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## FISCAL IMPACT REPORT

SPONSOR: Rodella DATE TYPED: 3/21/03 HB 540/aHJC

SHORT TITLE: Minor in Possession of Tobacco SB \_\_\_\_\_

ANALYST: Maloy

### APPROPRIATION

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

(Parenthesis ( ) Indicate Expenditure Decreases)

### REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY03	FY04			
		Significant – See Narrative	Recurring	Federal

(Parenthesis ( ) Indicate Revenue Decreases)

Relates to HB 136. Conflicts with HB 277

### SOURCES OF INFORMATION

Responses Received From

- Department of Health
- Taxation and Revenue Department
- Office of the Attorney General
- Administrative Offices of the District Attorneys
- Administrative Offices of the Courts
- Department of Public Safety

### SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amended House Bill 540 to correct a technical error in spelling,

and to change the penalty for possession of tobacco by a minor.

With regard to penalties, the bill no longer contains a monetary fine or a community service option. Instead, the bill provides for the standard penalty for a misdemeanor (as set forth in the criminal code) or the completion of a tobacco use prevention or cessation program.

#### Synopsis of Original Bill

House Bill 540 amends the Tobacco Products Act to provide for penalties for a minor's *possession* of any tobacco product. As the law currently stands, a minor is prohibited from *procuring or attempting to procure* tobacco products, but no mention is made regarding the minor's possession of such products. House Bill 540 would make it clear that it is illegal for a minor to be in possession of tobacco products.

The bill also amends the Act to make it mandatory upon retailers and wholesalers that they are to refuse the sale of tobacco product to any person who can not produce an identity card as evidence that that person is eighteen years of age or older.

Finally, HB 540 increases the fine for a minor's violation of the Act from not less than \$100 to not less than \$500, and also provides for the option of enrolling in and completing a smoking prevention or smoking cessation program.

#### Significant Issues:

- House Bill 540 addresses the anomaly under current law that, notwithstanding that retailers are prohibited from selling tobacco products to minors, and that minors are prohibited from purchasing tobacco products, it is not illegal for a minor to possess tobacco products and there is no sanction for a minor who possesses tobacco products.
- If effectively enforced in schools and by law enforcement officers, making the possession of tobacco products illegal (with serious sanctions) will cause significant impact upon minors who currently possess tobacco products on a routine basis. If effectively enforced, it should serve as a significant deterrent.
- Opponents of such legislation may argue that this will be no different than outlawing the purchase and possession of alcoholic beverages by minors, and that the alcohol laws are difficult to effectively enforce. Regardless of the law, minors obtain alcohol and drink. The same will be true of tobacco products.

However, unlike alcohol, minors currently feel free to smoke during the day, at school, walking down the street, in restaurants, etc. without fear of impunity. This would stop. While minors may still find ways to obtain tobacco products (stealing them from their parents, or requesting another to purchase them), they will be far more unwilling to consume them openly and frequently. Rather, like alcohol consumption, smoking will be more limited to after-hours, unsupervised (party) activities. While this legislation is not a complete fix, it will undoubtedly curb daily, routine consumption, and may prevent, or make more difficult, addiction to tobacco products.

## FISCAL IMPLICATIONS

In broadening the reach of the law with respect to conduct engaged in by a substantial number of minors in the state, it can be anticipated that there will be fiscal and administrative issues surrounding the enforcement of House Bill 540. These impacts will be borne most heavily by the law enforcement agencies and the courts.

According to the Department of Health, the bill supports the current Synar amendment regulations, restricting the sale of tobacco to minors. The State of New Mexico must maintain no more than a 20% non-compliance rate of sales of tobacco products to minors, or the Department of Health may be at risk of losing up to 40% of its funds received from the Substance Abuse Treatment Block Grant, or up to \$3,428,340.

## TECHNICAL ISSUES

- On page 2, line 1, the word “possess” is misspelled.
- Confusion regarding the penalties has been raised--- whether the “new” penalty for violating the Act is a fine not to exceed \$500 **AND** enrollment in and completion of a smoking prevention or smoking cessation program or perform 48 hours of community service, or whether it is a fine not to exceed \$500 **OR** enrollment in and completion of a smoking prevention or smoking cessation program or perform 48 hours of community service.
- Is possession of a tobacco product a “delinquent act” to be included in the Children’s Code?

The Department of Health reports a number of technical issues for consideration:

- Throughout the document “a” tobacco product is referenced; it is recommended this be changed to “any”.
- On page 2, line 10 the word “goods” is used to reference tobacco products; it is recommended this be change to read “tobacco products”.
- On page 2, line 11, when referring to a person attempting to purchase tobacco, it states “is unable”; it is recommended this be changed to “cannot”, and the word “valid” be included before the words “identity card”. In the definitions, valid should be defined. There is no reference to the production of a false identification card; it is recommended this be added.
- On page 3, line 1, the word “be” needs removed. And, on lines 4 through 9, it states one or the other of the three penalties shall be imposed. It is recommended the wording allow a possible combination of penalties as well.
- Regarding the enrollment in and completion of a smoking prevention or cessation program, there is no clarity on who or how an assessment will be made as to which type program in which a minor will participate, whether the program is evidence based, or as to

the duration or dosage of such program.

- HB 540 imposes increased fines for attempted procurement, procurement or possession of tobacco products by minors. However, it does not state in which funds these fines will be placed. It is recommended these funds are used for tobacco prevention programming and such language is also included in this bill.

## **OTHER SUBSTANTIVE ISSUES**

The Department of Health provided the following general, statistical information:

- Smoking is a leading preventable cause of death in the state, causing about 2,100 deaths annually. If current trends continue, it is estimated that 44,000 New Mexico children and teens who are alive today will die prematurely from a disease caused by smoking.
- The economic burden of tobacco-related morbidity and mortality is staggering. A 2002 CDC publication of a Smoking Attributable Morbidity, Mortality and Economic Costs (SAMMEC) analysis estimated that \$360 million was spent in New Mexico in 1998 on direct health care costs due to smoking. Of this amount, \$144 million was spent providing Medicaid services, representing 15% of all Medicaid expenditures. Indirect costs for absenteeism and forfeited future earnings in 1999 due to smoking-caused morbidity and premature mortality in New Mexico totaled an additional \$397 million.
- Tobacco sales rates in New Mexico have dropped somewhat over the past five years, from a per capita rate of 105 packs per New Mexican in 1997 to a per capita rate of 85 packs in 2001. However, the American Journal of Public Health estimates that about 8.3 million, or about 10%, of cigarette sales are bought or smoked by minors in New Mexico each year. Underage tobacco sales are a major public health problem. Nationally, three of five underage smokers report that they buy their own cigarettes. Illegal sales of tobacco products to minors are estimated to amount to \$1.26 billion a year, and to generate over \$220 million in profits every year for the tobacco industry.
- Data collected by the Behavioral Health Services Division (BHSD) indicate that youth between the ages of twelve and seventeen use tobacco at a rate 3.6% higher than the national average; currently 16.6% of the youth in New Mexico report smoking cigarettes. This use of tobacco by youth is too high. Center for Substance Abuse Prevention-sponsored research has indicated that mandating attendance and completion of a smoking prevention or cessation program is an effective means of deterring the onset of use or thirty-day use. Penalizing youth for possession of tobacco products is more controversial.
- In different states, there are many variations of “youth possession” laws, in terms of the offence itself, the penalty imposed, and the agency responsible for enforcement. Offences addressed by such laws may include youth purchase, attempt to purchase, possession, and/or use of tobacco products. The most common provision is the prohibition of the purchase of tobacco by youth, with 33 states having such a law on their books, including New Mexico’s current Tobacco Products Act. Only 9 states prohibit purchase, possession, and use by minors, as would be provided by HB 540. (CDC Best Practices for Comprehensive Tobacco Control Programs, 1999.)

- The policy of penalizing youth for possession of tobacco products is controversial. While youth possession laws in various forms have become popular among legislators in recent years, the tobacco control community is divided over the relative merits of such a policy.

Arguments in favor of youth possession laws have included:

- diminishing social acceptability of youth smoking
- serving as a deterrent
- sending a consistent message
- rendering compliance a shared responsibility between sellers and purchasers
- keeping tobacco off school grounds.

Arguments against youth possession laws have included:

- their diverting enforcement resources from retailers
  - insufficient enforcement resources for them
  - potential for being counter-productive
  - potential for abuse by law enforcement officials
  - questionable value of penalties
  - lack of evidence that such laws are effective in inhibiting youth tobacco use.
- A well-referenced policy analysis of youth tobacco possession laws in the U.S. and Canada (Canadian Cancer Society, 2001; [www.quebec.cancer.ca](http://www.quebec.cancer.ca).) reports that “the most respected voices in tobacco control”, including the U.S. Surgeon General, the Center for Disease Control and Prevention, and the World Health Organization, have not endorsed youth possession laws. It also points out that there is no scientific evidence from controlled studies for such laws’ effectiveness in inhibiting youth tobacco use. Even where anecdotal experience may seem to show a positive impact in selected communities, it is impossible to separate the effects of the access laws from other components.

The Canadian Cancer Society (CCS) analysis strongly emphasizes that a possession law should only be considered as one element of a long-term, well-funded, and comprehensive strategy to reduce tobacco use among children and adults. As a minimum, the strategy should include the following measures:

- High tobacco taxes
  - Mandatory smoke-free workplaces and public places
  - Restrictions on tobacco product promotion
  - A mass media counter-advertising campaign
  - Curriculum-based anti-tobacco education
  - A strongly enforced prohibition on the supply to minors, such that the level of retailer compliance achieved is at least 85%.
- Department of Health tobacco control initiatives have produced advances with regard to effective mass media campaigns, anti-tobacco education, and compliance with the pro-

hibition on tobacco sales to minors. However, in New Mexico, the kind of well-funded, comprehensive strategy that the CCS report specifies, as a prerequisite to considering possession laws, has not been put in place. Such a strategy would require increased funding, increases in tobacco taxes, and improvements in implementing clean air ordinances.

- The mere existence of a law prohibiting youth from possessing tobacco may do nothing to diminish the social acceptability, among youth themselves, of youth smoking. Such measures may even be counterproductive; when such activities as smoking are defined as “for adults only”, they can become more, not less, appealing to youth. Enforcement would be particularly difficult: possession, unlike sales in stores, is not an observable public occurrence; and youth are surrounded by tobacco products, which are used legally by adults.

### **ALTERNATIVES**

The increased penalties proposed by HB 540 (Section 4) could be enacted without making it illegal for a minor to possess tobacco products.

**SJM/njw**