

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 02/03/12
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

EWM/lj:svb