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## FISCAL IMPACT REPORT

SPONSOR Thomson/ Ferrary ORIGINAL DATE 02/18/21  
LAST UPDATED \_\_\_\_\_ HB 205  
SHORT TITLE Prohibit Sale of Flavored Tobacco Products SB \_\_\_\_\_  
ANALYST Torres

### REVENUE (dollars in thousands)

Estimated Revenue					Recurring or Nonrecurring	Fund Affected
FY20	FY21	FY22	FY23	FY24		
				See technical issues	Recurring	General Fund

Parenthesis ( ) indicate revenue decreases

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Attorney General (NMAG)  
Administrative Office of the Courts (AOC)  
Department of Health (DOH)

### SUMMARY

#### Synopsis of Bill

House Bill 205 (HB205) intends to make it illegal to sell, purchase, or possess flavored tobacco products in New Mexico and to add criminal penalties. However, there may be issues with the definition of characterizing flavor and a flavored tobacco product. See technical issues.

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

### FISCAL IMPLICATIONS

Based on the definition of characterizing flavor in the bill, it does not appear to have any affect. (See technical issues.)

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, and appeals from convictions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

## SIGNIFICANT ISSUES

The Department of Health notes the following implications related to flavored tobacco products:

On January 2, 2020, the U.S. Food and Drug Administration (FDA) published its enforcement priorities that includes enforcement against any flavored, cartridge-based electronic nicotine delivery system (ENDS) product (other than a tobacco- or menthol-flavored ENDS product) as a strategy to reduce youth initiation of such products (<https://www.fda.gov/media/133880/download>). Based on the evidence published in the report, “The Flavor Trap: How Tobacco Companies Are Luring Kids with Candy-Flavored E-Cigarettes and Cigars,” the Campaign for Tobacco Free Kids further recommends that the FDA should strengthen its rules by banning all flavorings, including menthol, in all tobacco products. A key finding of that report states, “Tobacco companies have a long history of developing and marketing flavored tobacco products as ‘starter’ products that attract kids.”

According to the article, “Menthol and Cigarettes” from the Centers for Disease Control and Prevention (CDC), young people and African Americans are more likely to smoke menthol cigarettes than other groups. The report also notes that tobacco companies add menthol to make cigarettes seem less harsh and more appealing to new smokers and young people. The article states, “Smoking any kind of cigarette, including menthol cigarettes, is harmful and increases risk for serious illness and death. Studies have shown that menthol in cigarettes likely leads people—especially young people—to experiment with smoking. It also could increase a young person’s risk of becoming dependent on nicotine.”

On Jan. 22, 2021, attorneys general from 23 states, including New Mexico, submitted a letter to the FDA calling for a ban on menthol cigarettes, arguing that it would benefit public health overall, decrease youth smoking and help mitigate the harm menthol cigarettes do to minority populations<sup>1</sup> and noted that menthol in cigarettes disguises their harsh flavor, making it attractive for beginners who experiment with cigarettes and ultimately become addicted. In the letter, they highlighted the FDA’s data saying that in 2019 it was estimated that 46.7 percent of middle and high school-aged smokers use menthol cigarettes.

Currently, five states and at least 300 localities have passed restrictions on the sale of flavored tobacco products (<https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>).

The Tobacco Products Act, as it was adopted in 2020, eliminated youth penalties in favor of applying penalties to retailers, distributors, and manufacturers for selling tobacco products to a minor. HB205 reintroduces penalties for youth. Youth purchase, use, and possession laws unfairly punish and stigmatize children and inappropriately shift blame from the tobacco retailers, distributors, and manufacturers to children and youth. Stigma has not been proven to be an effective public health intervention and may deter those

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<sup>1</sup> (<https://ncdoj.gov/wp-content/uploads/2021/01/2021-01-22-State-Comments-on-Citizen-Petition-on-Menthol-in-Cigarettes.pdf>)

wanting to quit from seeking help or education<sup>2</sup>. Furthermore, laws that penalize children that are not strictly enforced can breed disrespect for the law by young people, thereby having a negative effect<sup>3</sup>. Laws that penalize youth tobacco possession, use, and purchase may divert policy attention from effective tobacco control strategies, relieve the tobacco industry of responsibility for its marketing practices, and reinforce the tobacco industry's espoused position that smoking is for adults only.<sup>4</sup>

A recent study showed that when certain flavored e-cigarette flavors are restricted, youth navigate to those still available<sup>5</sup>. For example, youth use of mint and menthol e-cigarettes increased sharply in 2019 after July restricted the availability of other flavors in November 2018. Within a four-year period, mint and menthol went from among the least popular to among the most popular e-cigarette flavors among high school students.

Prohibiting the sale of flavored tobacco products, as [intended] in HB205, could result in decreased use of tobacco products by youth and young adult populations in New Mexico.

Flavored tobacco and vaping products have the greatest appeal to youth and young adults (2016 Surgeon General's Report: E-Cigarette use Among Youth & Young Adults). In New Mexico, nearly 8 in 10 of New Mexico high school youth and young adults who smoke or vape use flavored products, compared to just under half of adults age 30 and older (2017 YRRS; 2018 NMTES). The strong appeal of flavored tobacco and vaping products makes youth and young adults susceptible to lifelong nicotine addiction and exposure to other harmful chemicals, including heavy metals and cancer-causing toxins (2016 Surgeon General's Report & Young Adults).

African Americans are also expected to be positively impacted by HB205, as they have been targeted historically by the tobacco industry, resulting in higher smoking prevalence and disproportionately high use of menthol-flavored tobacco products (CDC African Americans & Tobacco Factsheet, 2020). In New Mexico, 21 percent of African American adults currently smoke cigarettes, highest among all racial/ethnic groups and higher than the general population (16 percent) [2017-2019 BRFSS].

Health impacts resulting from [a ban on flavored products] include an expected significant reduction in the availability and use of flavored tobacco products, especially among youth and youth adults who are especially drawn to flavored products. Among New Mexico high school youth, e-cigarettes are the highest prevalence tobacco product (34 percent) and about 8 in 10 e-cigarette users report using flavored products (2019/2017 YRRS). The 2016 Surgeon General Report on e-cigarettes concluded that flavors are among the most commonly cited reasons for using e-cigarettes among youth and young adults (2016 Surgeon General's Report: E-Cigarette Use Among Youth & Young Adults). The prohibition of flavored tobacco products ... would likely reduce the high rate of e-cigarette use, reduce the likelihood of switching to other tobacco products, and reduce the risks posed by nicotine addiction. [It] will also significantly reduce access

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<sup>2</sup> (<https://www.tobaccofreekids.org/assets/factsheets/0074.pdf>)

<sup>3</sup> (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1766089/pdf/v012p000i6.pdf>)

<sup>4</sup> (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1766089/pdf/v012p000i6.pdf>)

<sup>55</sup> (<https://jamanetwork.com/journals/jama/fullarticle/2755265>)

to flavored cigars, spit/chew, and hookah products among youth in the state.

## **DUPLICATION, CONFLICT, COMPANIONSHIP OR RELATIONSHIP**

HB205 relates to:

- HB97, which would clarify that municipalities and counties may enact ordinances, charter amendments or regulations pertaining to the sales of tobacco products that are stricter than, but not in conflict with, the provisions of the Tobacco Products Act.
- SB95, which would clarify that municipalities and counties may enact ordinances, charter amendments or regulations pertaining to the sales of tobacco products that are stricter than, but not in conflict with, the provisions of the Tobacco Products Act.
- HB167, which would amend cigarette tax distribution formulas, increase tax rates for cigarettes and other tobacco products, including e-cigarettes, and reduce tax stamp discounts to distributors.

## **TECHNICAL ISSUES**

Section 4-A. defines “characterizing flavor” as a “*distinguishable taste or aroma or both, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product. A tobacco product shall not be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information*”. By excluding products that use additives or flavorings, it appears that any flavored tobacco product would not meet the definition of having a characterizing flavor since such flavors must be additives.

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