive tobacco retailer licensing that would be expected to increase compliance with existing state and federal tobacco laws. The licensing portion of this bill would allow New Mexico regulatory agencies to better understand who is selling tobacco products and where they are being sold. DOH also notes that holding retailers, distributors, and manufacturers accountable is considered an important step to reducing youth access to tobacco products, and the penalties proposed by this bill are consistent with enforcement priorities recently set forth by the U.S. Food and Drug Administration.

Regarding the bill's removal of criminal penalties for "minors", DOH states there is evidence that laws penalizing youth tobacco possession, use, and purchase are not effective and pose enforcement challenges. On the other hand, DPS "understands the desire to prevent minors from entering the criminal justice system, but it feels the lack of any penalty as it relates to minors' illegal behavior would undermine the clear public policy evidenced in HB 195. DPS would prefer wording that makes it a petty misdemeanor for a minor to possess or procure products. Alternatively, a civil penalty could be imposed for minors."

The bill's proposal of a minimum age of 21 for purchasing tobacco products is consistent with federal minimum age of sale laws. On December 20, 2019, the President signed legislation amending the Federal Food Drug and Cosmetic Act, and raising the federal minimum age of sale of tobacco products from 18 to 21 years. It is now illegal for any retailer to sell any tobacco product, including cigarettes, cigars, and e-cigarettes, to a person under the age of 21.

According to the Regulation and Licensing Department (RLD),

Implementing a comprehensive tobacco retail licensing structure will increase compliance with tobacco laws, including the recent federal legislation raising the legal age to buy tobacco products to 21 years of age, and enhances the ongoing efforts to prevent youth from using tobacco products in the first place.

Enactment of this legislation would add New Mexico to the ranks of the 39 other states that regulate tobacco products.

TRD notes that “Currently licensing for tobacco-oriented entities is governed in multiple departments and tracking the various businesses has proven difficult. This bill will make licensing easier for the taxpayer and improve the consistency of licensing data, while maintaining taxing authority within the Taxation and Revenue Department (TRD).”

CONFLICT, DUPLICATION, RELATIONSHIP

Senate Bill 131 is a duplicate.

House Bill 23 and Senate Bill 9 propose to impose licensing requirements for the sale, distribution, and manufacture of e-cigarettes and e-liquid only. There are no regulatory or licensing measures for other tobacco products included.

House Bill 66 proposes to amend the Tobacco Products, E-Cigarette, and Nicotine Liquid Container Act to ban the sale of tobacco products, e-cigarettes, devices and nicotine liquid to any person under twenty-one years of age.

House Bill 54 proposes to prohibit the sale, purchase or provision of free samples specifically of flavored tobacco products and provides a different definition of tobacco product.

Senate Bill 91 proposes to prohibit the sale, purchase or provision of free samples of flavored e-cigarette products.

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