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FISCAL IMPACT REPORT

SPONSOR Ruiloba ORIGINAL DATE 2/18/19
LAST UPDATED _____ HB 552
SHORT TITLE E-Cigarette and Nicotine Liquid Act SB _____
ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$4,000.0	\$4,000.0	\$8,000.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to, partly conflicts with, HB 260, SB 342, SB 343, SB 166
Near duplication of Senate Bill 450.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH, commenting on near duplicate bill SB 450)
Regulation and Licensing Department (RLD)
New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of Bill

House Bill 552 creates an E-Cigarette and Nicotine Liquid Act, placing the functions of regulating that industry within the Regulation and Licensing Department. It sets criteria for licensure and fees for manufacturers, distributors and retailers of these products. The bill specifies when a license is not issued, reasons must be given by RLD and the applicant allowed to re-apply without additional fees. Licenses which had not been suspended or revoked could be transferred from one location to another, but not from one person to another. Penalties up to \$10,000 could be assessed for violations of the act, and those fines plus the license fees would be retained within the RLD. Manufacturers are permitted to flavor their nicotine liquids, but cannot “make them attractive to youth,” or sell them or give samples to minors, and must sell them in child-resistant containers. Signs must be posted indicating the products cannot be sold to those under 18 years of age, although these prohibitions would not apply to a minor using an FDA-approved tobacco cessation product. Unannounced inspections to assure compliance with the act would be conducted. Tobacco products, including nicotine liquids, could be sold in vending machines only where they were not accessible to minors.

Buyers would be required to show identification, and an age-verification process must be used, **showing age greater than 21**. Buyers showing false identification would be committing a violation of the act.

Communities within New Mexico would not be permitted to set policies regarding e-cigarettes and/or liquid nicotine products that would be at variance with the provisions of this act.

FISCAL IMPLICATIONS

There is no appropriation. The agency which would be responsible for regulating and enforcing provisions of the act, RLD, states that its costs, based on licensing and regulating and enforcing alcohol and gaming laws, would be \$4,000,000 per year. RLD's reasoning is as follows:

- SB 450 does not contain an appropriation to the Regulation and Licensing Department to administer the licensing and regulating duties of the newly created E-Cigarette and Nicotine Liquid Act. There is no space in the current facilities to house the additional staff that would be required to comply with the duties required. Monies would be required for staff, a facility, furniture, equipment, supplies, IT resources/staff to support the new licensing and regulatory functions, telephones, overhead, etc.
- The bill does not create any kind of fund for the fees it indicates the Department may retain.
- Monies would have to be appropriated to deal with the cost of regulation and enforcement. Currently, the Alcohol and Gaming Division (AGD) within the Regulation and Licensing Department performs similar licensing and regulatory functions as those that will be required in SB 450. However, AGD has only 15 FTEs to perform its alcohol licensing and compliance duties. Alcohol investigative and enforcement duties are performed by certified peace officers of the Special Investigation Division (SID) of the Department of Public Safety. The combined staff required to regulate the alcohol industry is currently 41, comprised of 26 (SID's authorized FTEs) plus 15 (AGD's authorized FTEs) and the current combined budget is just under \$4 million (less than \$1 million for AGD and approximately \$3 million for Special Investigations Division)
- RLD estimates that to license and regulate the E-Cigarette and Nicotine Liquid Act, it will require more than 41 licensing, compliance, inspection and enforcement staff as are currently regulating the liquor industry in New Mexico, particularly since the alcohol industry has been regulated since the end of Prohibition in the 1930s.
- The new duties under the new Act would require at least forty-one (41) FTEs to start-up the unit and perform licensing & compliance duties, management, inspections and investigative and enforcement duties.

SIGNIFICANT ISSUES

There is continuing debate as to the benefits and risks of "vaping". Currently more than twice as many minors in the United States are using vapor products as are using traditional tobacco products such as cigarettes. The industry touts those studies that show that e-cigarettes can be used as a step to quitting using tobacco products. On the other hand, many organizations, including the American Academy of Pediatrics (AAP), believe that use of e-cigarettes causes minors to become addicted to nicotine, and many of those minors go on to use cigarettes and

other tobacco products. The New Mexico Youth Risk and Resilience Study, a broad-based study among New Mexico high school students (youthrisk.org) indicates that 10.6 percent of high school students were current cigarette users in 2017 and 24.7 percent of them were current e-cigarette users in the same year (third highest state of the 37 reporting to the CDC on their findings). Comment from the AAP includes the following: “To prevent children, adolescents, and young adults from transitioning from e-cigarettes to traditional cigarettes, there is a critical need for e-cigarette regulation, legislative action, and counterpromotion to protect youth.”

DOH notes that “The Tobacco Control Legal Consortium (Consortium) recommends that, in most circumstances, existing definitions of “tobacco products” in tobacco control laws should be broadened to include e-cigarettes and similar products. Defining e-cigarettes solely as standalone products rather than including them in a broadened definition of “tobacco products” risks disqualifying these devices from current tobacco products restrictions. Broadening the general definition of “tobacco products” to clearly include e-cigarettes and other electronic nicotine delivery systems would subject them to the same legal restrictions applied to other tobacco products, such as youth access, sales, and marketing restrictions. The Consortium recommends including – in the same section of the statute or ordinance – a separate definition of e-cigarette in addition to the broadened definition of “tobacco product.” The Consortium emphasizes the need for clear definitions and concise language to avoid confusion about what constitutes an e-cigarette. They advise that, “...definitions should be explicit about what they cover yet broad enough to anticipate future product innovations. This eliminates ambiguity of new products that are similar to those already in existence but would not fall under a narrow definition.” (Tobacco Control Legal Consortium, 2014)”

DOH also comments on the discrepancy that would occur between how other tobacco products are regulated and how e-cigarettes and liquid nicotine would be regulated if this bill were passed. DOH also takes note of the apparent discrepancy between that portion of the law which forbids making these products attractive to minors, and the permission the bill gives to adding flavoring.

To the point of preemption of local governments’ ability to make their own regulations on these products, DOH states “SB552 would preempt a local government’s authority to enact more stringent tobacco control regulations that could further protect youth. Because local control is so integral to tobacco control, the tobacco industry and its allies have historically used, and continue to use, preemptive strategies to thwart smoke-free laws, youth access and retailer licensing restrictions, advertising and promotion regulations, and similar policies.”

TECHNICAL ISSUES

RLD notes the following issues are important to its regulation and enforcement of the act:

- The bill contains no provision for the Department to promulgate rules necessary to administer the Act.
- SB 450 allows for the delivery of e-cigarettes and nicotine liquids to the consumer. Enforcement of violations at a person’s home will be extremely difficult.
- The bill does not provide penalties for unlicensed activity.
- The bill has no appropriation for start-up costs. The Department will need to have space, hire staff, purchase equipment (computers, telephones, copiers) and office supplies in order to begin preparing applications and setting up the processes necessary to begin

licensing and inspection functions. The licensing and penalty fees to fund the Department will not begin immediately, but the duties under the bill will begin immediately. Additionally there is no fund set up although the bill indicates that the Department may retain fees.

- The Bill has no provisions whatsoever regarding the dual licensure of alcohol and e-cigarettes or nicotine liquids. Perhaps the drafters intend that alcohol and e-cigarettes or nicotine liquids can be either retailed or wholesaled at the same location or by the same people.
- The Bill does not effectively establish separate industry tiers. As with alcohol, establishing the separation of manufacturers and retailers ensures economic diversity, provides natural price floors, and avoids monopolization. SB 450 does not contain any provisions that would prevent persons from holding all three types of licenses.
- The Bill does not provide for any enforcement powers in district court, and only minimal inspection ability rather than the power to investigate. At a minimum, there should be an investigative/adjudicative framework with an appropriate law enforcement agency, similar to the relationship between AGD and the Special Investigations Division of the Department of Public Safety.
- The bill does not define a “licensed premises” and is unclear about how many premises may be licensed on one application. Page 8, lines 23 – 25 seem to indicate that an application can be made for multiple locations. Is one application fee of one hundred fifty dollars valid for multiple locations or for only one location? The bill is also silent regarding any distance requirements from churches and schools.
- The bill requires that licensees maintain invoices for two years, but does not specify invoices for what. Would a convenience store need to maintain invoices for candy or other non-tobacco related products?
- The bill prohibits sales to minors but does not prohibit minors from being employed in the sale of e-cigarettes and nicotine liquids.
- The bill does not contain language regarding the refusal to sell e-cigarettes and nicotine liquids to persons unable to produce identification similar to Section 30-49-5. The forms of identification listed do not include ID’s issued by a foreign government.
- This bill does not provide specific guidelines regarding expiration and renewal of licenses. It states that terms “shall not exceed” either five years or one year. Additionally, the bill states that the department shall either grant or deny a license application within sixty days after a complete application is submitted. The bill does not set forth either any application requirements or grounds for denial. It requires that applicant submit to a background check but does not indicate what the department can do with the results of that check. Can a license be denied for certain types of violations? Without the ability to promulgate rules, the bill is too vague to allow the department to effectively implement the licensing process.

RELATIONSHIP and partial CONFLICT with:

- HB260 which proposes to ban the sale, purchase, or provision of free samples of flavored tobacco products, and would provide definitions and penalties somewhat different than in SB 450;
- SB342 which proposes to amend the Tobacco Products, E-Cigarette, and Nicotine Liquid Container Act to ban the sale of tobacco products, e-

cigarettes or nicotine liquid to any person under twenty-one years of age (instead of 18, as in this act).

- SB343 which proposes to ban the sale, purchase, or provision of free samples of flavored tobacco products, and would provide related definitions and penalties.
- SB166, which proposes to increase the cigarette tax rate, impose a tax on certain cigars and on e-liquid used in e-cigarettes, and provide a discount in tax for certain cigarettes and tobacco products.
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NEAR DUPLICATE BILL: House Bill 552. Key differences are as follows:

Provision	House Bill 552 Version	Senate Bill 450 Version
Age when one can buy e-cigarettes or liquid nicotine	21	18
Penalties for violating act.	No administrative penalty specified	Up to \$10,000 administrative penalty for violating act.
Penalties for sale to a minor	Up to \$250	Up to \$1000
Criminal penalty for sales to a minor	Misdemeanor	None specified
Administrative fine for sales to a minor, increasing with number of violations	\$250-\$1000; revocation after fourth offense in 24-month period	\$250-\$5000; revocation after fourth offense in 24-month period

ALTERNATIVES

DOH proposes that “Rather than enacting a new E-Cigarette and Nicotine Liquid Act, the provisions in SB450 that provide for licensure requirements and fees, and prohibit certain acts pertaining to the manufacture, sale, or distribution of e-cigarette and nicotine liquid could be incorporated into the current Tobacco Products, E-Cigarette, and Nicotine Liquid Container Act to cover all tobacco products.”

RLD strongly requests that the Legislature create a non-reverting fund or allow the department to keep 25 percent of monies in the fund to pay for the act’s administration.

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Understanding Conscience Clause Legislation in the context of Religious Liberty Traditions in the United States

This document is one of a series of resources created by a joint work group of the Board of Educational Affairs and Board of Professional Affairs of the American Psychological Association (APA) to inform and guide practitioners, educators, graduate students, and policy makers about the topic of conscience clause legislation. Some conscience clause bills permit practicing psychologists or those who are training to become psychologists to refuse to provide treatment they deem to be contrary to their religious beliefs without adverse consequences. In this document we highlight historical factors that have influenced the development of religious freedom in the United States as embodied in First Amendment Rights, describe how these factors relate to conscience clause legislation and professional training for competence, and then provide a brief overview of common tensions. To engage effectively in policy debates regarding conscience clause legislation in their states, psychologists can benefit from understanding relevant historical contexts and tensions.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

First Amendment to the United States Constitution (1791)

Highlighting Historical Factors Impacting Early Religious Liberty Traditions

- **European precipitants:** European immigrants came to the new world after a protracted series of religious wars.
 - European nations held the ancient and widespread view that religious uniformity was essential for kingdoms and any threat to state religion was also a threat to the state itself.
 - European settlers initially came to the U.S. for freedom to practice their own faith, but not for religious liberty per se. They expected a common faith to be practiced in their new communities.
 - The Radical Reformation, including groups that later became known as the Mennonites or Amish, cultivated a dissenting view arguing that the state should not compel or force compliance in matters of religious belief and practice.
- **Religious liberty traditions:** Roger Williams left Plymouth Bay, a Puritan settlement, to build another colony (Rhode Island) that would recognize the right of people to follow their own free conscience in matters of religious belief. William Penn adopted this same principle of freedom of conscience in Pennsylvania and that colony became a mecca for religious dissidents from many areas.
- **Federalizing religious liberty:** When the U.S. won its independence, state churches were still in place in most colonies representing groups as divergent as Catholic, Anglican, or Congregational. There was no way to establish one sect as the religion of the new country without plunging America back in the religious

conflicts of Europe. To avoid this problem, the religious liberty model of Roger Williams and William Penn inspired the new federal government's approach to these matters. This meant that freedom of belief on religious matters without any state compulsion became federal law.

- **The first liberty:** This religious liberty tradition embodied in the first amendment has been called the "first liberty." It grants freedom of conscience on religious beliefs, prohibits establishment of religion by the government, and implicitly acknowledges the U.S. as a place that accommodates religious pluralism.
- **Freedom of religion as freedom of belief and practice:** Freedom of religion has subsequently been interpreted by the Supreme Court to mean freedom of belief for the religious and non-religious alike. It is freedom of belief or "soul liberty" that allows dissenting minorities to be protected in their beliefs rather than forced to conform to majority religious beliefs or practices.

Conscience Clause Legislation

- The Supreme Court of the United States has interpreted the First Amendment to require that state actors maintain a non-hostile neutrality towards religion and ensure freedom of conscience.
- Yet, the right to *free exercise of religion* does not require a state to accommodate religious practices in opposition to a valid rule or law that is neutral, generally applicable, and does not target any particular religious group.
- Conscience clause initiatives have arisen over time, from the freedom to be a conscientious objector during wartime to the freedom from having to engage in professional practices not consistent with one's faith.
- Although educational and practice settings are generally expected to respect or accommodate the religious liberty rights for students and employees, protections for conscience are not absolute and a wide range of court decisions has limited these rights. When there is compelling public interest, such as access to quality health care, or quality assurance in education, certain accommodations may not be required.

Common Tensions Impacting Mental Health Professions

- **Training competence and religious liberty:** Institutions with training programs have a joint obligation to instill minimum profession-wide competencies in graduate students and respect their religious liberty.
- **Freedom of religion and non-discrimination:** It is a complex issue as to whether there should be limits to the accommodation of religious beliefs when religious beliefs and practices potentially result in a discriminatory impact. Whereas some have argued that conscience clauses sanction unfair discrimination, others argue that not making room for conscience is itself discriminatory against religious beliefs. These worldviews can include biases and stereotypes about others that exacerbate tensions and polarize dialogue.
- **Psychologists accept public oversight:** Licensed mental health professions are regulated by state jurisdictions for the purpose of public protection. Graduate

students in training programs and practitioners licensed in a regulated profession accept public oversight to protect the general welfare of those they serve. Although training programs and employment settings may infringe upon religious practices to achieve important educational and public welfare interests, such as ensuring the non-injurious and competent care of clients, they must also be mindful of the religious liberties of graduate students and psychologists,

This document was prepared as an informational summary by the BEA/BPA Joint Working Group, and reviewed by the [Board of Educational Affairs](#) and [Board of Professional Affairs](#) in March 2017. The document was not reviewed by APA Council and thus not adopted as APA policy.

For more information about conscience clause matters as related to psychological practice and graduate training, we provide four resources:

Advocacy Tips for Conscience Clause Legislation:

<http://www.apa.org/ed/graduate/conscience-clause-advocacy.aspx>

Practice Statement about Serving a Diverse Public:

<http://www.apa.org/ed/graduate/diversity-preparation.aspx>

Education and Training Statement about Serving a Diverse Public:

<http://www.apa.org/ed/graduate/diversity-preparation.aspx>

Wise, E. H., Bieschke, K. J., Forrest, L., Cohen-Filipic, J., Hathaway, W. L., & Douce, L. A. (2015). Psychology's proactive approach to conscience clause court cases and legislation. *Training and Education in Professional Psychology*, 9, 259-268. <http://dx.doi.org/10.1037/tep0000092>.

For more information or assistance, contact: [Susan R. Lazaroff, J.D.](#), Director, State Advocacy, American Psychological Association. Phone: 202-336-5868 Email: slazaroff@apa.org