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FISCAL IMPACT REPORT

ORIGINAL DATE 01/20/15
LAST UPDATED 02/17/15 **HB** 15/aHHGIC/aHFL#1

SPONSOR Bandy

SHORT TITLE No Sales of E-Cigarettes to Minors **SB** _____

ANALYST Boerner

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY14 | FY15 | FY16 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|------|------|----------------------|------------------------------|------------------|
| Total | | NFI | | | | |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Relates to SB 232 which would add a new section to the Dee Johnson Clean Indoor Air Act to prohibit the use or possession of tobacco products, alternative nicotine products and vapor devices by minors. SB 232 would also prohibit the sale of alternative nicotine products and vapor devices to minors by broadening existing law that already prohibits the sale of tobacco products to minors.

Relates to HB 78 which would transfer \$100 million dollars from the general fund operating reserve to the Tobacco Settlement Permanent Fund on the effective date of the act.

Responses Received From

Department of Health (DOH)
 Administrative Office of the Courts (AOC)
 Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of House Floor Amendment # 1

House Floor amendment number 1 strikes the HHGIC amendment and adds the very same amendment: "APPLICABILITY--The provisions of the Tobacco Products and E-Cigarette Act do not apply to the lawful purchase or use by a minor of a tobacco-cessation product approved by the Federal Food and Drug Administration."

Additionally, the HFL1 adds a temporary provision directing that by August 1, 2014, the Public Education Department shall revise its tobacco, alcohol and drug free school districts policy to include e-cigarettes, as defined in Section 30-49-2 NMSA 1978

[Section 30-49-2 NMSA 1978 defines “minor” as used in the Tobacco Products Act an individual who is less than eighteen years of age].

Synopsis of HHGIC Amendment

The House Health, Government & Indian Affairs Committee amendment to House Bill 15 proposes to add a new section that would read as follows: "APPLICABILITY--The provisions of the Tobacco Products and E-Cigarette Act do not apply to the lawful purchase or use by a minor of a tobacco-cessation product approved by the Federal Food and Drug Administration."

SIGNIFICANT ISSUES

Current FDA regulations indicate that over-the-counter purchase of FDA-approved cessation aids is not approved for minors and that use of these products should be under the care and supervision of a health care professional.

www.fda.gov/forconsumers/consumerupdates/ucm198176.htm

Synopsis of Original Bill

House Bill 15 amends the Tobacco Products Act by changing the title to the “Tobacco Products and E-Cigarettes Act,” providing a definition for “e-cigarette,” and prohibiting sales of e-cigarettes to minors, including online internet sales to minors in New Mexico.

DOH defines “e-cigarettes” as battery-operated electronic smoking devices designed to deliver nicotine, flavor and other chemicals. They turn highly addictive nicotine and other chemicals into a vapor that is inhaled by the user. Most electronic smoking devices are manufactured to look like conventional cigarettes, cigars, or pipes. Some resemble everyday items such as pens and USB memory sticks (Food and Drug Administration, 2013). E-cigarettes, first sold primarily over the Internet and in shopping mall kiosks, are widely available now in many local convenience stores, gas stations, retail tobacco stores and standalone e-cigarette shops (Tobacco Control Legal Consortium, 2013).

FISCAL IMPLICATIONS

Respondent agencies all indicated none or unknown fiscal implications. RLD noted the Tobacco Products Act requires monitoring of establishments including random inspections by the RLD Alcohol and Gaming Division (AGD) and appropriate law enforcement authorities in counties and municipalities, and this bill would extend that monitoring to e-cigarettes as well. Since AGD has no inspectors or funding to hire staff to conduct the required inspections, this portion of the statute has historically been interpreted to mean enforcement would rely on certified peace officers.

If the intent of this bill is to cause AGD to undertake inspections and monitoring, AGD would require funding for two FTE (\$115 thousand annually) to conduct inspections around the state as well as vehicles (\$50 thousand annually), gas, per diem, meals lodging, and equipment (\$15 thousand annually).

The Department of Public Safety, Special Investigations Division (DPS) currently conducts inspections for liquor related issues and the AGD conducts administrative hearings and collects

any administrative fines issued against license holders. The penalties under this bill are criminal in nature and would be prosecuted by the criminal court system and revenue from fines would be collected by the courts.

SIGNIFICANT ISSUES

DOH provided a full background and health implications summary. Most important to note:

- According to the Food and Drug Administration (2013), the safety and efficacy of e-cigarettes have not been fully studied; therefore, e-cigarettes have not been proven to be safe products and the health risks associated with their use are unknown;
- The popularity of e-cigarettes among youth has been rapidly escalating nationwide and the potential for e-cigarette use to escalate among youth is enhanced by e-cigarette manufacturers using flavoring strategies appealing to youth once used by cigarette manufacturers;
- The Tobacco Control Legal Consortium recommends that, in most circumstances, existing definitions of “tobacco products” in tobacco control laws should be broadened to include e-cigarettes and similar products;
- There are no federal or New Mexico state statutes or regulations governing the manufacturing, marketing, or sale of electronic smoking devices; however, 23 states ban sales to minors, 3 states ban use in public and work places, and 1 state broadened the definition of taxable tobacco products to include e-cigarettes;
- As of January 6, 2014, the City of Albuquerque passed an ordinance prohibiting sale of vapor products to minors. The City of Santa Fe is currently considering similar action.

Please see HB 15 Attachment 1 for the complete background and health implications summary provided by DOH.

RLD notes that state legislation regarding tobacco sales of cigarettes generally must be in compliance with the Jenkins PACT Act, although some states exclude nicotine-free “E-cigarettes.”

[The federal Prevent All Cigarette Trafficking (PACT) Act, 15, U.S.C. § 375, et seq. became effective June 30, 2010. The PACT Act amended provisions of the Jenkins Act (15 U.S.C. §§ 375 - 378) regarding the shipment and packaging of tobacco products, compliance with state tax and licensing requirements, and the filing of certain reports with the state tobacco tax administrator. The Jenkins Act, as amended, requires every person including cigarette manufacturers, wholesalers, distributors, and delivery sellers, who sell, transfer, or ship for profit cigarettes, roll-your-own (ryo) tobacco, and smokeless tobacco in interstate commerce to register with the US Attorney General and the state tobacco tax administrator of each state into which shipments are made, and file monthly reports with the state tobacco tax administrator, no later than the 10th of each month.]

RLD also points out the bill would require all tobacco or e-cigarettes to be sold in their original factory sealed packages; however, many e-cigarette products are not pre-packaged but are sold in bulk. The liquid used in many of these products is also not pre-packaged by a factory. It is unclear whether the bill intends to prohibit sale of these types of bulk products.

The AOC points out that New Mexico’s Attorney General is among 40 attorneys general who signed a letter to the federal Food and Drug Administration urging regulation of e-cigarettes in the same manner as tobacco products. Additionally, the FDA has stated it intends to issue a proposed rule extending FDA’s tobacco product authorities beyond traditionally-regulated tobacco products to include other products like e-cigarettes.

(See <http://www.fda.gov/newsevents/publichealthfocus/ucm172906.htm>)

PERFORMANCE IMPLICATIONS

DOH notes that HB 15 relates to the “reduce tobacco use” goals of the 2014-2016 NM State Health Improvement Plan and the 2014-2016 NM Department of Health Strategic Plan.

AMENDMENTS

The DOH provided a number of amendment recommendations, primarily to:

- Amend the definition of “tobacco product” to include products made or derived from tobacco, regardless of how they are consumed;
- Include a more refined definition of “electronic smoking device” to replace the definition of “e-cigarette;”
- Replace all references to “e-cigarette” with “including electronic smoking devices;” and,
- Replace “Preemption” language on page 6 with, “Nothing in the Tobacco Products including Electronic Smoking Devices Act shall be construed to preempt or in any manner preclude specific provisions of a county or municipal ordinance to prohibit the sale of tobacco products including e-cigarettes to minors; provided that the provisions of such a county or municipal ordinance are inclusive of all minimum standards and provisions for prohibiting the sale of tobacco products including e-cigarettes to minors within the Tobacco Products including Electronic Smoking Devices Act.”

Please see HB 15 Attachment 1, paragraph II, for the full listing of proposed DOH amendments.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The title of the “Tobacco Products Act” would remain unchanged. A definition for “e-cigarette” would not be added to the act. The sales of e-cigarettes, including online internet sales, would not be prohibited to minors in New Mexico.

CB/svb;jl

2013 LEGISLATIVE SESSION
AGENCY BILL ANALYSIS

Section I: General

HB 15
SB _____

Date (of THIS analysis): 1/8/2014

Correction:
Amendment:
Substitute:

Sponsor(s): Paul C. Bandy

Short Title: No Sales of E-cigarettes to Minors

Reviewing Agency: Department of Health

Person Writing Analysis: Tres Hunter Schnell
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Phone Number: 827-

Section II: Fiscal Impact

APPROPRIATION (dollars in thousands)

| Appropriation Contained | | Recurring or Nonrecurring | Fund Affected |
|-------------------------|-------|---------------------------|---------------|
| FY 13 | FY 14 | | |
| \$ | \$ | | |
| \$ | \$ | | |
| \$ | \$ | | |

REVENUE (dollars in thousands)

| Estimated Revenue | | | Recurring or Nonrecurring | Fund Affected |
|-------------------|-------|-------|---------------------------|---------------|
| FY 13 | FY 14 | FY 15 | | |
| \$ | \$ | \$ | | |
| \$ | \$ | \$ | | |

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY 13 | FY 14 | FY 15 | 3 Year Total Cost | Recurring or Non-recurring | Fund Affected |
|--------------|-------|-------|-------|-------------------|----------------------------|---------------|
| Total | \$ | \$ | \$ | \$ | | |

Section III: Relationship to other legislation

Duplicates: None

Conflicts with: None

Companion to: None

Relates to: None

Duplicates/Relates to an Appropriation in the General Appropriation Act: None

Section IV: Narrative

1. BILL SUMMARY

a) Synopsis

House Bill 15 (HB15) has been introduced on behalf of the Tobacco Settlement Revenue Oversight Committee to amend the title of the “Tobacco Products Act” to “Tobacco Products and E-Cigarettes Act,” to add a definition for “e-cigarette,” and to prohibit the sales of e-cigarettes to minors, including online internet sales to minors in New Mexico.

b) Significant Issues

Electronic smoking devices, also known as e-cigarettes, are battery-operated products designed to deliver nicotine, flavor and other chemicals. They turn highly addictive nicotine, and other chemicals into a vapor that is inhaled by the user. Most electronic smoking devices are manufactured to look like conventional cigarettes, cigars, or pipes. Some resemble everyday items such as pens and USB memory sticks ([Food and Drug Administration, 2013](#)). E-cigarettes, first sold primarily over the Internet and in shopping mall kiosks, are widely available now in many local convenience stores, gas stations, retail tobacco stores and standalone e-cigarette shops ([Tobacco Control Legal Consortium, 2013](#)).

There are currently no federal or New Mexico state statutes or regulations governing the manufacturing, marketing, or sale of electronic smoking devices. E-cigarettes have not been proven to be safe products and the health risks associated with their use are unknown ([Campaign for Tobacco-Free Kids, 2013](#)).

Popularity of e-cigarettes among youth has been rapidly escalating nationwide. According to the [Centers for Disease Control and Prevention \(CDC\) \(September, 2013\)](#), "... e-cigarette experimentation and recent use doubled among US middle and high school students between 2011 and 2012. For students in grades 6-12, “ever use of e-cigarettes” increased from 3.3% to 6.8%; “current e-cigarette use” increased from 1.1% to 2.1%, and “current use of both e-cigarettes and conventional cigarettes” increased from 0.8% to 1.6%.”

The potential for e-cigarette use to escalate among youth is enhanced by e-cigarette manufacturers using flavoring strategies once used by cigarette manufacturers. According to the [Campaign for Tobacco-Free Kids \(October, 2013\)](#), e-cigarette manufacturers "are offering kid-friendly flavors reminiscent of kids’ cereal (e.g., Fruit Loops and Cinnamon Toast Crunch), baked goods (chocolate chip cookies and brownie), and candy (banana Laffy Taffy cherry crush, and gummi bear)." In addition to flavors, e-cigarette manufacturers use

cartoons to sell e-cigarettes, even though for many years the major manufacturers of traditional cigarettes have been banned from using cartoons to advertise. ([National Association of Attorneys General, 2013](#)).

According to the [Food and Drug Administration \(2013\)](#), the safety and efficacy of e-cigarettes have not been fully studied, so it is unknown: whether they are safe for their intended use; how much nicotine or other chemicals may be inhaled; whether there are any risks from the secondhand vapors for non-users; or whether the use of e-cigarettes can increase nicotine addiction among youth or lead them to try other tobacco products. The Food and Drug Administration is considering classifying e-cigarettes as "tobacco products," which would extend its reach and potentially subject e-cigarettes to a host of rules and regulations that apply to tobacco products ([Food and Drug Administration, 2013](#)).

Several states and local jurisdictions are applying laws governing tobacco products to e-cigarettes. Currently, 23 states ban sales to minors, 3 states ban use in public and work places, and 1 state broadened the definition of taxable tobacco products to include e-cigarettes (Correspondence with Campaign for Tobacco Free Kids, 9/10/13). As of January 6, 2014, the City of Albuquerque passed an ordinance prohibiting sale of vapor products to minors. The City of Santa Fe is currently considering similar action.

A growing number of elected officials at state and federal levels are demanding strong actions to stop the marketing and sale of electronic cigarettes to minors. According to the [Campaign for Tobacco-Free Kids \(September, 2013\)](#), Attorneys General representing 40 states, 10 United States (U.S.) Senators, and 2 U.S. House members are also advocating for strong measures to stop the marketing and sale of electronic cigarettes to minors.

The Tobacco Control Legal Consortium (Consortium) recommends that, in most circumstances, existing definitions of "tobacco products" in tobacco control laws should be broadened to include e-cigarettes and similar products. Defining e-cigarettes solely as standalone products rather than including them in a broadened definition of "tobacco products" risks disqualifying these devices from current tobacco products restrictions. Broadening the general definition of "tobacco products" to clearly include electronic smoking devices would subject such devices to the same legal restrictions applied to other tobacco products, such as youth access, sales, and marketing restrictions. The Consortium recommends including – in the same section of the statute or ordinance – a separate definition of e-cigarette in addition to the broadened definition of "tobacco product." The Consortium emphasizes the need for clear definitions and concise language to avoid confusion about what constitutes an e-cigarette. They advise that, "...definitions should be explicit about what they cover yet broad enough to anticipate future product innovations. This eliminates ambiguity if new products or components are released that are similar to those already in existence but would not fall under a narrow definition." ([Tobacco Control Legal Consortium, 2013](#))

2. PERFORMANCE IMPLICATIONS:

HB15 relates to the "Reduce tobacco use" goals of the 2014-2016 NM State Health Improvement Plan and the 2014-2016 NM Department of Health Strategic Plan.

3. FISCAL IMPLICATIONS:

No implications for DOH.

4. ADMINISTRATIVE IMPLICATIONS:

No implications for DOH.

5. DUPLICATION, CONFLICT, COMPANIONSHIP OR RELATIONSHIP

None

6. TECHNICAL ISSUES:

None

7. LEGAL/REGULATORY ISSUES (OTHER SUBSTANTIVE ISSUES):

None

8. DISPARITIES ISSUES:

None

9. ALTERNATIVES:

None

10. WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?

The title of the "Tobacco Products Act" would remain unchanged. A definition for "e-cigarette" would not be added to the act. The sales of e-cigarettes, including online internet sales, would not be prohibited to minors in New Mexico.

11. AMENDMENTS:

Propose to change to page 1, line 21 to read "Tobacco Products including Electronic Smoking Devices Act" instead of "Tobacco Products and E-Cigarette Act".

Propose to change page 2, line 1 to read "Tobacco Products including Electronic Smoking Devices Act:" instead of "Tobacco Products and E-Cigarette Act:"

Propose to change page 2, lines 3 through 11 to read "Tobacco product" means any product that is made from or derived from tobacco or contains nicotine or a similar substance, and is intended for human consumption or is likely to be consumed, whether smoked, heated, chewed, absorbed, dissolved, inhaled or ingested by any other means, including, but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, snus, or an electronic smoking device. "Tobacco product" does not include any product specifically approved by the U.S. Food and Drug Administration for sale as a tobacco cessation product that is being marketed and sold solely for the approved purpose. "Electronic smoking device" means any product containing or delivering nicotine or any other similar substance intended for human consumption that can be used by a person to simulate smoking through inhalation of vapor or aerosol from the product. "Electronic smoking device" includes any component part of such product whether or not sold separately. "Electronic smoking device" does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product and is being marketed and sold solely for the approved purpose." instead of "A. "e-cigarette": (1) means any electronic oral device, whether composed of a heating element and battery or an electronic circuit, that provides a vapor of nicotine or any other substances the use or inhalation of which simulates smoking; and (2) includes any such device, or any part thereof, whether manufactured, distributed, marketed or sold as an e-cigarette, e-cigar, e-pipe or any other product, name or descriptor."

Propose to change page 2, line 16 to read "TOBACCO INCLUDING ELECTRONIC SMOKING DEVICES" instead of "TOBACCO AND E-CIGARETTE."

Propose to change page 2, line 18 to read "including electronic smoking devices" instead of "or an e-cigarette".

Propose to change page 2, line 21 to read "including electronic smoking devices" instead of "or e-cigarette".

Propose to change page 2, line 24 to read "including electronic smoking devices" instead of "or an e-cigarette".

Propose to change page 3, lines 3 through 4 to read "REFUSAL TO SELL TOBACCO PRODUCTS INCLUDING ELECTRONIC SMOKING DEVICES" instead of "REFUSAL TO SELL TOBACCO PRODUCTS OR E-CIGARETTES".

Propose to change page 3, lines 5 through 6 to read "refuse to sell tobacco products including electronic smoking devices" instead of "refuse to sell tobacco products or e-cigarettes".

Propose to change page 3, lines 14 through 15 to read "including electronic smoking devices" instead of "or e-cigarettes".

Propose to change page 3, line 19 to read "INCLUDING ELECTRONIC SMOKING DEVICES" instead of "AND E-CIGARETTES".

Propose to change page 3, line 23 to read "including electronic smoking devices" instead of "or e-cigarettes".

Propose to change page 4, line 3 to read "including electronic smoking devices" instead of "or e-cigarettes".

Propose to change page 4, line 7 to read "including electronic smoking devices" instead of "or e-cigarettes".

Propose to change page 4, line 16 through 19 to read "C. The online internet sale of tobacco products including electronic smoking devices to a minor in New Mexico is prohibited." instead of "C. The provisions of this section do not apply to written, telephonic or electronic sales of tobacco products. D. The online internet sale of e-cigarettes to a minor in New Mexico is prohibited."

Propose to change page 4, lines 22 through 23 to read "INCLUDING ELECTRONIC SMOKING DEVICES" INSTEAD of "OR E-CIGARETTES".

Propose to change page 4, line 25 to read "including electronic smoking devices" instead of "or e-cigarettes".

Propose to change page 5, line 1 to read "including electronic smoking devices" instead of "or e-cigarettes".

Propose to change page 5, line 10 to read "including electronic smoking devices" instead of "or e-cigarettes".

Propose to change page 5, line 11 to read "including electronic smoking devices" instead of "or e-cigarettes".

Propose to change page 5, line 12 to read "including electronic smoking devices" instead of "or e-cigarettes".

Propose to change page 5, line 15 to read "INCLUDING ELECTRONIC SMOKING DEVICES" instead of "OR E-CIGARETTES".

Propose to change page 5, line 17 to read "INCLUDING ELECTRONIC SMOKING DEVICES" instead of "OR E-CIGARETTES".

Propose to change page 6, lines 1 through 2 to read ‘including electronic smoking devices" instead of "or e-cigarettes”.

Propose to change page 6, line 3 to read "Tobacco Products including Electronic Smoking Devices Act" instead of "Tobacco Products and E-Cigarette Act".

Propose to change page 6, line 8 to read ‘including electronic smoking devices" instead of "or e-cigarettes”.

Propose to change page 6, lines 9 through 10 to read "Tobacco Products including Electronic Smoking Devices Act" instead of "Tobacco Products and E-Cigarette Act".

Propose to change page 6, lines 6 through 10 to read "EXPLICIT NONPREEMPTION.--Nothing in the Tobacco Products including Electronic Smoking Devices Act shall be construed to preempt or in any manner preclude specific provisions of a county or municipal ordinance to prohibit the sale of tobacco products including e-cigarettes to minors; provided that the provisions of such a county or municipal ordinance are inclusive of all minimum standards and provisions for prohibiting the sale of tobacco products including e-cigarettes to minors within the Tobacco Products including Electronic Smoking Devices Act.” instead of "30-49-11. PREEMPTION.--When a municipality or county adopts an ordinance or a regulation pertaining to sales of tobacco products or e-cigarettes, the ordinance or regulation shall be consistent with the provisions of the Tobacco Products and E-Cigarette Act."