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FISCAL IMPACT REPORT

ORIGINAL DATE 2/18/19

SPONSOR Muñoz LAST UPDATED _____ HB _____

SHORT TITLE E-Cigarette & Nicotine Liquid Act SB 450

ANALYST Chilton

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY19	FY20		
	Mentioned, not specified	Uncertain	Uncertain

(Parenthesis () Indicate Expenditure Decreases)

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, HB260, SB342, SB343, SB166
Near duplication of House Bill 552.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH)
Regulation and Licensing Department (RLD)
New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of Bill

Senate Bill 450 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 that 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 thousand could be assessed for violations of the act, and those fines plus the license fees would be retained within 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. 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 or liquid nicotine products that would be at variance with the provisions of this act.

An appropriation is noted in the bill’s title, but not mentioned elsewhere in the bill, and an amount is not specified.

FISCAL IMPLICATIONS

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

- SB450 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 and 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 SB450. However, AGD has only 15 FTE 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, comprising of 26 (SID’s authorized FTE) plus 15 (AGD’s authorized FTE) 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 the 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 because 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 41 FTE to start-up the unit and perform licensing and 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 AAP (see attachment) 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 counter promotion to protect youth.”

DOH notes, “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 that 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, “SB450 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.
- SB450 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. SB450 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 and 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 \$150 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 30-49-5 NMSA 1978. The forms of identification listed do not include IDs 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 60 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 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 SB450.
- SB342 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 proposes to ban the sale, purchase, or provision of free samples of flavored tobacco products and would provide related definitions and penalties.
- SB166 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.

NEAR DUPLICATE BILL: House Bill 552. Key differences between the two bills follow:

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, “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 nonreverting 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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