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SENATE BILL 397

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

Lynda M. Lovejoy

AN ACT

RELATING TO TOBACCO SALES; INCLUDING CIGARETTE PACKS STAMPED WITH TAX-CREDIT STAMPS IN THE DEFINITION OF "UNITS SOLD" FOR DETERMINING ESCROW PAYMENTS DUE PURSUANT TO THE MASTER SETTLEMENT AGREEMENT; AMENDING THE CIGARETTE TAX ACT; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 6-4-12 NMSA 1978 (being Laws 1999, Chapter 208, Section 1, as amended) is amended to read:

"6-4-12. DEFINITIONS.--As used in Sections 6-4-12 [~~and 6-4-13~~] through 6-4-13.2 NMSA 1978:

A. "adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement;

B. "affiliate" means a person who directly or

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underscored material = new
~~[bracketed material] = delete~~

underscored material = new
[bracketed material] = delete

1 indirectly owns or controls, is owned or controlled by, or is
2 under common ownership or control with, another person. Solely
3 for purposes of this definition, the terms "owns", "is owned"
4 and "ownership" mean ownership of an equity interest, or the
5 equivalent thereof, of ten percent or more, and the term
6 "person" means an individual, partnership, committee,
7 association, corporation or any other organization or group of
8 persons;

9 C. "allocable share" means "Allocable Share" as
10 that term is defined in the Master Settlement Agreement;

11 D. "cigarette" means any product that contains
12 nicotine, is intended to be burned or heated under ordinary
13 conditions of use, and consists of or contains:

14 (1) any roll of tobacco wrapped in paper or in
15 any substance not containing tobacco;

16 (2) tobacco, in any form, that is functional
17 in the product [~~which~~] and that, because of its appearance, the
18 type of tobacco used in the filler or its packaging and
19 labeling, is likely to be offered to, or purchased by,
20 consumers as a cigarette; or

21 (3) any roll of tobacco wrapped in any
22 substance containing tobacco [~~which~~] that, because of its
23 appearance, the type of tobacco used in the filler or its
24 packaging and labeling, is likely to be offered to, or
25 purchased by, consumers as a cigarette described in Paragraph

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underscoring material = new
~~[bracketed material] = delete~~

1 (1) of this subsection. The term "cigarette" includes "roll-
2 your-own" (i.e., any tobacco [~~which~~] that, because of its
3 appearance, type, packaging or labeling, is suitable for use
4 and likely to be offered to, or purchased by, consumers as
5 tobacco for making cigarettes). For purposes of this
6 definition of "cigarette", 0.09 ounces of "roll-your-own"
7 tobacco shall constitute one individual "cigarette";

8 E. "Master Settlement Agreement" means the
9 settlement agreement (and related documents) entered into on
10 November 23, 1998 by the state and leading United States
11 tobacco product manufacturers;

12 F. "qualified escrow fund" means an escrow
13 arrangement with a federally or state chartered financial
14 institution having no affiliation with any tobacco product
15 manufacturer and having assets of at least one billion dollars
16 (\$1,000,000,000) where such arrangement requires that such
17 financial institution hold the escrowed funds' principal for
18 the benefit of releasing parties and prohibits the tobacco
19 product manufacturer placing the funds into escrow from using,
20 accessing or directing the use of the funds' principal except
21 as consistent with Subsection B of Section 6-4-13 NMSA 1978;

22 G. "released claims" means "Released Claims" as
23 that term is defined in the Master Settlement Agreement;

24 H. "releasing parties" means "Releasing Parties" as
25 that term is defined in the Master Settlement Agreement;

.182940.7SA

underscored material = new
[bracketed material] = delete

1 I. "tobacco product manufacturer" means an entity
2 that, after the date of enactment of this act, directly (and
3 not exclusively through any affiliate):

4 (1) manufactures cigarettes anywhere that such
5 manufacturer intends to be sold in the United States, including
6 cigarettes intended to be sold in the United States through an
7 importer (except where such importer is an original
8 participating manufacturer (as that term is defined in the
9 Master Settlement Agreement) that will be responsible for the
10 payments under the Master Settlement Agreement with respect to
11 such cigarettes as a result of the provisions of Subsection
12 II(mm) of the Master Settlement Agreement and that pays the
13 taxes specified in Subsection II(z) of the Master Settlement
14 Agreement, and provided that the manufacturer of such
15 cigarettes does not market or advertise such cigarettes in the
16 United States);

17 (2) is the first purchaser anywhere for resale
18 in the United States of cigarettes manufactured anywhere that
19 the manufacturer does not intend to be sold in the United
20 States; or

21 (3) becomes a successor of an entity described
22 in Paragraph (1) or (2) of this subsection.

23 The term "tobacco product manufacturer" shall not include
24 an affiliate of a tobacco product manufacturer unless such
25 affiliate itself falls within Paragraph (1), (2) or (3) of this

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underscored material = new
[bracketed material] = delete

1 subsection; and

2 J. "units sold" means the number of individual
3 cigarettes sold in the state by the applicable tobacco product
4 manufacturer (whether directly or through a distributor,
5 retailer or similar intermediary or intermediaries) during the
6 year in question, as measured by [~~excise taxes collected,~~
7 ~~ounces of "roll-your-own" tobacco sold and sales of products~~
8 ~~bearing tax-exempt stamps on packs or "roll-your-own" tobacco~~
9 ~~containers. The secretary of taxation and revenue shall~~
10 ~~promulgate such rules as are necessary to ascertain the amount~~
11 ~~of state excise tax paid on the cigarettes of such tobacco~~
12 ~~product manufacturer for each year]:~~

13 (1) the excise tax due from cigarettes sold
14 bearing tax stamps pursuant to the Cigarette Tax Act;

15 (2) ounces of "roll-your-own" tobacco sold on
16 which the tobacco products tax is due pursuant to the Tobacco
17 Products Tax Act; or

18 (3) cigarettes sold bearing tax-exempt or tax-
19 credit stamps pursuant to the Cigarette Tax Act."

20 SECTION 2. A new Section 6-4-13.2 NMSA 1978 is enacted to
21 read:

22 "6-4-13.2. [NEW MATERIAL] RULES--AMOUNT OF STATE EXCISE
23 TAX PAID ON CIGARETTES OF TOBACCO PRODUCT MANUFACTURER.--The
24 secretary of taxation and revenue shall adopt rules regarding
25 how to determine for each year:

.182940.7SA

underscoring material = new
~~[bracketed material] = delete~~

1 A. the amount of state excise tax paid on the
2 cigarettes of a tobacco product manufacturer and on the number
3 of ounces of "roll-your-own" tobacco sold; and

4 B. the number of cigarettes bearing tax-exempt or
5 tax-credit stamps that are sold."

6 **SECTION 3.** Section 7-12-5 NMSA 1978 (being Laws 1971,
7 Chapter 77, Section 5, as amended) is amended to read:

8 "7-12-5. AFFIXING STAMPS.--

9 A. Except as provided in Section 7-12-6 NMSA 1978,
10 all cigarettes shall be placed in packages or containers to
11 which a stamp shall be affixed. Only a distributor with a
12 valid license issued pursuant to the Cigarette Tax Act may
13 purchase or obtain unaffixed tax-exempt stamps, tax-credit
14 stamps or tax stamps. A distributor shall not sell or provide
15 unaffixed stamps to another distributor, manufacturer, export
16 warehouse proprietor or importer with a valid permit pursuant
17 to 26 U.S.C. 5713 or any other person.

18 B. Stamps shall be affixed by the distributor to
19 each package of cigarettes to be sold or distributed in New
20 Mexico within thirty days of receipt of those packages.

21 C. A distributor shall apply stamps only to
22 packages of cigarettes that the distributor has received
23 directly from another distributor or from a manufacturer or
24 importer of cigarettes that possesses a valid and current
25 permit pursuant to 26 U.S.C. 5713.

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Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 02/16/11
 SPONSOR Lovejoy LAST UPDATED 03/09/11 HB _____
 SHORT TITLE Cigarette Stamp to Determine Escrow Payments SB 397
 ANALYST Burrows

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY11	FY12	FY13		
	\$0.0- \$7,500.0	\$0.0- \$7,500.0	Recurring	Tobacco Settlement Permanent Fund

(Parenthesis () Indicate Revenue Decreases)

Relates to SB81, SB264, HB250, HB79

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH)
 Attorney General's Office (AGO)
 Taxation and Revenue Department (TRD)

SUMMARY

Synopsis of Bill

Senate Bill 397 proposes to amend the definition of "units sold" for the purpose of determining escrow payments of cigarette manufacturers who are not participating in the Master Settlement Agreement (MSA) to include both "tax-exempt" and "tax-credit" stamps. Under current law, tax-exempt stamps are issued on sales on tribal land to tribal members and on sales to the U.S. and New Mexico governments or any political subdivision of New Mexico. Tax-credit stamps are issued on sales on tribal land to non-tribal members, for which the tribe or Indian nation is required to charge a minimum tax of \$0.75 per retail unit, but may retain the tax for tribal use.

MSA participating manufacturers make payment under the provisions of the MSA on all sales in New Mexico, regardless of the type of stamp issued. This proposal is intended to equalize treatment of MSA participating and non-participating manufacturers.

Because this bill includes emergency language, the provisions will be effective at the time of signing.

FISCAL IMPLICATIONS

According to the Attorney General's Office (AGO), escrow payments under current law are approximately \$100 thousand to \$400 thousand per year. The AGO estimates an additional \$7.5 million annually would be available under Senate Bill 379. Moreover, this proposal could minimize the potential for MSA participating members to prevail in claims against the state for failure to diligently enforce its escrow statutes. As well, this bill will provide statutory support for the state to bring claim against non-participating members who fail to pay escrow.

TRD is not aware of any direct revenue impact from the change to the definition of "units sold" under the cigarette Master Settlement Agreement. The definition change to "units sold" is considered by TRD to be a technical clean-up that should contribute to a more clear and precise interpretation, which could thereby forestall legal challenges by tobacco manufacturers to the administration of the MSA agreement.

According to TRD, the new "tax-credit" stamp associated with certain cigarettes subject to a qualifying tribal-imposed tax began on July 1, 2010. From July 2010 through December 2010, the department issued 14.6 million "tax-credit" stamps to cigarette distributors. The expected volume for FY10 is expected to be about 30 million "tax-credit" stamps. This volume represents all state tax-exempt cigarettes sold by tribal entities, and includes all cigarette brands and manufacturers of cigarettes sold by tribal-approved retailers.

The December 2010 consensus revenue forecast assumes the state will receive the full payment for escrow on both "tax-credit" and "tax-exempt" stamps.

SIGNIFICANT ISSUES

The AGO reports that Senate Bill 397 will remove ambiguity under current law as to which sales are subject to escrow payment. Currently, New Mexico has two tobacco manufacturers: one that is party to the MSA and one that is not. Senate Bill 397 will level the playing field between these manufacturers.

According to the AGO, during 2009 and 2010, when statute included language similar to that in this proposal, New Mexico was able to collect escrow on 100 percent of cigarette sales. But since 2010, when the language was inadvertently amended, only 8 percent of MSA non-participant sales have resulted in escrow payments.

The Department of Health (DOH) reports that funds received through the MSA are used to prevent and treat chronic disease.

ADMINISTRATIVE IMPLICATIONS

According to the AGO, Senate Bill 397 could simplify auditing procedures, and strengthen the state's position against claims of lax enforcement of escrow payment. As such, the bill would simplify enforcement litigation, which could minimize costs in terms of staffing and litigation procedures.

TRD reports it will need to adopt rules to determine the amount of excise tax paid on cigarettes and on ounces of "roll-your own" tobacco, and the number of cigarettes sold bearing tax-exempt

and tax-credit stamps. TRD does not anticipate any additional operating costs as a result of this bill.

RELATIONSHIP

Senate Bill 81 and House Bill 250 would raise the tax on tobacco products from 25 percent to 57 percent per retail unit, and impose a minimum excise tax on small quantities.

House Bill 79 provides for an additional distribution from the Tobacco Settlement Permanent Fund to the Tobacco Settlement Program Fund through FY13.

Senate Bill 264 would extend the excise tax to all sales on tribal land to non-tribal members. This would remove the “tax-credit” status on these sales, thereby making the sales subject to escrow payment.

OTHER SUBSTANTIVE ISSUES

TRD contends the “tax-credit” stamp is another form of a tax-exempt stamp because no state excise tax is collected on cigarettes with either stamp. As a stamp on cigarettes sold in the state and exempted from state excise tax, tax-credit stamped cigarettes should be included for purposes of the MSA “units sold.”

TRD further states the definition of “units sold” plays a key role in the MSA escrow requirements for non-participating manufacturers, and also is important in determining changes to the market share for participating manufacturers, and evaluating the effective administration of the MSA by the state.

The Department of Health (DOH) states that Senate Bill 397 can assist DOH’s strategic plan to improve community health, and prevent and control chronic diseases.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The definition of “units sold” for the purpose of determining escrow payments will continue to exclude “tax-credit” stamps.

LKB/mew:svb

The Legislative Finance Committee has adopted the following principles to guide responsible and effective tax policy decisions:

- 1. Adequacy:*** revenue should be adequate to fund government services.
- 2. Efficiency:*** tax base should be as broad as possible to minimize rates and the structure should minimize economic distortion and avoid excessive reliance on any single tax.
- 3. Equity:*** taxes should be fairly applied across similarly situated taxpayers and across taxpayers with different income levels.
- 4. Simplicity:*** taxes should be as simple as possible to encourage compliance and minimize administrative and audit costs.
- 5. Accountability/Transparency:*** Deductions, credits and exemptions should be easy to monitor and evaluate and be subject to periodic review.

More information about the LFC tax policy principles will soon be available on the LFC website at www.nmlegis.gov/lcs/lfc

1 SENATE BILL 225

2 **50TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2012**

3 INTRODUCED BY

4 Lynda M. Lovejoy

5
6
7 ENDORSED BY THE TOBACCO SETTLEMENT REVENUE OVERSIGHT COMMITTEE AND
8 THE REVENUE STABILIZATION AND TAX POLICY COMMITTEE

9
10 AN ACT

11 RELATING TO TOBACCO SALES; CLARIFYING THAT CIGARETTE PACKS
12 STAMPED WITH TAX-CREDIT STAMPS ARE "UNITS SOLD" FOR THE PURPOSE
13 OF DETERMINING ESCROW PAYMENTS DUE PURSUANT TO THE MASTER
14 SETTLEMENT AGREEMENT; AMENDING THE CIGARETTE TAX ACT; DECLARING
15 AN EMERGENCY.

16
17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

18 SECTION 1. Section 6-4-12 NMSA 1978 (being Laws 1999,
19 Chapter 208, Section 1, as amended) is amended to read:

20 "6-4-12. DEFINITIONS.--As used in Sections 6-4-12 [~~and~~
21 ~~6-4-13~~] through 6-4-13.2 NMSA 1978:

22 A. "adjusted for inflation" means increased in
23 accordance with the formula for inflation adjustment set forth
24 in Exhibit C to the Master Settlement Agreement;

25 B. "affiliate" means a person who directly or

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underscored material = new
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1 indirectly owns or controls, is owned or controlled by, or is
2 under common ownership or control with, another person. Solely
3 for purposes of this definition, the terms "owns", "is owned"
4 and "ownership" mean ownership of an equity interest, or the
5 equivalent thereof, of ten percent or more, and the term
6 "person" means an individual, partnership, committee,
7 association, corporation or any other organization or group of
8 persons;

9 C. "allocable share" means "Allocable Share" as
10 that term is defined in the Master Settlement Agreement;

11 D. "cigarette" means any product that contains
12 nicotine, is intended to be burned or heated under ordinary
13 conditions of use and consists of or contains:

14 (1) any roll of tobacco wrapped in paper or in
15 any substance not containing tobacco;

16 (2) tobacco, in any form, that is functional
17 in the product [~~which~~] and that, because of its appearance, the
18 type of tobacco used in the filler or its packaging and
19 labeling, is likely to be offered to, or purchased by,
20 consumers as a cigarette; or

21 (3) any roll of tobacco wrapped in any
22 substance containing tobacco [~~which~~] that, because of its
23 appearance, the type of tobacco used in the filler or its
24 packaging and labeling, is likely to be offered to, or
25 purchased by, consumers as a cigarette described in Paragraph

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1 (1) of this subsection. The term "cigarette" includes "roll-
2 your-own" (i.e., any tobacco [~~which~~] that, because of its
3 appearance, type, packaging or labeling, is suitable for use
4 and likely to be offered to, or purchased by, consumers as
5 tobacco for making cigarettes). For purposes of this
6 definition of "cigarette", 0.09 ounces of "roll-your-own"
7 tobacco shall constitute one individual "cigarette";

8 E. "Master Settlement Agreement" means the
9 settlement agreement (and related documents) entered into on
10 November 23, 1998 by the state and leading United States
11 tobacco product manufacturers;

12 F. "qualified escrow fund" means an escrow
13 arrangement with a federally chartered or state-chartered
14 financial institution having no affiliation with any tobacco
15 product manufacturer and having assets of at least one billion
16 dollars (\$1,000,000,000) where such arrangement requires that
17 such financial institution hold the escrowed funds' principal
18 for the benefit of releasing parties and prohibits the tobacco
19 product manufacturer placing the funds into escrow from using,
20 accessing or directing the use of the funds' principal except
21 as consistent with Subsection B of Section 6-4-13 NMSA 1978;

22 G. "released claims" means "Released Claims" as
23 that term is defined in the Master Settlement Agreement;

24 H. "releasing parties" means "Releasing Parties" as
25 that term is defined in the Master Settlement Agreement;

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underscored material = new
~~[bracketed material] = delete~~

1 I. "tobacco product manufacturer" means an entity
2 that, after the date of enactment of this act, directly (and
3 not exclusively through any affiliate):

4 (1) manufactures cigarettes anywhere that such
5 manufacturer intends to be sold in the United States, including
6 cigarettes intended to be sold in the United States through an
7 importer (except where such importer is an original
8 participating manufacturer (as that term is defined in the
9 Master Settlement Agreement) that will be responsible for the
10 payments under the Master Settlement Agreement with respect to
11 such cigarettes as a result of the provisions of Subsection
12 II(mm) of the Master Settlement Agreement and that pays the
13 taxes specified in Subsection II(z) of the Master Settlement
14 Agreement, and provided that the manufacturer of such
15 cigarettes does not market or advertise such cigarettes in the
16 United States);

17 (2) is the first purchaser anywhere for resale
18 in the United States of cigarettes manufactured anywhere that
19 the manufacturer does not intend to be sold in the United
20 States; or

21 (3) becomes a successor of an entity described
22 in Paragraph (1) or (2) of this subsection.

23 The term "tobacco product manufacturer" shall not include
24 an affiliate of a tobacco product manufacturer unless such
25 affiliate itself falls within Paragraph (1), (2) or (3) of this

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underscored material = new
[bracketed material] = delete

1 subsection; and

2 J. "units sold" means the number of individual
3 cigarettes sold in the state by the applicable tobacco product
4 manufacturer, whether directly or through a distributor,
5 retailer or similar intermediary or intermediaries, during the
6 year in question, as measured by [~~excise taxes collected,~~
7 ~~ounces of "roll-your-own" tobacco sold and sales of products~~
8 ~~bearing tax-exempt stamps on packs or "roll-your-own" tobacco~~
9 ~~containers. The secretary of taxation and revenue shall~~
10 ~~promulgate such rules as are necessary to ascertain the amount~~
11 ~~of state excise tax paid on the cigarettes of such tobacco~~
12 ~~product manufacturer for each year]:~~

13 (1) the excise tax due from cigarettes sold
14 bearing tax stamps pursuant to the Cigarette Tax Act;

15 (2) ounces of "roll-your-own" tobacco sold on
16 which the tobacco products tax is due pursuant to the Tobacco
17 Products Tax Act; or

18 (3) cigarettes sold bearing tax-exempt or tax-
19 credit stamps pursuant to the Cigarette Tax Act."

20 SECTION 2. A new Section 6-4-13.2 NMSA 1978 is enacted to
21 read:

22 "6-4-13.2. [NEW MATERIAL] RULES--AMOUNT OF STATE EXCISE
23 TAX PAID ON CIGARETTES OF TOBACCO PRODUCT MANUFACTURER.--The
24 secretary of taxation and revenue shall adopt rules regarding
25 how to determine for each year:

.187675.1SA

underscoring material = new
~~[bracketed material]~~ = delete

1 A. the amount of state excise tax paid on the
2 cigarettes of a tobacco product manufacturer and on the number
3 of ounces of "roll-your-own" tobacco sold; and

4 B. the number of cigarettes bearing tax-exempt or
5 tax-credit stamps that are sold."

6 **SECTION 3.** Section 7-12-5 NMSA 1978 (being Laws 1971,
7 Chapter 77, Section 5, as amended) is amended to read:

8 "7-12-5. AFFIXING STAMPS.--

9 A. Except as provided in Section 7-12-6 NMSA 1978,
10 all cigarettes shall be placed in packages or containers to
11 which a stamp shall be affixed. Only a distributor with a
12 valid license issued pursuant to the Cigarette Tax Act may
13 purchase or obtain unaffixed tax-exempt stamps, tax-credit
14 stamps or tax stamps. A distributor shall not sell or provide
15 unaffixed stamps to another distributor, manufacturer, export
16 warehouse proprietor or importer with a valid permit pursuant
17 to 26 U.S.C. 5713 or any other person.

18 B. Stamps shall be affixed by the distributor to
19 each package of cigarettes to be sold or distributed in New
20 Mexico within thirty days of receipt of those packages.

21 C. A distributor shall apply stamps only to
22 packages of cigarettes that the distributor has received
23 directly from another distributor or from a manufacturer or
24 importer of cigarettes that possesses a valid and current
25 permit pursuant to 26 U.S.C. 5713.

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[bracketed material] = delete

1 D. A distributor shall not affix a tax stamp, a
2 tax-exempt stamp or a tax-credit stamp to a package of
3 cigarettes of a manufacturer or a brand family that is not
4 included in the directory or sell, offer or possess for sale
5 cigarettes of a manufacturer or brand family that is not
6 included in the directory.

7 E. Packages shall contain cigarettes in lots of
8 five, ten, twenty or twenty-five.

9 F. Unless the requirements of this section are
10 waived pursuant to Section 7-12-6 NMSA 1978, a tax stamp shall
11 be affixed to each package of cigarettes subject to the
12 cigarette tax, a tax-credit stamp shall be affixed to each
13 package of cigarettes subject to a qualifying tribal cigarette
14 tax and a tax-exempt stamp shall be affixed to each package of
15 cigarettes not subject to the cigarette tax pursuant to Section
16 7-12-4 NMSA 1978.

17 ~~[G. A tax-exempt stamp or tax-credit stamp is not~~
18 ~~an excise tax stamp for purposes of determining units sold~~
19 ~~pursuant to Section 6-4-12 NMSA 1978.~~

20 H.] G. Stamps shall be affixed inside the
21 boundaries of New Mexico, unless the department has granted a
22 license allowing a person to affix stamps outside New Mexico."

23 SECTION 4. APPLICABILITY.--The provisions of this act
24 shall apply to units sold on or after January 1, 2010 pursuant
25 to Section 6-4-13 NMSA 1978.

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underscoring material = new
~~[bracketed material] = delete~~

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SECTION 5. EMERGENCY.--It is necessary for the public
peace, health and safety that this act take effect immediately.

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FISCAL IMPACT REPORT

ORIGINAL DATE 02/03/12
LAST UPDATED 02/10/12 **HB** _____

SPONSOR Lovejoy

SHORT TITLE Cigarette Tax Definitions **SB** 225/aSCORC/aSFC

ANALYST Walker-Moran

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY12	FY13	FY14		
Up to \$7,500.0	At least \$7,500.0	At least \$7,500.0	Recurring	Tobacco Escrow Account

(Parenthesis () Indicate Revenue Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)

SUMMARY

Synopsis of SFC Amendment

The Senate Finance Committee amendment to Senate Bill 225 strikes the Senate Corporations and Transportation Committee Amendment 1. On page 7, line 24, the SFC amendment strikes "January 1, 2010" and inserts in lieu thereof "July 1, 2012".

Synopsis of SCORC Amendment

The Senate Corporations and Transportation Committee amendment to Senate Bill 225 changes the applicability date to January 1, 2012 instead of January 1, 2010.

Synopsis of Original Bill

Senate Bill 225 amends section 6-4-12 NMSA 1978 to further define "units sold" to include cigarettes sold bearing tax stamps, ounces of "roll-your-own" tobacco sold on which the tobacco products tax is due, and cigarettes sold bearing tax-exempt or tax-credit stamps pursuant to the Cigarette Tax Act. A new section 6-4-13.2 NMSA 1978 gives the Secretary of the Taxation and Revenue Department the authority to adopt rules regarding the amount of state excise tax that will be paid each year and the number of cigarettes bearing tax-exempt or tax-credit stamps that are sold. Section 7-12-5 NMSA 1978 is also amended to remove language stating that a tax-exempt stamp or tax-credit stamp is not an excise tax stamp.

The provisions of this act shall apply to units sold on or after ~~January 1, 2010~~ January 1, 2012 pursuant to section 6-4-13 NMSA 1978.

There is an Emergency clause in this bill.

FISCAL IMPLICATIONS

According to the Attorney General's Office, SB 225 will help to ensure that New Mexico collects escrow on all cigarette sales in New Mexico. Escrow collected without passing this bill will be approximately \$100,000 to \$400,000 annually, at the most. Escrow collected under the changes proposed by SB 225 will be closer to \$8 million – a difference of over \$7.5 million per year. New Mexico can then take action against these escrow amounts to collect for the health costs of these tobacco product sales into the state of New Mexico. SB 225 will also help secure receipt of New Mexico's future MSA payments in full, by reducing the potential for the PMs to prevail in a future claim against the state for failure to diligently enforce its escrow statutes. These escrow accounts are held by the NPMs themselves, in trust for the State of New Mexico, and there is statutory support for the concept that the State can sue the NPM for failure to pay escrow, or other statutory violations as well, and be guaranteed payment, up to the amount in the escrow account.

SIGNIFICANT ISSUES

According to the Attorney General's Office, SB 225 clarifies that all tobacco sales in New Mexico by Tobacco manufacturers that are not participants (non-participating manufacturers, or NPMs) in the Master Settlement Agreement (MSA) will have to pay escrow on all of their sales in New Mexico. Most NPMs contend that the law, as written at this time, does not require them to pay escrow on tobacco sales bearing an exempt stamp or a tribal-credit stamp, and are therefore not making escrow payments on those sales. (Those MSA participating manufacturers (PMs) who make payments under the MSA do make MSA Payments on all sales in New Mexico, regardless of the type of stamp involved in the sale.) SB 225 accomplishes this goal by defining "units sold" (the measure by which escrow is assessed) to include all sales, including tax excise sales, tax exempt sales (on Federal and certain State property) and tribal tax-credit sales (sales on tribal land to non-tribal members, for which the tribes are required to charge a minimum of \$0.75 tax, but may retain the tax for tribal use).

PERFORMANCE IMPLICATIONS

The AGO is primarily responsible for enforcement of the tobacco escrow statutes, working in conjunction with TRD, that is primarily responsible for the enforcement of excise tax and stamping under the Cigarette Tax Act. In the past, TRD and the AGO had to rely mostly upon accurate and honest reporting of the NPMs to determining whether the sales they reported were validly exempt from escrow or not, and have had disputes with manufacturers regarding the validity of the claimed exemption and its application to whether escrow was due on any particular sale. SB 225 will make it unambiguous; that escrow is due on every tobacco sale in New Mexico, whether on tribal property, federal property, state property, or a retail venue in any location. During 2009 and 2010, when similar language was in place, New Mexico was able to collect escrow on 100% of sales reported in this state. Since the language was amended inadvertently in 2010, the state collects escrow on less than 8% of all NPM sales in New Mexico.

ADMINISTRATIVE IMPLICATIONS

The administrative implication of this bill is that it will ease the litigation demands on the tobacco enforcement attorneys who have to face challenges to the validity of any exemptions taken on cigarettes. It will also make it easier for the AGO to audit cigarette distributor reports and compare sales reported by distributor as compared to sales reported by manufacturers. More importantly, in future challenges by the PMs as to diligent enforcement, the case prepared by New Mexico to support a diligent enforcement claim will be much simpler and straight forward, as well as defensible.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 75 provides for an additional distribution from revenue attributable to the Cigarette Tax Act to the county and municipality recreational fund. HB 75 does not conflict with SB 225.

OTHER SUBSTANTIVE ISSUES

Per the AOG:

SB 225 will clarify that escrow must be paid by any NPM on any sales, whether those sales bear an excise tax stamp, an exempt tax stamp, or a tribal tax-credit stamp. To date, the PMs that pay under the MSA have challenged the fact that New Mexico diligently enforced its escrow statute, for years 2003 through 2010. One of the bases for their allegation that we did not diligently enforce is that not all sales were valid tribal sales. While New Mexico strongly disagrees that we have not diligently enforced all tobacco statutes, SB 225 eliminates the challenge regarding whether the any sales should have been subject to excise tax, and thus escrow.

As the statute at issue is currently written, several NPMs have challenged what sales they are required to pay escrow on, because they contend there is an ambiguity in the exemption from the Cigarette Tax Act. SB 225 will make enforcement litigation for the AGO less complex and therefore, less costly, in terms of staffing and litigation costs. SB 225 will remove any question or ambiguity regarding what sales upon which escrow must be paid.

While some tribes have questioned whether SB 225 would violate any aspect of Tribal Sovereignty, it clearly does not. Escrow is not assessed against retailers, distributors or purchasers. It is assessed against tobacco cigarette manufacturers and only those who do not participate in the Master Settlement Agreement. New Mexico has 2 tobacco manufacturers. One is a PM, and makes payments under the MSA on all of its sales in New Mexico, including sales on tribal land and federal property. The other does not make MSA payments, and only pays escrow on the small percentage of its sales that do not occur on tribal property. SB 225 would level the playing field between these two manufacturers. New Mexico has many NPMs that sell cigarettes and tobacco products into New Mexico from all over the country, and from outside the United States. If SB 225 is not passed, all NPMs, including those from out of state and out of the country will have an economic advantage over the one PM in this state, and all other PMs. Passage of SB 225 would ensure that all NPMs have established funds sufficient to reimburse the state for their share of the state's medical costs associated with the sale of their product.

SB 225 is not new legislation. SB 212, passed in 2009 adopted the same principle; that escrow be collected on all cigarettes sold in New Mexico, whether those sales were subject to or exempt from excise tax. However, when a new bill to introduce the Tribal tax credit stamp was passed during special session in 2010 (HB 3), insufficient changes were made to accommodate the new application of the “unit sold” definition as applied to tribal tax credit sales. While the Department of Taxation and Revenue was convinced that the 2010 legislation did not impact the 2009 definition of units sold, New Mexico is currently in litigation over exactly this issue. It is clear, however, that this was not TRD’s intent. In fact, the TRD attorney that worked on this bill stated that she did not believe that the 2010 legislation (HB 3), had any impact on the 2009 “unit sold” definition at all.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Escrow collected without passing this bill will be approximately \$100,000 to \$400,000 annually, at the most. Escrow collected under the changes proposed by SB 225 will be closer to \$8 million – a difference of over \$7.5 million per year.

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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AN ACT

RELATING TO TOBACCO SALES; CLARIFYING THAT CIGARETTE PACKS
STAMPED WITH TAX-CREDIT STAMPS ARE "UNITS SOLD" FOR THE
PURPOSE OF DETERMINING ESCROW PAYMENTS DUE PURSUANT TO THE
MASTER SETTLEMENT AGREEMENT; AMENDING THE CIGARETTE TAX ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 6-4-12 NMSA 1978 (being Laws 1999,
Chapter 208, Section 1, as amended) is amended to read:

"6-4-12. DEFINITIONS.--As used in Sections 6-4-12
through 6-4-13.2 NMSA 1978:

A. "adjusted for inflation" means increased in
accordance with the formula for inflation adjustment set
forth in Exhibit C to the Master Settlement Agreement;

B. "affiliate" means a person who directly or
indirectly owns or controls, is owned or controlled by, or is
under common ownership or control with, another person.

Solely for purposes of this definition, the terms "owns", "is
owned" and "ownership" mean ownership of an equity interest,
or the equivalent thereof, of ten percent or more, and the
term "person" means an individual, partnership, committee,
association, corporation or any other organization or group
of persons;

C. "allocable share" means "Allocable Share" as
that term is defined in the Master Settlement Agreement;

1 D. "cigarette" means any product that contains
2 nicotine, is intended to be burned or heated under ordinary
3 conditions of use and consists of or contains:

4 (1) any roll of tobacco wrapped in paper or
5 in any substance not containing tobacco;

6 (2) tobacco, in any form, that is functional
7 in the product and that, because of its appearance, the type
8 of tobacco used in the filler or its packaging and labeling,
9 is likely to be offered to, or purchased by, consumers as a
10 cigarette; or

11 (3) any roll of tobacco wrapped in any
12 substance containing tobacco that, because of its appearance,
13 the type of tobacco used in the filler or its packaging and
14 labeling, is likely to be offered to, or purchased by,
15 consumers as a cigarette described in Paragraph (1) of this
16 subsection. The term "cigarette" includes "roll-your-own"
17 (i.e., any tobacco that, because of its appearance, type,
18 packaging or labeling, is suitable for use and likely to be
19 offered to, or purchased by, consumers as tobacco for making
20 cigarettes). For purposes of this definition of "cigarette",
21 0.09 ounces of "roll-your-own" tobacco shall constitute one
22 individual "cigarette";

23 E. "Master Settlement Agreement" means the
24 settlement agreement (and related documents) entered into on
25 November 23, 1998 by the state and leading United States

1 tobacco product manufacturers;

2 F. "qualified escrow fund" means an escrow
3 arrangement with a federally chartered or state-chartered
4 financial institution having no affiliation with any tobacco
5 product manufacturer and having assets of at least one
6 billion dollars (\$1,000,000,000) where such arrangement
7 requires that such financial institution hold the escrowed
8 funds' principal for the benefit of releasing parties and
9 prohibits the tobacco product manufacturer placing the funds
10 into escrow from using, accessing or directing the use of the
11 funds' principal except as consistent with Subsection B of
12 Section 6-4-13 NMSA 1978;

13 G. "released claims" means "Released Claims" as
14 that term is defined in the Master Settlement Agreement;

15 H. "releasing parties" means "Releasing Parties"
16 as that term is defined in the Master Settlement Agreement;

17 I. "tobacco product manufacturer" means an entity
18 that, after the date of enactment of this act, directly (and
19 not exclusively through any affiliate):

20 (1) manufactures cigarettes anywhere that
21 such manufacturer intends to be sold in the United States,
22 including cigarettes intended to be sold in the United States
23 through an importer (except where such importer is an
24 original participating manufacturer (as that term is defined
25 in the Master Settlement Agreement) that will be responsible

1 for the payments under the Master Settlement Agreement with
2 respect to such cigarettes as a result of the provisions of
3 Subsection II(mm) of the Master Settlement Agreement and that
4 pays the taxes specified in Subsection II(z) of the Master
5 Settlement Agreement, and provided that the manufacturer of
6 such cigarettes does not market or advertise such cigarettes
7 in the United States);

8 (2) is the first purchaser anywhere for
9 resale in the United States of cigarettes manufactured
10 anywhere that the manufacturer does not intend to be sold in
11 the United States; or

12 (3) becomes a successor of an entity
13 described in Paragraph (1) or (2) of this subsection.

14 The term "tobacco product manufacturer" shall not
15 include an affiliate of a tobacco product manufacturer unless
16 such affiliate itself falls within Paragraph (1), (2) or (3)
17 of this subsection; and

18 J. "units sold" means the number of individual
19 cigarettes sold in the state by the applicable tobacco
20 product manufacturer, whether directly or through a
21 distributor, retailer or similar intermediary or
22 intermediaries, during the year in question, as measured by:

23 (1) the excise tax due from cigarettes sold
24 bearing tax stamps pursuant to the Cigarette Tax Act;

25 (2) ounces of "roll-your-own" tobacco sold

1 on which the tobacco products tax is due pursuant to the
2 Tobacco Products Tax Act; or

3 (3) cigarettes sold bearing tax-exempt or
4 tax-credit stamps pursuant to the Cigarette Tax Act."

5 SECTION 2. A new Section 6-4-13.2 NMSA 1978 is enacted
6 to read:

7 "6-4-13.2. RULES--AMOUNT OF STATE EXCISE TAX PAID ON
8 CIGARETTES OF TOBACCO PRODUCT MANUFACTURER.--The secretary of
9 taxation and revenue shall adopt rules regarding how to
10 determine for each year:

11 A. the amount of state excise tax paid on the
12 cigarettes of a tobacco product manufacturer and on the
13 number of ounces of "roll-your-own" tobacco sold; and

14 B. the number of cigarettes bearing tax-exempt or
15 tax-credit stamps that are sold."

16 SECTION 3. Section 7-12-5 NMSA 1978 (being Laws 1971,
17 Chapter 77, Section 5, as amended) is amended to read:

18 "7-12-5. AFFIXING STAMPS.--

19 A. Except as provided in Section 7-12-6 NMSA 1978,
20 all cigarettes shall be placed in packages or containers to
21 which a stamp shall be affixed. Only a distributor with a
22 valid license issued pursuant to the Cigarette Tax Act may
23 purchase or obtain unaffixed tax-exempt stamps, tax-credit
24 stamps or tax stamps. A distributor shall not sell or
25 provide unaffixed stamps to another distributor,

1 manufacturer, export warehouse proprietor or importer with a
2 valid permit pursuant to 26 U.S.C. 5713 or any other person.

3 B. Stamps shall be affixed by the distributor to
4 each package of cigarettes to be sold or distributed in New
5 Mexico within thirty days of receipt of those packages.

6 C. A distributor shall apply stamps only to
7 packages of cigarettes that the distributor has received
8 directly from another distributor or from a manufacturer or
9 importer of cigarettes that possesses a valid and current
10 permit pursuant to 26 U.S.C. 5713.

11 D. A distributor shall not affix a tax stamp, a
12 tax-exempt stamp or a tax-credit stamp to a package of
13 cigarettes of a manufacturer or a brand family that is not
14 included in the directory or sell, offer or possess for sale
15 cigarettes of a manufacturer or brand family that is not
16 included in the directory.

17 E. Packages shall contain cigarettes in lots of
18 five, ten, twenty or twenty-five.

19 F. Unless the requirements of this section are
20 waived pursuant to Section 7-12-6 NMSA 1978, a tax stamp
21 shall be affixed to each package of cigarettes subject to the
22 cigarette tax, a tax-credit stamp shall be affixed to each
23 package of cigarettes subject to a qualifying tribal
24 cigarette tax and a tax-exempt stamp shall be affixed to each
25 package of cigarettes not subject to the cigarette tax

1 pursuant to Section 7-12-4 NMSA 1978.

2 G. Stamps shall be affixed inside the boundaries
3 of New Mexico, unless the department has granted a license
4 allowing a person to affix stamps outside New Mexico."

5 SECTION 4. APPLICABILITY.--The provisions of this act
6 shall apply to units sold on or after July 1, 2012 pursuant to
7 Section 6-4-13 NMSA 1978.

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1 SENATE BILL 516

2 **51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013**

3 INTRODUCED BY

4 Linda M. Lopez

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10 AN ACT

11 RELATING TO TOBACCO SALES; REQUIRING THAT CIGARETTE PACKS
12 STAMPED WITH TAX-CREDIT STAMPS ARE "UNITS SOLD" FOR THE PURPOSE
13 OF DETERMINING ESCROW PAYMENTS DUE PURSUANT TO THE MASTER
14 SETTLEMENT AGREEMENT; AMENDING THE CIGARETTE TAX ACT;
15 INCREASING CIVIL AND CRIMINAL PENALTIES FOR VIOLATIONS OF THE
16 CIGARETTE TAX ACT AND THE TOBACCO ESCROW FUND ACT.

17
18 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

19 SECTION 1. Section 6-4-12 NMSA 1978 (being Laws 1999,
20 Chapter 208, Section 1, as amended) is amended to read:

21 "6-4-12. DEFINITIONS.--As used in Sections 6-4-12 [~~and~~
22 ~~6-4-13~~] through 6-4-13.1 NMSA 1978:

23 A. "adjusted for inflation" means increased in
24 accordance with the formula for inflation adjustment set forth
25 in Exhibit C to the Master Settlement Agreement;

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underscored material = new
[bracketed material] = delete

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1 B. "affiliate" means a person who directly or
2 indirectly owns or controls, is owned or controlled by, or is
3 under common ownership or control with, another person. Solely
4 for purposes of this definition, the terms "owns", "is owned"
5 and "ownership" mean ownership of an equity interest, or the
6 equivalent thereof, of ten percent or more, and the term
7 "person" means an individual, partnership, committee,
8 association, corporation or any other organization or group of
9 persons;

10 C. "allocable share" means "Allocable Share" as
11 that term is defined in the Master Settlement Agreement;

12 D. "cigarette" means any product that contains
13 nicotine, is intended to be burned or heated under ordinary
14 conditions of use, and consists of or contains:

15 (1) any roll of tobacco wrapped in paper or in
16 any substance not containing tobacco;

17 (2) tobacco, in any form, that is functional
18 in the product [~~which~~] and that, because of its appearance, the
19 type of tobacco used in the filler or its packaging and
20 labeling, is likely to be offered to, or purchased by,
21 consumers as a cigarette; or

22 (3) any roll of tobacco wrapped in any
23 substance containing tobacco [~~which~~] that, because of its
24 appearance, the type of tobacco used in the filler or its
25 packaging and labeling, is likely to be offered to, or

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1 purchased by, consumers as a cigarette described in Paragraph
2 (1) of this subsection. The term "cigarette" includes "roll-
3 your-own" (i.e., any tobacco [~~which~~] that, because of its
4 appearance, type, packaging or labeling, is suitable for use
5 and likely to be offered to, or purchased by, consumers as
6 tobacco for making cigarettes). For purposes of this
7 definition of "cigarette", 0.09 ounces of "roll-your-own"
8 tobacco shall constitute one individual "cigarette";

9 E. "Master Settlement Agreement" means the
10 settlement agreement (and related documents) entered into on
11 November 23, 1998 by the state and leading United States
12 tobacco product manufacturers;

13 F. "qualified escrow fund" means an escrow
14 arrangement with a federally chartered or state chartered
15 financial institution having no affiliation with any tobacco
16 product manufacturer and having assets of at least one billion
17 dollars (\$1,000,000,000) where such arrangement requires that
18 such financial institution hold the escrowed funds' principal
19 for the benefit of releasing parties and prohibits the tobacco
20 product manufacturer placing the funds into escrow from using,
21 accessing or directing the use of the funds' principal except
22 as consistent with Subsection B of Section 6-4-13 NMSA 1978;

23 G. "released claims" means "Released Claims" as
24 that term is defined in the Master Settlement Agreement;

25 H. "releasing parties" means "Releasing Parties" as

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underscoring material = new
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1 that term is defined in the Master Settlement Agreement;

2 I. "tobacco product manufacturer" means an entity
3 that, after the date of enactment of this act, directly (and
4 not exclusively through any affiliate):

5 (1) manufactures cigarettes anywhere that such
6 manufacturer intends to be sold in the United States, including
7 cigarettes intended to be sold in the United States through an
8 importer (except where such importer is an original
9 participating manufacturer (as that term is defined in the
10 Master Settlement Agreement) that will be responsible for the
11 payments under the Master Settlement Agreement with respect to
12 such cigarettes as a result of the provisions of Subsection
13 II(mm) of the Master Settlement Agreement and that pays the
14 taxes specified in Subsection II(z) of the Master Settlement
15 Agreement, and provided that the manufacturer of such
16 cigarettes does not market or advertise such cigarettes in the
17 United States);

18 (2) is the first purchaser anywhere for resale
19 in the United States of cigarettes manufactured anywhere that
20 the manufacturer does not intend to be sold in the United
21 States; or

22 (3) becomes a successor of an entity described
23 in Paragraph (1) or (2) of this subsection.

24 The term "tobacco product manufacturer" shall not include
25 an affiliate of a tobacco product manufacturer unless such

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1 affiliate itself falls within Paragraph (1), (2) or (3) of this
2 subsection; and

3 J. "units sold" means the number of individual
4 cigarettes sold in the state by the applicable tobacco product
5 manufacturer, whether directly or through a distributor,
6 retailer or similar intermediary or intermediaries, during the
7 year in question, as measured by excise taxes [~~collected~~] owed,
8 ounces of "roll-your-own" tobacco sold and sales of products
9 bearing tax-exempt or tax-credit stamps on packs or "roll-your-
10 own" tobacco containers. The secretary of taxation and revenue
11 shall promulgate such rules as are necessary to ascertain the
12 amount of state excise tax paid on the cigarettes of such
13 tobacco product manufacturer for each year."

14 SECTION 2. Section 6-4-22 NMSA 1978 (being Laws 2003,
15 Chapter 114, Section 9, as amended) is amended to read:

16 "6-4-22. PENALTIES AND OTHER REMEDIES.--

17 A. It is unlawful for a person to:

18 (1) affix a tax stamp, a tax-exempt stamp or a
19 tax-credit stamp or otherwise pay the tax due on a package or
20 other container of cigarettes of a tobacco product manufacturer
21 or a brand family that is not included in the directory; or

22 (2) sell, offer for sale or possess for any
23 purpose other than personal use cigarettes of a tobacco product
24 manufacturer or a brand family that is not included in the
25 directory.

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1 B. The secretary may revoke or suspend the
2 registration or license of a person licensed or registered
3 pursuant to Section 7-12-9.1 or 7-12A-7 NMSA 1978 that violates
4 Subsection A of this section.

5 C. Each stamp affixed, payment of tobacco tax,
6 offer to sell, possession for any purpose other than personal
7 use or sale of cigarettes in violation of Subsection A of this
8 section constitutes a separate violation. For each violation,
9 the secretary may impose a civil penalty in an amount not to
10 exceed the greater of [~~five thousand dollars (\$5,000)~~] ten
11 thousand dollars (\$10,000) or [~~five hundred~~] one thousand
12 percent of the retail value of the cigarettes sold, offered for
13 sale or possessed for any purpose other than personal use.

14 D. Cigarettes that have been sold, offered for sale
15 or possessed for any purpose other than personal use in this
16 state in violation of Subsection A of this section are
17 contraband, are subject to seizure and forfeiture and shall be
18 destroyed.

19 E. It is unlawful for a person to sell, distribute,
20 acquire, hold, own, possess, transport, import or cause to be
21 imported cigarettes that the person knows or should know are
22 intended for distribution or sale in violation of Subsection A
23 of this section. A person who violates this subsection is
24 guilty of a [~~misdemeanor~~] fourth degree felony and shall be
25 sentenced in accordance with Section [~~31-19-1~~] 31-18-15 NMSA

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1 1978.

2 F. A tobacco product manufacturer, stamping agent
3 or importer of cigarettes, or any officer, employee or agent of
4 any such entity, who knowingly makes any materially false
5 statement in any record required by the Tobacco Escrow Fund Act
6 or Section 6-4-13 NMSA 1978 to be filed with the attorney
7 general is guilty of a [~~fourth~~] third degree felony and upon
8 conviction shall be sentenced pursuant to the provisions of
9 Section 31-18-15 NMSA 1978.

10 G. The attorney general or the department may seek
11 an injunction to compel compliance with or to restrain a
12 threatened or actual violation of Subsection A of this section.
13 In any action brought pursuant to this subsection, the state
14 shall be entitled to recover the costs of investigation, costs
15 of the action and reasonable attorney fees, if the state
16 prevails.

17 H. The attorney general may issue a civil
18 investigative demand based on reasonable belief that any person
19 may be in possession, custody or control of an original or copy
20 of any book, record, report, memorandum, paper, communication,
21 tabulation, map, chart, photograph, mechanical transcription or
22 other document or recording relevant to the subject matter of
23 an investigation of a probable violation of the Tobacco Escrow
24 Fund Act. The attorney general may, prior to the institution
25 of a civil proceeding, execute in writing and cause to be

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underscoring material = new
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1 served upon the person a civil investigative demand requiring
2 the person to produce documentary material and permit the
3 inspection and copying of the material.

4 I. For the purposes of this section, fewer than one
5 thousand cigarettes shall be presumed to be for personal use."

6 SECTION 3. Section 7-12-5 NMSA 1978 (being Laws 1971,
7 Chapter 77, Section 5, as amended) is amended to read:

8 "7-12-5. AFFIXING STAMPS.--

9 A. Except as provided in Section 7-12-6 NMSA 1978,
10 all cigarettes shall be placed in packages or containers to
11 which a stamp shall be affixed. Only a distributor with a
12 valid license issued pursuant to the Cigarette Tax Act may
13 purchase or obtain unaffixed tax-exempt stamps, tax-credit
14 stamps or tax stamps. A distributor shall not sell or provide
15 unaffixed stamps to another distributor, manufacturer, export
16 warehouse proprietor or importer with a valid permit pursuant
17 to 26 U.S.C. 5713 or any other person.

18 B. Stamps shall be affixed by the distributor to
19 each package of cigarettes to be sold or distributed in New
20 Mexico within thirty days of receipt of those packages.

21 C. A distributor shall apply stamps only to
22 packages of cigarettes that the distributor has received
23 directly from another distributor or from a manufacturer or
24 importer of cigarettes that possesses a valid and current
25 permit pursuant to 26 U.S.C. 5713.

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underscored material = new
[bracketed material] = delete

1 D. A distributor shall not affix a tax stamp, a
2 tax-exempt stamp or a tax-credit stamp to a package of
3 cigarettes of a manufacturer or a brand family that is not
4 included in the directory or sell, offer or possess for sale
5 cigarettes of a manufacturer or brand family that is not
6 included in the directory.

7 E. Packages shall contain cigarettes in lots of
8 five, ten, twenty or twenty-five.

9 F. Unless the requirements of this section are
10 waived pursuant to Section 7-12-6 NMSA 1978, a tax stamp shall
11 be affixed to each package of cigarettes subject to the
12 cigarette tax, a tax-credit stamp shall be affixed to each
13 package of cigarettes subject to a qualifying tribal cigarette
14 tax and a tax-exempt stamp shall be affixed to each package of
15 cigarettes not subject to the cigarette tax pursuant to Section
16 7-12-4 NMSA 1978.

17 ~~[G. A tax-exempt stamp or tax-credit stamp is not~~
18 ~~an excise tax stamp for purposes of determining units sold~~
19 ~~pursuant to Section 6-4-12 NMSA 1978.~~

20 H.] G. Stamps shall be affixed inside the
21 boundaries of New Mexico, unless the department has granted a
22 license allowing a person to affix stamps outside New Mexico."

23 SECTION 4. Section 7-12-12 NMSA 1978 (being Laws 1971,
24 Chapter 77, Section 12, as amended) is amended to read:

25 "7-12-12. SHIPMENT OF UNSTAMPED CIGARETTES IN NEW

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1 MEXICO.--

2 A. A person that ships unstamped packages of
3 cigarettes into New Mexico other than to a distributor shall
4 first file a notice of the shipment with the department. The
5 requirements of this subsection apply to a person that uses the
6 services of a common or contract carrier to deliver unstamped
7 packages of cigarettes to other than a licensed distributor in
8 New Mexico.

9 B. A person that transports unstamped packages of
10 cigarettes into or within New Mexico shall carry, in the
11 transporting vehicle, invoices or equivalent documents
12 applicable to all cigarettes in the shipment. The invoices or
13 documents shall show:

14 (1) the name and address of the consignor or
15 seller;

16 (2) the name and address of the consignee or
17 purchaser; and

18 (3) the quantity [~~of each~~], manufacturer and
19 brand of all cigarettes transported.

20 C. The provisions of Subsections A and B of this
21 section shall not apply to shipments using a common or contract
22 carrier transporting cigarettes through New Mexico for delivery
23 to [~~another~~] a location outside of New Mexico pursuant to a
24 proper bill of lading or freight bill that states the quantity,
25 source and destination of the cigarettes.

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underscored material = new
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1 D. A common or contract carrier transporting
2 cigarettes to a distributor pursuant to a proper bill of lading
3 or freight bill that states the quantity of cigarettes, the
4 name and address of the consignor or seller of the cigarettes
5 and the name and address of the consignee or purchaser of the
6 cigarettes shall not be in violation of the provisions of
7 Subsection A of this section.

8 [~~D-~~] E. The department may, by regulation, require
9 and prescribe the contents of reports to be filed with the
10 department by persons transporting unstamped packages of
11 cigarettes in New Mexico."

12 SECTION 5. Section 7-12-13.1 NMSA 1978 (being Laws 2006,
13 Chapter 91, Section 16) is amended to read:

14 "7-12-13.1. CIVIL PENALTIES.--

15 A. Whoever [~~knowingly~~] fails, neglects or refuses
16 to comply with the provisions of the Cigarette Tax Act shall be
17 liable for, in addition to any other penalty provided in that
18 act:

19 (1) for a first offense, a penalty of up to
20 [~~one thousand dollars (\$1,000)~~] two thousand dollars (\$2,000);

21 (2) for a second offense, a penalty of not
22 less than [~~one thousand five hundred dollars (\$1,500)~~] three
23 thousand dollars (\$3,000) and no more than [~~two thousand five~~
24 ~~hundred dollars (\$2,500)~~] five thousand dollars (\$5,000); and

25 (3) for a third or subsequent offense, a

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1 penalty of not less than [~~five thousand dollars (\$5,000)~~] ten
2 thousand dollars (\$10,000).

3 B. Whoever fails to pay a tax imposed pursuant to
4 the Cigarette Tax Act at the time the tax is due shall, in
5 addition to any other penalty provided in that act, be liable
6 for a penalty of five hundred percent of the tax due but
7 unpaid.

8 C. Contraband cigarettes in New Mexico and the
9 equipment used to manufacture, package or stamp them are
10 subject to seizure, forfeiture and destruction by the
11 department, its revenue officers or its agents or by other
12 state or local peace officers.

13 D. Counterfeit stamps for use in New Mexico in the
14 possession of any person and the equipment used to produce them
15 are subject to seizure by the department, its revenue officers
16 or its agents or by other state or local peace officers."

17 SECTION 6. Section 7-12-13.2 NMSA 1978 (being Laws 2006,
18 Chapter 91, Section 17, as amended) is amended to read:

19 "7-12-13.2. CRIMINAL OFFENSES--CRIMINAL PENALTIES--
20 SEIZURE AND DESTRUCTION OF EVIDENCE.--

21 A. Whoever violates a provision of the Cigarette
22 Tax Act or a rule adopted pursuant to that act is guilty of a
23 [~~misdemeanor~~] fourth degree felony and shall be sentenced in
24 accordance with the provisions of Section [~~31-19-1~~] 31-18-15
25 NMSA 1978.

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1 B. Whoever, with intent to defraud, fails to comply
2 with a licensing, reporting or stamping requirement of the
3 Cigarette Tax Act or with a licensing, reporting or stamping
4 rule adopted pursuant to that act is guilty of a [~~fourth~~] third
5 degree felony and upon conviction shall be sentenced pursuant
6 to the provisions of Section 31-18-15 NMSA 1978.

7 C. Whoever packages cigarettes for sale in New
8 Mexico or whoever sells cigarettes in New Mexico, in packages
9 of other than five, ten, twenty or twenty-five cigarettes is:

10 (1) for the first offense, guilty of a
11 [~~misdemeanor~~] fourth degree felony and when convicted shall be
12 sentenced pursuant to Section [~~31-19-1~~] 31-18-15 NMSA 1978; and

13 (2) for the second or subsequent offense,
14 guilty of a [~~fourth~~] third degree felony and when convicted
15 shall be sentenced pursuant to Section 31-18-15 NMSA 1978.

16 D. Whoever purchases or otherwise knowingly obtains
17 counterfeit stamps or whoever produces, uses or causes
18 counterfeit stamps to be used is guilty of a [~~fourth~~] third
19 degree felony and upon conviction shall be sentenced pursuant
20 to the provisions of Section 31-18-15 NMSA 1978.

21 E. Whoever sells or possesses for the purpose of
22 sale contraband cigarettes is in violation of the Cigarette Tax
23 Act and shall have the product and related equipment seized.
24 If convicted of selling or possessing for sale contraband
25 cigarettes, the person shall be sentenced as follows:

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1 (1) a violation with a quantity of fewer than
2 two cartons of contraband cigarettes, or the equivalent, is a
3 [~~petty~~] misdemeanor and is punishable in accordance with the
4 provisions of Section 31-19-1 NMSA 1978;

5 (2) a first violation with a quantity of two
6 cartons or more of contraband cigarettes, or the equivalent, is
7 a [~~misdemeanor~~] fourth degree felony and is punishable in
8 accordance with the provisions of Section [~~31-19-1~~] 31-18-15
9 NMSA 1978; and

10 (3) a second or subsequent violation with a
11 quantity of two cartons or more of contraband cigarettes, or
12 the equivalent, is a [~~fourth~~] third degree felony and is
13 punishable by a fine not to exceed [~~fifty thousand dollars~~
14 ~~(\$50,000)~~] one hundred thousand dollars (\$100,000) or
15 imprisonment for a definite term not to exceed eighteen months,
16 or both, and shall also result in the revocation by the
17 department of the manufacturer's or distributor's license, if
18 any.

19 F. Contraband cigarettes or counterfeit stamps
20 seized by the department or by a law enforcement agency shall
21 be retained as evidence to the extent necessary. Contraband
22 cigarettes or counterfeit stamps no longer needed as evidence
23 shall be destroyed.

24 G. Prosecution for a violation of a provision of
25 this section does not preclude prosecution under other

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1 applicable laws."

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Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

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FISCAL IMPACT REPORT

ORIGINAL DATE 02/21/13

SPONSOR Lopez LAST UPDATED _____ HB _____

SHORT TITLE Cigarette Tax Stamps & Penalties SB 516

ANALYST Walker-Moran

REVENUE (dollars in thousands)

Estimated Revenue					Recurring or Nonrecurring	Fund Affected
FY13	FY14	FY15	FY16	FY17		

(Parenthesis () Indicate Revenue Decreases)

Relates to HB 428, HB 75

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Taxation and Revenue Department (TRD)
 Public Regulation Commission (PRC)
 Indian Affairs Department (IAD)

SUMMARY

Synopsis of Bill

Senate Bill 516 has two principal purposes. First, it amends the Cigarette Tax Act by deleting Section 7-12-5(G). That provision indicates that cigarette sales bearing a tax-credit stamp are not "units sold" for the purposes of the Tobacco Escrow Act. Along with that deletion, the bill amends Section 6-4-12(J) to include tax-credit sales in the definition of "units sold" in the Tobacco Escrow Act. The bill also amends the definition of "units sold" in Section 6-4-12 to encompass all sales on which excise tax is owed rather than all sales on which excise tax is collected.

Second, the bill increases the civil and criminal penalties for violations of the Tobacco Escrow Act. The civil penalties are paid by non-participating manufacturers who fail to pay the escrow they are legally required to pay. The criminal penalties are applied to persons selling contraband cigarettes (those cigarettes that do not appear on the Attorney General's tobacco directory). In

addition to increasing those penalties, the bill amends Section 7-12-13.1 to create strict liability for the failure to pay required escrow.

There is no effective date of this bill. It is assumed that the new effective date is 90 days after this session ends (June 14, 2013).

FISCAL IMPLICATIONS

***Escrow collected per the changes in this bill will increase payments into the tobacco escrow account. The impact could potentially be several million dollars but cannot be determined exactly until escrow payments are collected from non-participating manufacturers (NPMs).

As reported by Attorney General's Office (AGO):

This bill is designed to immunize New Mexico's Tobacco Escrow Act from challenge by the participating manufacturers, or PMs (those tobacco manufacturers who signed the Master Settlement Agreement, or MSA, in settlement of the claims brought by the states against them). Under the MSA, New Mexico is required to collect escrow on tobacco sales made by those manufacturers who did not sign the MSA – the non-participating manufacturers or NPMs. The collection of that escrow is designed to subject both the PMs and NPMs to similar cost structures so that the PMs, who make annual payments to the State pursuant to the MSA, would not be operating at a competitive disadvantage in the State by virtue of their settlement. Part of New Mexico's obligation is to pass a "qualifying statute" that requires NPMs to make these escrow payments. If New Mexico's Tobacco Escrow Act is determined not to be a qualifying statute, the State will lose all of the PM payments it received during the years in which it did not have a qualifying statute.

Though we are prepared to defend the adequacy of the Tobacco Escrow Act as currently written, there is a real risk that it could be found inadequate and that the State would be forced to repay (in the form of a credit against future MSA payments) the money the PMs have paid to New Mexico since possibly 2006 and certainly since 2010. Those payments average between \$35 and \$40 million each year. The passage of this bill would absolutely ensure that New Mexico would have a qualifying statute for the first calendar year in which the bill is effective.

As reported by the Indian Affairs Department (IAD):

Escrow is not assessed against retailers, distributors or purchasers. It is assessed against tobacco cigarette manufacturers and only those who do not participate in the Master Settlement Agreement. However, the cost to the manufacturer might be or could be ultimately passed down to the consumer. Being that this bill addresses escrow for sales on tribal property, the bill could have some effect on businesses and consumers on tribal lands.

SIGNIFICANT ISSUES

As reported by the Taxation and Revenue Department (TRD):

The 2009 amendment to the MSA (Section 6-4-12, Subsection J) added the provision that tax-exempt stamps are to be included in the measurement of "units sold" for purposes of determining escrow payment obligations of non-participating manufacturers. In the 2010 Special Session, a

cigarette tax increase (HB-3 or Laws 2010 2nd S.S., Chapter 5) created a new “tax-credit” stamp which applies to tribal cigarettes that are subject to a qualifying tribal-imposed tax. The department contends that the “tax-credit” stamp is another form of a tax-exempt stamp because no state excise tax is collected on cigarettes with either stamp. As a stamp on cigarettes sold in the state and exempted from state excise tax, volumes of tax-credit stamped cigarettes should be included as volumes intended to be included for purposes of the MSA “units sold”.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the AGO, the failure to pass this bill imperils future MSA payments to the State of New Mexico of between \$35 and \$40 million each year.

SS/svb