



Synopsis of SFC Amendment

The Senate Finance Committee amendment to the Senate Judiciary Committee substitute for Senate Bill 131 strikes the appropriation from the bill and requires the new tobacco products administration fund to be appropriated by the Legislature.

Synopsis of Original Bill

The Senate Judiciary Committee substitute for Senate Bill 131 repeals and replaces the Tobacco Products Act enacted in 2019 to add state licensure of in-state manufacturing, distribution or retail sale of tobacco products to the existing provisions on sales to minor and e-cigarettes and liquid nicotine containers. The bill broadly defines “Tobacco product” and carries a \$350 thousand general fund appropriation to the Alcohol Beverage Control Division (ABCD) of the Regulation and Licensing Department (RLD).

The Act incorporates all tobacco products and defines tobacco products as any product made from tobacco or nicotine, intended for human consumption, including cigars, cigarettes, chewing tobacco, pipe tobacco, snuff, e-cigarettes, and electronic nicotine delivery systems. The Act excludes products regulated as a drug or device by the U.S. Food and Drug Administration.

Specifically, the bill:

- Creates and requires licensure for the following tobacco product related activities: manufacture, distribution, and retail sales. Such regulation to include: qualifications of licensure, including issuance, renewals, fines and revocations; inspection and monitoring; and record keeping.
- Allows ABCD to promulgate rules in order to administer the Act.
- Requires ABCD to begin issuing licenses to manufacturers, distributors, and retailers of tobacco products. The licenses are non-transferrable from person to person, but may be transferred to a different location with approval.
- Provides fees to be charged:
  - Manufacturers, up to \$850, application fee, for a one-year license, per location;
  - Distributors, up to \$850, application fee, for a one-year license, per location;
  - Retailers, up to \$850, application fee for a one-year license.
- Provides for administrative penalties for violations of the Act. The bill provides that ABCD may suspend or revoke a license, require the use of identification verification software, or impose an administrative penalty in an amount not more than ten thousand dollars (\$10,000), or any combination thereof.
  - Upon the fourth violation for sale of a tobacco product to a minor at the same location within a three-year time period, the license issued for that location shall permanently be revoked.
- Grants RLD and the Department of Public Safety (DPS) authority to enforce the Act. RLD is limited to authority over the administrative requirements. The Act allows for

RLD, DPS, and local law enforcement to conduct inspections of any place tobacco products are sold, manufactured, or distributed.

- Defines “minor” under the Tobacco Products Act to mean an individual who is younger than twenty-one years of age. This bill removes criminal penalties for minors attempting to purchase tobacco products.
  - The bill prohibits the sale of tobacco products that are knowingly attractive to minors and the sale of tobacco products from vending machines unless the vending machine is in age-controlled locations off limits to minors.
- Creates the non-reverting “tobacco products administration fund” which will include application fees and administrative penalties collected by ABCD, in order to administer the Act.
  - The original bill provided a continual appropriation of money in the fund to ABCD, but this appropriation was stripped from the bill by the Senate Finance Committee amendment.
- Repeals NMSA 1978, Sections 30-49-1 through 30-49-13 (the Tobacco Products, E-Cigarette and Nicotine Liquid Container Act)

The effective date of this bill is 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 was resolved with the SFC amendment.*

The bill creates the tobacco products administration fund for monies generated by licensing fees and administrative penalties.

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.

## 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 that includes licensing. If passed, New Mexico would be the first state to create such a framework for e-cigarettes.

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.

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.<sup>1</sup>

According to statements from 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.

The NM Department of Health (DOH) provided the following discussion:

The greatest health impact from [this bill] will come from reducing legal and social access to tobacco products by youth and young adults. With approximately 84,000 New Mexicans suffering from smoking-related diseases and with an estimated economic burden of \$1.4 billion annually the proposed legislation seeks to reduce the likelihood young people will ever begin using tobacco products by raising the legal age to purchase these products to 21 years.

Pairing the increase in the age of sale of tobacco to 21 years with a robust new tobacco retailer regulatory and licensing system to ensure enforcement could reduce youth and young adult tobacco use, curtail nicotine addiction, and reduce poor health outcomes and death in New Mexico. Nationally, tobacco sales to those younger than 21 years account for just 2% of total tobacco sales, yet produce 90 percent of new smokers ([American Journal of Public Health, 2014](#)). A recent evaluation report of Oregon's Tobacco 21 law found that it reduced initiation of tobacco use among youth and young adults and decreased the perceived ease of access to tobacco products ([2019 Oregon Health Authority Report](#)). In addition, a [2015 Institute of Medicine](#) report noted that an increase in tobacco sales age to 21 years would reduce adult smoking prevalence by 12 percent.

In this new proposed Tobacco Products Act, the Department of Public Safety (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 the new law does not require DPS to exercise its authority, nor is the ABCD required to request the DPS to investigate or enforce, DPS expects 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 DPS, the department believes this could result in significant fiscal implications for DPS, since the department 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

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<sup>1</sup> <https://www.fda.gov/tobacco-products/compliance-enforcement-training>

New Mexico Human Services Department. The current grant is limited to \$117,000 for annual overtime expenses specifically for tobacco-related minor compliance operations. DPS states the 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.

DPS also provided the following discussion regarding the removal of criminal penalties for minors possessing or attempting to procure tobacco products:

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 SB131. DPS would prefer wording similar to that offered in Section 25 of Senate Bill 9, which makes it a petty misdemeanor for a minor to possess or procure products. Alternatively, a civil penalty could be imposed for minors.

Previous responses from the Taxation and Revenue Department (TRD) indicated the following regarding licensing of tobacco products:

TRD auditors with experience in both the more regulated alcohol industry and less regulated tobacco industry expect a significant improvement in tobacco tax compliance as a result of this bill. Unlike in most other states that regulate tobacco sales, New Mexico auditors have seen the rightful ownership of the tobacco business come into question in some cases. In the tobacco retail segment, businesses open, close, and transfer ownership regularly, increasing the cost of ensuring equitable tax compliance. Licensing would not only keep the department apprised of who the tobacco retailers and distributors are in New Mexico, but licensing would provide the department with a cleaner audit trail. Overall, licensing retailers would garner a significant increase in compliance with the Tobacco Products Tax.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

House Bill 195 was a duplicate of this bill prior to substitution and amendment.

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.

### **TECHNICAL ISSUES**

According to the New Mexico Attorney General's Office (NMAG):

Currently, TRD issues licenses for cigarette manufacturers and distributors, and regulates their retail sales. To avoid confusion or arguments of implicit revocation, [this bill] should clearly state that these (TRD) license requirements are unaffected by it.

To protect New Mexico's rights under the Master Settlement Agreement, [this bill] should include a licensing requirement that distributors and retailers only carry cigarettes, little cigars and roll-your-own tobacco products that are listed on the New Mexico Tobacco Directory, See NMSA 1978, Secs. 6-4-12 through 24. Such requirement is included for manufacturers only in Section 4(C)(2). Likewise, the definition of "contraband" should include tobacco products not included in the Directory, where applicable.

[This bill] appears to permit the sale of cigars only in age-controlled locations. (Sec. 14(C)). This disparate treatment may be subject to Equal Protection challenges since cigars have always been sold at retail locations and the State would need a rational basis to defend such a change.

DI/rl/al/sb