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FISCAL IMPACT REPORT

SPONSOR: Beam DATE TYPED: 3/20/03 HB 137/aHBIC/aSJC

SHORT TITLE: Tobacco Escrow Fund Act SB _____

ANALYST: Maloy

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
		See Narrative	See Narrative	Recurring	General Fund

REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY03	FY04			
	Indeterminate		Recurring	Tobacco Settlement Fund

Relates to: SB 298 Tobacco Permanent Fund
CS/SB 804 Cigarette Tax Increase

SOURCES OF INFORMATION

Responses Received From
Office of the Attorney General
Department of Health
Taxation and Revenue Department

SUMMARY

Synopsis of SJC Amendments

The Senate Judiciary Committee has amended House Bill 137 as follows:

1. In striking the HBIC Amendment, the Senate Judiciary Committee proposes the term “distributor” does *not* include a retailer of cigarette packages upon which stamps were already affixed when the packages were received by that retailer. The definition of distributor becomes “a person 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”.

2. Installment payments made by participating manufacturers to the Tobacco Escrow Fund are changed from “quarterly” to “annually”. Compliance with these payment requirements is still certified by the Attorney General.
3. The bill clarifies that manufacturers’ declarations regarding band families sold in the state are to be for the current calendar year, in addition to the preceding calendar year.
4. The bill also clarifies the standard by which a manufacturer may not include a brand family in its certification. A brand family may not be included *unless* it is affirmed that the brand family sold, and payments made, were *in the volume and shares determined pursuant to the master settlement agreement*.
5. Section 6 of the bill established the process by which the Attorney General may determine to remove, or to not include, a tobacco product manufacturer or a brand family in the directory. This provision has been struck in its entirety and replaced with a new Section 6. The new Section 6 provides for e-mail notice of preliminary determinations for removal or not to include (sent to the manufacturer’s registered agent). Following receipt of this notice, the manufacturer shall have 10 business days to demonstrate full compliance with all elements of the Tobacco Escrow Fund Act. Failure to do so will result in removal or non-inclusion.

The 10-day window of opportunity to correct any areas of non-compliance applies only if the non-compliance did not include a failure to meet the requirements of Section 7 of the Act. Failure to comply with Section 7 shall result in a final determination to remove, or not to include.

All determinations by the Attorney General to remove or not include may be appealed to district court.

6. The bill clarifies that the distributors’ reporting obligations apply to both pre-rolled and roll-your-own cigarettes.
7. The bill corrects a technical error wherein the word “proof” was omitted.
8. As it applies to non-participating manufacturers, the bill allows these individuals to simply show proof of having established a qualified escrow account on its own without requiring that the proof come from, or the account be held by a “financial institution”. The bill also allows the non-participating manufacturer to calculate compliance with the fund obligations “*exclusive of interest*”.

The intentions for interest are unclear. Is the interest to be kept by the non-participating manufacturers? Or, is the bill intent that the interest remain part of the fund, but only the principle amount is calculated for verifying the non-participating manufacturer’s compliance?

9. The bill makes clear that cigarettes sold in New Mexico in violation of this law are “contraband” and *shall be* (rather than may be) seized and destroyed.
10. The amendments also make clear that matters regarding this law, if taken to court, will open the non-victorious party to the obligation of paying the state’s attorneys fees and court costs. The bill is silent as to whether the state would have a similar obligation if it were to be the non-victorious party.
11. Finally, the amendment strikes languages defining how this Act is to be construed in relation to other sections of related law.

Synopsis of HBIC Amendments

1. The House Business and Industry Committee has amended House Bill 137 as follows:

On Page 2, Line 21, strike the semicolon, and insert in lieu thereof, a period and:

“Distributor” does not include persons who are retailers of cigarette packages upon which New Mexico tax stamps were already affixed when the packages were received in by that retailer:”

The affect of this amendment is to better define the term “distributor” and address concerns relating to businesses that will not be affixing and reporting tax stamps on certain cigarettes because the product will have been stamped in advance of the distributor’s receiving it.

Synopsis of Original Bill

1. House Bill 137 is New Mexico’s version of a national model statute being considered by states having participated in the multi-state Tobacco Master Settlement Agreement (Master Settlement Agreement). HB 137 is designed to complement the Non-Participating Tobacco Manufacturer Model Statute (Non-Participating Statute), previously enacted in 1999.

The Non-Participating Statute was enacted to address the need to have tobacco manufacturers who were not part of the Master Settlement Agreement put in escrow a portion of their sales proceeds to have available to satisfy judgments that may be entered against them due to harm caused by their products.

Enactment of the Non-Participating Statute was also necessary to protect New Mexico from the affects of a “non-participating manufacturer adjustment” under the terms of the Master Settlement Agreement. Such an “adjustment” could significantly reduce payments received by New Mexico under the Master Settlement Agreement.

2. HB 137 establishes a procedure by which distributors of cigarette and roll-your-own tobacco for sale in New Mexico can more easily discern which brands are compliant with the Non-Participating Statute. Annually, tobacco manufacturers whose cigarettes are sold in New Mexico must provide the Attorney General’s Office (AGO) in-

formation about their business, products and brands.

The AGO shall publish on its web site a directory listing of all tobacco product manufacturers that have provided current, accurate and complete certifications. The AGO shall keep this list current and inform a manufacturer if they are in jeopardy of being removed from the list.

3. HB 137 requires distributors submit, on a monthly basis, to the Taxation and Revenue Department (TRD) a list of brand families and the total number of cigarettes for which the distributor affixed stamps or otherwise paid tax due. The bill requires a distributor provide documentation of sales of all non-participating brands.
4. Finally, HB 137 makes it illegal to sell, offer, or possess, for sale, cigarettes of a tobacco product manufacturer that is not noted in the AGO's directory.

Significant Issues

1. Since enactment of the Master Settlement Agreement, experience has shown that additional statutory authority is necessary to achieve enforcement of the Non-Participating Statute against non-compliant / non-participating tobacco product manufacturers.
2. It has been shown that key to New Mexico's enforcement success is the role of distributors in the process.
3. The need for additional enforcement mechanisms is a phenomenon that has been recognized by all parties to the Master Settlement Agreement, and has spurred the formulation of model complementary legislation (this bill), which is intended to be enacted uniformly throughout the country.

FISCAL IMPLICATIONS:

1. There is no appropriation contained within HB 137.
2. This bill contains an emergency clause.
3. More effective oversight pursuant to HB 137's provisions should increase the amount of funds received under the Master Settlement Agreement. The amount is unknown, and has not been estimated by the reviewing agencies.
3. HB 137 will require greater monitoring and oversight responsibilities of the AGO and TRD with respect to the sales of cigarettes in the state. This will require staffing and budget resources. Also, increased enforcement will undoubtedly lead to an increase in enforcement / legal actions. There are concerns about the AGO and TRD's ability to adequately assume the additional responsibilities without additional FTE.
4. The AGO estimates a need for \$49.0 in FY03, and \$99.0 in FY04 to address their additional responsibilities.
5. While the TRD does not provide an estimate dollar figure, TDR expressly notes that two additional FTE will be needed to change the forms, instructions, and to assist

with education or and compliance from cigarette wholesalers / distributors. Similarly, one additional FTE will be needed to manage the additional data entry workload.

6. TRD also notes that HB 137 will require additional Information Systems Technology for both of the responsible agencies. The TRD estimates that the tracking system and database (to be created within the current cigarette tax system) will cost \$16,800.

ADMINISTRATIVE IMPLICATIONS:

Both the AGO and TRD assert the need for additional funding, FTE and enhanced IS technology. See Fiscal Implications above.

OTHER SUBSTANTIVE ISSUES:

The AGO reports the following consequences of not enacting this bill:

1. New Mexico may be out of step with the other states that are adopting this model bill to aid in their enforcement efforts.
2. Enforcement of the Non-Participating Statute protects New Mexico from exposure to the non-participating adjustment under the Master Settlement Agreement, which can significantly reduce payments received under the settlement. As it currently stands, the Non-Participating Statute would benefit immeasurably from the complementing provisions of HB 137. Without HB 137, the state will be denied needed tools that will allow for more effective enforcement of its Non-Participating statute.

TECHNICAL ISSUES

1. Sections 8(f) and 10(B) of HB 137 provide that the state shall be entitled to costs, expenses and attorneys fees if the state files suit under those sections to enforce the Act. This should probably state that the state can recover costs, expenses and attorneys fees if it brings suit and substantially prevails.
2. The definitions in HB 137 should more clearly identify / reference the Master Settlement Agreement (versus subsequent agreements that have arisen out of the Master Settlement Agreement). Also, the bill specifically cites to definitions in the Master Settlement Agreement and, in that most individuals will not have a copy of the Master Agreement at hand, restatement of the definitions may be helpful.

SJM/prr:yr