

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 1/31/09

SPONSOR Martinez LAST UPDATED HB

SHORT TITLE Safer Cigarette and Firefighter Protection Act SB 243

ANALYST Lucero

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	\$0.01	Recurring	Safer Cigarette Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates HB70

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
	Unknown	Unknown	Recurring	Safer Cigarette

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	\$0.01*	\$0.01*	\$0.01*	\$0.03*	Recurring	Safer Cigarette fund

(* Minimal to Moderate but indeterminate at this time)

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH)

Public Regulation Commission (PRC)

Taxation and Revenue Department (TRD)

Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

Senate Bill 243 proposes to enact the “Safer Cigarette and Firefighter Protection Act” and establish the “Safer Cigarette and Firefighter Protection Fund”. The proposed Act would require cigarettes to have properties to allow for the self extinguishing of the cigarettes should they be left unattended. SB243 proposes a significant series of testing standards to be completed by the Fire Marshal’s office, enforcement standards, and a fee structure for fines imposed for non-compliance.

This bill provides that the Taxation and Revenue Department (TRD) in the regular course of conducting inspections of wholesale dealers, agent and retail dealers may inspect cigarettes to determine if the cigarettes are marked as required by the Act. (See Detailed Discussion for marking of cigarette packaging requirements.) If the cigarettes are not marked as required, TRD shall notify the State Fire Marshal. The Act shall not prohibit wholesale or retail dealers from selling their existing inventory of cigarettes on or after the effective date of the Act if the wholesale or retail dealer can establish that state tax stamps were affixed to the cigarettes prior to the effective date in comparable quantity to the inventory purchased during the same period of the prior year.

The bill also proposes to create the Safer Cigarette and Firefighter Protection Fund, with appropriation authority granted to the Fire Marshal’s office to enforce the provisions of this Act, as well as for fire safety and prevention programs.

The effective dates would be January 1, 2010 for Sections 1 through 6 and 8 through 11 and June 19, 2009, for Section 7 (Implementation) and Section 12 (State Preemption).

FISCAL IMPLICATIONS

This bill creates a new fund and provides for continuing appropriations. The LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the legislature to establish spending priorities.

The State Fire Marshal reports that it is unknown how much revenue would be collected by the certification filings and assessed penalties; however it is believed that the revenues placed in the Safe Cigarette fund would be adequate to administer the program.

As currently drafted, SB243 requires the Attorney General’s Office (AGO) to maintain records of certifications required under the act, as well as copies of the test reports. However, the bill does not provide any funding to the AGO for this purpose. Additionally, the bill places the burden of monitoring and enforcement on the State Fire Marshal, the Taxation and Revenue Department as well as the AGO, but permits appropriations from a fund created with the penalties provided for under the Act to go only to the State Fire Marshal. While the act provides that either the State Fire Marshal or the AGO may prosecute violations of this Act, it is unlikely that the State Fire Marshal will have attorneys available for prosecution of the Act, and this task will likely fall to the AGO, yet no funds are provided to the AGO for that purpose. The bill places additional responsibilities on the AGO without providing additional funds.

SIGNIFICANT ISSUES

According to the Department of Health (DOH), smoking is the number one cause of preventable home fire deaths in the United States. The principal victims of tobacco-caused fires are children, senior citizens and firefighters. U.S. fire departments responded to an estimated 142,900 smoking-material fires in 2006. These fires caused 780 deaths, 1,600 injuries, and \$606 million in direct property damage. One-fourth of the deaths were of non-smokers. More children and elderly are injured in fires than any other portion of our population. That population statistically stands to see more of a benefit, but this bill potentially protects all populations.

New Mexico is one of only 6 states that have not introduced such legislation. Tobacco manufacturers have already geared up to meet the requirements and thus this Act would not be a financial burden to the companies. Additionally, New Mexico's five neighboring states require fire-safe cigarettes (AZ, UT, CO, OK, TX), as well as Canada.

In order to comply with the scheme of Tobacco legislation, AGO notes that some of the definitions in this bill should be changed to comport with existing definitions and processes. The bill also does not reflect the AGO's directory, on which this information should be kept, and maintained and kept for public review. Section 4(F) should be revised to include the requirement that compliance with the Act be noted on the AGO's tobacco directory, as described in NMSA 1978, § 6-4-16(D) and NMSA 1978, § 6-4-18. In addition, the Act does not reflect the concept of contraband cigarettes in New Mexico. If the bill is adopted, it should include a provision whereby the tobacco products that don't comply with the Act are deemed contraband, under NMSA 1978, § 6-4-22(D).

Optimally, the requirements of this Act should be made a requirement for tobacco manufacturer certification in New Mexico, pursuant to NMSA 1978, § 6-4-17, and the information should be required by the AGO and TRD for inclusion on the AGO directory, and manufacturer certification by TRD. However, the Act lacks any rulemaking provisions, giving the authority to promulgate rules to affect this outcome.

While the bill provides for the inspection and seizure and destruction of products in violation of the Act, it does not provide a procedure for doing so, nor does it refer to the Forfeiture Act, NMSA 1978, §§ 31-27-1, *et seq.*, incorporating the process provided under that statute. As written, the bill probably is in violation of the due process clause of the constitution (state and federal), by permitting destruction of property without due process. This could be cured by either a rule making clause, and rules that would address the procedures required, or by incorporating the Forfeiture Act, NMSA 1978, §§ 31-27-1, *et seq.*, as the process provided. It requires a hearing and findings before the ultimate destruction of property.

PERFORMANCE IMPLICATIONS

As drafted, the bill requires the AGO to maintain information regarding a cigarette brand's compliance with the section, to maintain records regarding manufacturers' compliance with the Act and to enforce the Act. Organizing and maintaining the records will require the time of non-lawyer staff. Enforcement of the Act will require the time of both lawyer staff and non-lawyer staff. There is no appropriation to fund these activities at the AGO, and the duties could detract from other Tobacco Enforcement efforts that are already under staffed at this time. According to the AGO, the Tobacco Enforcement section is over burdened, placing new responsibilities on

this section, without further funding for additional staff, places the states approximately \$40 million of Tobacco Settlement Fund at risk; New Mexico's settlement fund payment can be greatly or completely reduced if it is found that the AGO did not adequately enforce New Mexico's Tobacco Statutes.

ADMINISTRATIVE IMPLICATIONS

The Audit and Compliance Division of TRD may need to train employees on the new audit procedures. Notice to manufacturers and retailers will need to be developed through coordination between the Attorney General, State Fire Marshal, and Taxation and Revenue Department.

As drafted, the bill will require the AGO to maintain information regarding a cigarette brand's compliance with the section, to maintain records regarding manufacturers' compliance with the Act and to enforce the Act. This will require the time of a staff person to maintain the records and follow up on compliance with the Act, and it will require the time of an attorney to take civil action to enforce the provisions of the Act, if violated. Staff time required for the record keeping aspect will probably take the equivalent of .1 of a full time position. Depending upon the level of compliance, attorney time could be up to .3 of a full time lawyer position.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Duplicates HB70

TECHNICAL ISSUES

AGO notes:

This bill makes manufacturers responsible for compliance, but not distributors. In order to be more consistent with the Tobacco Escrow Fund Act in Title 6 (NMSA 1978, §§ 6-4-13 through 6-4-24) and the Cigarette Tax Act in Title & (NMSA 1978, §§ 7-12-1, *et seq.*) the drafter may want to consider whether a distributor who distributes cigarettes to be sold in New Mexico should also be subject to fines for selling cigarettes that don't comply with the Act, particularly if that information is included in the AGO directory.

As drafted, the bill does not make a specific determination about the fund that the penalties should go to. To make collection under this Act easier, the bill could contain a clause providing for fees and costs in the event an enforcement action is necessary:

In an action brought by the state to enforce the provisions of the Safer Cigarette and Firefighter Protection Act, the state shall be entitled to recover the costs of investigation, costs of the action and reasonable attorney fees, if the state prevails.

The following sections should be revised to be more consistent with the existing Tobacco statutes.

1. The term "agent" is vague, and does not comport with the New Mexico Tax Fund Act. The only entities permitted to purchase and affix stamps are tobacco distributors certified with the Taxation and Revenue Department. Section (2)(A) should read:
 - a. "agent" means a distributor of tobacco products required to affix stamps on

cigarette packages pursuant to Section 7-12-5 NMSA 1978 or required to pay excise tax imposed on cigarettes pursuant to Section 7-12A-3 NMSA 1978, as defined by NMSA 1978, 6-4-16(E).

b.

2. The definition of Cigarettes at section 2(B) does not match the definition of “cigarette” in the Tobacco Escrow Fund Act, at NMSA 1978, §§ 6-4-12(D):

a. “cigarette” means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition.

3. The definition of Tobacco Manufacturer does not comport with the existing definition at NMSA 1978, § 6-4-12(I):

a. “tobacco product manufacturer” means an entity that after the date of enactment of this act directly (and not exclusively through any affiliate):

i. manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the master settlement agreement) that will be responsible for the payments under the master settlement agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the master settlement agreement and that pays the taxes specified in subsection II(z) of the master settlement agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

ii. is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

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

b. The term “tobacco product manufacturer” shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within Paragraph (1), (2) or (3) of this subsection.

4. Section 4(F) of the bill could be easily amended to clarify that cigarettes that don’t conform to the requirements of the Act are to be considered Contraband, by adding a clause to the last sentence to the end of that section:

a. “and shall be considered contraband, as defined at NMSA 1978, § 6-4-

22(D), and shall be subject to enforcement under the Tobacco Escrow Fund Act, NMSA 1978, §§ 6-4-12 through 6-4-24.”

5. Section 5(C) should be amended to better coincide with the language and terms used in the existing Tobacco Escrow Fund Act. As written, the bill requires manufacturers to provide its Act certification to Wholesale dealers and agents to whom it sells cigarettes, and that Wholesale dealers and agents and retail dealers shall permit inspection of the cigarette packages to confirm compliance with the Act. This section should include the term “distributors” in both parts of this section, and should state that these entities shall permit “random, unannounced” inspections, during regular business hours.
6. There is no Severability Clause. There is no rule enabling section. There should be a rule enabling section for the Fire Marshal, Taxation and Revenue and the AGO’s office.

DOH notes:

Referring to reduced ignition propensity cigarettes as “fire-safe” rather than “safer” is consistent with terminology used in other states, nationally and internationally. Reduced ignition propensity cigarettes should not be called “safer” cigarettes to avoid implying that the health risks of smoking are reduced, but should instead be called “fire-safe” cigarettes. Both fire-safe and non-fire-safe cigarettes are known to cause addiction, illness and death. The use of fire-safe cigarettes by smokers will still pose the same health risks of smoking, such as cancer, emphysema or heart disease, but will reduce the risk of death from fire.

The Taxation and Revenue Department notes:

The definition of “cigarette” in Section 2, Subsection B (page 1, line 23) differs from the current definition in the Cigarette Tax Act (Section 7-12-2 NMSA 1978), and differs from definitions under the Master Settlement Agreement (MSA). The Department believes that a uniform definition of cigarette is important, particularly due to the extensive and wide-ranging regulation of cigarettes by various state agencies. In interim draft legislation, the Department has proposed the following amendment to Section 7-12-2. This bill should either include the existing version of the definition under Section 7-12-2 (A), or the proposed amended version of Section 7-12-2 (A) NMSA 1978 shown below, or perhaps refer directly to Section 7-12-2 (A) NMSA 1978.

"cigarette" means:

- (1) any roll of tobacco or any substitute for tobacco wrapped in paper or in any substance not containing tobacco; [ø€]
- (2) any roll of tobacco that is wrapped in any substance containing tobacco, other than one hundred percent natural leaf tobacco, which, because of its appearance, the type of tobacco used in the filler, its packaging and labeling, or its marketing and advertising, is likely to be offered to, or purchased by, consumers as a cigarette, as described in Paragraph (1) of this subsection [~~and "cigarette" includes~~];
- (3) bidis and kreteks; or
- (4) any other roll of tobacco that is defined as a "cigarette" in Subsection D of Section 6-4-12 NMSA 1978;

OTHER SUBSTANTIVE ISSUES

DOH acknowledges that *fire-safe* cigarettes or *reduced ignition propensity* cigarettes, which are those cigarettes with a reduced propensity to burn when left unattended, are effective in significantly reducing cigarette fires and fire-related deaths

AMENDMENTS

Possible amendments are discussed in “technical issues” section.

Additionally, the bill sponsor may want to consider amending the bill to remove the appropriation authority being granted in Section 9 of the bill. The LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the legislature to establish spending priorities.

To resolve some of the fiscal and administrative issues, money in the safer cigarette and firefighter protection act fund could also be made available to TRD and AGO for enforcement purposes.

DL/svb:mc