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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 02/18/15  
**LAST UPDATED** 03/18/15

**SPONSOR** SPAC **HB** \_\_\_\_\_  
**SHORT TITLE** Include E-Cigarettes in Tobacco Products Act **SB** 433/SPACS/aSJC  
**ANALYST** Dunbar/Chabot

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Companion to HB 42; HB 213; SB 360  
 Relates to HB 148  
 Relates to Appropriation in the General Appropriation Act

### SOURCES OF INFORMATION

Responses Received From  
 Public Education Department (PED)  
 New Mexico Corrections Department (NMCD)

### SUMMARY

#### Synopsis of Senate Judiciary Committee Amendment

Senate Judiciary Committee amendment to Senate Public Affairs Committee Substitute for Senate Bill 433 changes the definition of a “child-resistant” package to be significantly difficult for children under five to open or obtain a toxic or harmful amount of the substance in the container within a reasonable time but not difficult for an adult to use properly. It further states a “nicotine liquid container” does not include a pre-filled cartridge sealed by the manufacturer and not intended to be opened by the consumer.

#### Synopsis of the Original Bill

CS/433/SPAC amends the Tobacco Products Act title to the “Tobacco Products, E-Cigarette and Nicotine Liquid Container Act.” The bill prohibits the sales of e-cigarette and nicotine liquid containers to minors and requires nicotine liquid containers to be sold in child resistant packaging. In addition, CS/433/SPAC prohibits the online internet sale of e-cigarette and nicotine liquid containers to minors in New Mexico. The bill provides for penalties for violations

of the act.

This bill addresses a concern of PED with the previous SB 433 in which the regulation of sales to minors, free samples, vending machine sales restrictions, and the prohibition of internet sales would only apply to “devices” and not to nicotine liquid. PED notes that nicotine in the form of gels and semi-solids are not included in the definitions, leaving many current and emerging nicotine products unregulated.

CS/433/SPAC calls for the NM Public Education Department to revise its Tobacco, Alcohol, and Drug Free School Districts Rule (NMAC 6.12.4) to include e-cigarettes and nicotine liquid containers as defined in Section 2 of this bill by August 1, 2015.

The bill requires child-resistant packaging, as defined in Section 2.A of CS/433/SPAC of certain nicotine liquid products and proposes to prohibit the sales of e-cigarette devices or a nicotine liquid container to minors. Such acts would continue to constitute as a penalty under law in accordance with the newly amended sections 30-49-3, 7, 8 or 9 NMSA 1978.

An exception to this proposed ruling is stated in Section 7 of CS/433/SPAC, wherein free samples of tobacco products in connection with the practice of cultural or ceremonial activities in accordance with the federal American Indian Religious Freedom Act would be allowed.

The bill expands the Tobacco Products Act to include e-cigarettes and nicotine liquid containers. More specifically, the bill criminalizes the knowing sell or offer to sell of e-cigarettes and nicotine liquid containers to minors, and the crime constitutes a misdemeanor (the same penalty the current law imposes for the knowing sale or offer to sale of regular cigarettes to minors). The bill adds a new section to the law regarding nicotine liquid containers, making it a misdemeanor to sell or offer to sell such containers at retail unless the container is child resistant.

Finally, the bill makes any minor who procures or attempts to procure any e-cigarettes (as opposed to regular cigarettes) and nicotine liquid containers or any minor who presents any written, printed or photostatic evidence of age or identity that is false for the purpose of procuring or attempting to procure any e-cigarettes and nicotine liquid containers, subject to a fine not to exceed \$100 or 48 hours of community service.

## **FISCAL IMPLICATIONS**

As no financial allocation is provided through this bill, the PED and NMCD would be required to carry out its revisions to state rules with currently available staff.

It is difficult for NMCD to estimate the fiscal impact of this or any new misdemeanor crime(s) bill. However, the NMCD does not normally incarcerate misdemeanor offenders in its prisons, unless the offender is guilty of multiple crimes making his incarceration period one year or more. Therefore, the NMCD reasonably estimates that the bill will result in no or only a minimal increase in the number of offenders sentenced to NMCD custody or supervision.

However, it is important to consider the bill’s impact, as described by NMCD, on deterring criminal activity and protecting minors, and the ultimate economic savings or benefits it could garner for the state. For example, should this bill’s new misdemeanor crime regarding selling e-cigarettes and nicotine liquid containers to minors increase the public’s sense of safety by

detering and reducing crime victimization, a host of savings could be realized by this state. These savings range from reducing the expenses and impact of crimes upon victims or reducing minors' exposure to potentially harmful e-cigarettes and nicotine liquid containers, reducing the costs associated with victim support and advocacy services as well as court costs to adjudicate offenders.

## **SIGNIFICANT ISSUES**

NMAC 6.12.4.7 currently defines tobacco to mean "...substances that include, but are not limited to cigarettes, cigars, chewing tobacco, dipping tobacco, snuff and similar substances."

CS/433/SPAC defines "e-cigarette and nicotine liquid containers" in Section 30-49-2 NMSA 1978. This definition addresses the concerns of PED mentioned in SB 433.

The Tobacco Control Legal Consortium, as mentioned by PED, recommends that, in most circumstances, existing definitions of "tobacco products" in tobacco control laws should be broadened to include e-cigarettes and similar products in order to subject such devices to the same legal restrictions applied to other tobacco products, such as youth access, sales, and marketing restrictions. The Consortium advises 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, 2014](#))

Albuquerque Public Schools recently prohibited the use and/or possession of tobacco products, including e-cigarettes, in the Albuquerque Public Schools [2014-15 Student Behavior Handbook](#), page 12. This model school policy defines tobacco product to mean "any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product."

PED talked about the American Academy of Pediatrics' position on electronic smoking devices. The Academy states that to prevent poisoning, all e-liquids should be required to be sold in child-proof packaging (<http://www.aap.org/en-us/advocacy-and-policy/state-advocacy/Documents/E-Cigarettes.pdf>).

Additional points described by PED surmise that from 2010 to 2014, 139 cases of human exposure to e-cigarettes or liquid nicotine have been reported to the NM Poison and Drug Information Center. Children, drawn to nicotine liquid because of its many kid-friendly flavors, are especially vulnerable to nicotine poisoning. Also a reported dramatic increase in the number of such exposures, including a doubling from 2012 (17 cases) to 2013 (34 cases), nearly doubling again from 2013 (34 cases) to 2014 (62 cases) with 45 percent of these exposures in New Mexico having occurred among children, ages five years or younger. The uptick in reported exposures to liquid nicotine products in New Mexico mirrors trends seen nationwide. Nationally, the number of calls to poison centers involving e-cigarette liquids containing nicotine rose from 1 per month in September 2010 to 215 per month in February 2014. More than half (51.1 percent) of the calls to poison centers due to e-cigarettes involved young children under age 5. (Sources: [http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-e-liquid-packaging-2014\\_0.pdf](http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-e-liquid-packaging-2014_0.pdf))

New Mexico Poison and Drug Information Center, 2010-2014 data  
[www.cdc.gov/mmwr/preview/mmwrhtml/mm6313a4.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6313a4.htm))

The use of electronic smoking devices is on the rise among youth throughout the nation. In 2014, the [Monitoring the Future Survey](#) found that the use of e-cigarettes among teens surpassed the use of traditional cigarettes. More than twice as many 8th and 10th graders reported using e-cigarettes than traditional cigarettes, and among 12th graders, 17 percent reported currently using e-cigarettes compared with 14 percent who used traditional cigarettes. The National Youth Tobacco Survey found that e-cigarette use among high school students tripled between 2011 and 2013, increasing from 1.5 percent to 4.5 percent. Finally, in response to public comments obtained during regional Youth Risk and Resiliency Survey (YRRS) presentations in every region across the state, New Mexico youth e-cigarette usage data will be collected in the 2015 YRRS.

(Sources: [www.monitoringthefuture.org/pressreleases/14cigpr\\_complete.pdf](http://www.monitoringthefuture.org/pressreleases/14cigpr_complete.pdf) and [www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm?s\\_cid=mm6235a6\\_e](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm?s_cid=mm6235a6_e))

## **PERFORMANCE IMPLICATIONS**

CS/433/SPAC supports the PED’s strategic lever that all students are ready to learn by reinforcing the linkage between health and academic success.

## **ADMINISTRATIVE IMPLICATIONS**

The PED will have to revise its rule to include e-cigarettes and nicotine liquid containers as defined by the proposed definitions to Section 30-49-2 NMSA. The PED would need to post notice of a public hearing for proposed rule changes to NMAC 6.12.4, hold public hearings, and post the final rule. It will be necessary to inform school districts of this change in rule. The PED currently has the capacity to carry out these revisions.

## **TECHNICAL ISSUES**

PED notes that SB433/SPACS proposes a definition of e-cigarettes which includes nicotine liquid. It does not include nicotine in the form of gels and semi-solids, leaving many current and emerging nicotine products unregulated

## **CONFLICT, RELATIONSHIP**

SB433/SPACS is a companion to:

- HB42, which amends 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.
- HB213, which proposes to require the use of child-resistant packaging for nicotine liquids, providing penalties, including civil action in a district court by the Attorney General, a permanent or temporary injunction, a restraining order, or any other appropriate order, including a civil penalty, not to exceed one thousand dollars.
- SB360, which adds a definition of “tobacco products,” restricts vending machine sales to age-controlled locations where minors are not permitted, restricts free samples, provides explicit non-preemption, and imposes penalties.

SB 433 relates to:

- HB148, which amends and enacts sections of the motor vehicle code to prohibit and establish penalties for smoking in any motor vehicle when a minor is present.

BD/bb/aml/je/aml/je