FISCAL IMPACT REPORT

		LAST UPDATED	
SPONSOR	Ferrary	**ORIGINAL DATE**	1/27/23
SHORT TITLE	Prohibiting Sale of Flavored Tobacco Products	**BILL NUMBER**	House Bill 94
		ANALYST	Anderson/Faubion

REVENUE*
(dollars in thousands)

Estimated Revenue					Recurring or Nonrecurring	Fund Affected
FY23	**FY24**	**FY25**	**FY26**	**FY27**		
--	($1,900)	($1,900)	($1,900)	($1,800)	Recurring	New Mexico Finance Authority (NMFA)/Credit Enhancement – Cigarette Tax
--	($167)	($163)	($160)	($157)	Recurring	UNM Cancer Center – Cigarette Tax
--	($1,800)	($1,700)	($1,700)	($1,700)	Recurring	NMFA/UNM Health Sciences – Cigarette Tax
--	($745)	($728)	($713)	($700)	Recurring	NMFA/Department of Health – Cigarette Tax
--	($125)	($122)	($119)	($117)	Recurring	Rural County Cancer Treatment Fund – Cigarette Tax
--	($18,800)	($18,300)	($17,900)	($17,600)	Recurring	General Fund – Cigarette Tax
--	($5,800)	($6,200)	($6,700)	($7,300)	Recurring	General Fund – Tobacco Products Tax
--	($6,600)	($7,500)	($8,800)	($10,500)	Recurring	General Fund – GRT
--	($1,900)	($2,200)	($2,500)	($3,000)	Recurring	Counties - GRT
--	($7,600)	($8,700)	($10,100)	($12,100)	Recurring	Municipalities - GRT
--	Indeterminant but significant (see *Fiscal Implications)*				Recurring	Tribal Governments

Parenthesis ( ) indicate revenue decreases
*Amounts reflect most recent analysis of this legislation.

Relates to Senate Bill 235, House Bill 123, and House Bill 124

Sources of Information

LFC Files

<u>Responses Received From</u>
Regulation Licensing Department (RLD)
New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of House Bill 94

House Bill 94 (HB94) would prohibit the sale of flavored tobacco products. It would also require retailers to post a sign at any place where tobacco products are sold informing the public of the ban.

This bill does not contain an effective date, and as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

The impact of banning tobacco products is difficult to determine. Few data sources are available on consumer responses to banned flavored tobacco products, so consumer impacts are highly uncertain. Projections and studies of the revenue impact from these types of bans range from 4.1 percent in cigarette tax revenue and 7.6 percent decline in tobacco tax revenue from a menthol ban in California[1] to a 32.8 percent decline in cigarette sales from a flavor ban in Massachusetts[2]. It is important to note, in Massachusetts, neighboring states saw a significant uptick in sales as consumers simply shifted to buying their products over the state line. Nationally, the proportion of flavored and menthol sales in 2015 was as follows: cigarettes (32.5 percent menthol), large cigars (26.1 percent flavored), cigarillos (47.5 percent flavored, 0.2 percent menthol), little cigars (21.8 percent flavored, 19.4 percent menthol), chewing tobacco (1.4 percent flavored, 0.7 percent menthol), moist snuff (3.0 percent flavored, 57.0 percent menthol), and the smokeless tobacco product called snus (88.5 percent menthol)[3]. In New Mexico in 2015, 33 percent of tobacco users typically used flavored products[4].

The fiscal impact of this bill was determined by assuming a similar rate of sales decline as occurred in Massachusetts following their flavored tobacco products ban because the shift to neighboring states experienced there may be similar to the shift that will likely occur to tribal areas in New Mexico (see "Significant Issues"). Using a combination of the cigarette sales impact in Massachusetts and the proportion of flavored to nonflavored tobacco sales nationally, LFC applied a sales discount factor to each tobacco product and the cigarette sales forecast from the December 2022 Consensus Revenue Estimating Group forecast to determine the fiscal impact for each distribution of cigarette and tobacco taxes.

The tobacco products tax, applied to all tobacco products except cigarettes, flows directly into the general fund, while slightly less than half of the cigarette tax benefits the general fund. The rest is distributed to University of New Mexico and New Mexico Finance Authority for a cancer center, a health sciences center, Department of Health facilities, and a rural county cancer

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[1] Tobaccoeconomics.org

[2] Asare S, Majmundar A, Westmaas JL, et al. Association of Cigarette Sales With Comprehensive Menthol Flavor Ban in Massachusetts. JAMA Intern Med. 2022.

[3] Kuiper NM, Gammon D, Loomis B, Falvey K, Wang TW, King BA, Rogers T. Trends in Sales of Flavored and Menthol Tobacco Products in the United States During 2011-2015. Nicotine Tob Res. 2018.

[4] Satomi Odani, MPH, Brian Armour, PhD, Israel T Agaku, PhD, Flavored Tobacco Product Use and Its Association With Indicators of Tobacco Dependence Among US Adults, 2014–2015, Nicotine & Tobacco Research, Volume 22, Issue 6, June 2020.

treatment fund. All the beneficiaries would experience a revenue decrease if the bill were enacted.

The decrease in sales will also impact gross receipts tax collections on these products. Assuming roughly 75 percent of sales occur in municipalities and 25 percent in counties and an average state effective GRT rate of 4.157 percent, a combined municipal rate of 7.915 percent, and a remainder of county combined rate of 7.152 percent (FY23 effective rates less the additional 0.0125 percent rate reduction for FY24), the state GRT loss would be approximately $6.6 million in FY24, growing to over $10 million by FY27. Counties would lose approximately $2 million to $3 million, and municipalities would lose approximately $7.5 million to over $12 million in FY27.

Tribal governments will likely see an increase in both excise and gross receipts taxes as consumers purchase their preferred flavored tobacco products on tribal land. While the magnitude of this shift in consumer behavior is difficult to determine, it will likely be significant, although less than the loss experienced by the state because some consumers will switch to nonflavored products or quit using tobacco products altogether.

The Regulation Licensing Department (RLD) indicated the existing Alcoholic Beverage Control (ABC) Division staff will be able to administer citations resulting from the prohibition. Monetary administrative penalties collected by ABC will not result in substantial revenue, with licensees complying with the act.

SIGNIFICANT ISSUES

Bans or restrictions on the sale of favored tobacco or menthol products are gaining momentum around the country. Bans on flavored tobacco exist in five U.S. States—Massachusetts, California, New Jersey, New York, and Rhode Island—and at least 247 municipalities. California's ban, with very similar parameters as included in this bill, was challenged unsuccessfully. On February 6, 2020, federal regulation went into effect that prohibits the sale of flavored, other than menthol or tobacco flavored, cartridge-based (closed system) electronic nicotine delivery systems. Separately, the U.S. Food and Drug Administration (FDA) has proposed a national ban on menthol cigarettes—which would almost certainly fall under House Bill 94 definition of a flavored tobacco product—that is currently pending publication for comment. If the FDA ban takes effect, it could raise further legal arguments that the federal Tobacco Products Act preempts state action in further challenges. Further review of the California challenge and scope of the FDA rule are needed to better predict the prospective effects to House Bill 94, but the proliferation of similar bans in both states and municipalities supports the legal posture of House Bill 94 at the current time.

As sovereign nations, federally recognized Indian tribal governments and reservations are not regulated by New Mexico's Tobacco Products Act. However, they must abide by the federal policy. Given the large number of tribal areas in New Mexico, this bill could incentivize tobacco users to purchase flavored tobacco products on tribal land instead of through retailers subject to the Tobacco Products Act, potentially severely limiting the health and consumption impacts of this bill. This shift in purchasing behavior will also like dull any substitution effects of consumers switching from flavored to unflavored tobacco products, further hurting state revenues.

This bill narrows the gross receipts tax (GRT) base. Many of the efforts over the last few years to reform New Mexico's taxes have focused on broadening the GRT base and lowering the rates. Narrowing the base leads to continually rising GRT rates, increasing volatility in the state's largest general fund revenue source. Higher rates compound tax pyramiding issues and force consumers and businesses to pay higher taxes on all other purchases without an exemption, deduction, or credit.

ADMINISTRATIVE IMPLICATIONS

Existing Alcoholic Beverage Control (ABC) Division staff will be able to administer any additional citations resulting from the prohibition.

The Office of the Attorney General is responsible for overseeing the Tobacco Master Settlement Agreement (MSA) and works closely with other state agencies regarding the regulation, accounting, and enforcement of tobacco sales and other provisions of the MSA. House Bill 94 would necessarily involve attention by the NMAG and related agencies in this ongoing work.

OTHER SUBSTANTIVE ISSUES

While the bill provides a definition for "flavored tobacco products" and "characterizing flavor" this may be difficult to enforce. In a practical setting, the "characterizing flavor" can be determined based on labeling; however, if those descriptive labels are not utilized, the only way to determine the "characterizing flavor" is through consumption, or use, by enforcement officials, and even this may lead to subjective opinions on whether or not a characterizing flavor can be determined.

The bill's definition of "characterizing flavor" includes the condition that "[a] tobacco product shall not be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information." These definitions are vague as to what can or cannot be added to be considered a "characterizing flavor" and prohibited. However, given the upholding of the California ban, which includes very similar definitions, there is some legal precedent supporting these definitions as enforceable.

TECHNICAL ISSUES

The provisions in this bill would go into effect two weeks before the start of a fiscal year. LFC recommends an effective date of July 1, 2023.

Does the bill meet the Legislative Finance Committee tax policy principles?

1. **Adequacy**: Revenue should be adequate to fund needed government services.
2. **Efficiency**: Tax base should be as broad as possible and avoid excess reliance on one tax.
3. **Equity**: Different taxpayers should be treated fairly.
4. **Simplicity**: Collection should be simple and easily understood.
5. **Accountability**: Preferences should be easy to monitor and evaluate

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