FISCAL IMPACT REPORT

		LAST UPDATED	
SPONSOR	Schmedes	**ORIGINAL DATE**	3/6/23
SHORT TITLE	No Menthol Cigarette Sales	**BILL NUMBER**	Senate Bill 440
		ANALYST	Faubion

REVENUE*
(dollars in thousands)

Estimated Revenue					Recurring or Nonrecurring	Fund Affected
FY23	**FY24**	**FY25**	**FY26**	**FY27**		
--	($1,900)	($1,900)	($1,900)	($1,800)	Recurring	New Mexico Finance Authority (NMFA)/Credit Enhancement – Cigarette Tax
--	($167)	($163)	($160)	($157)	Recurring	UNM Cancer Center – Cigarette Tax
--	($1,800)	($1,700)	($1,700)	($1,700)	Recurring	NMFA/UNM Health Sciences – Cigarette Tax
--	($745)	($728)	($713)	($700)	Recurring	NMFA/Department of Health – Cigarette Tax
--	($125)	($122)	($119)	($117)	Recurring	Rural County Cancer Treatment Fund – Cigarette Tax
--	($18,800)	($18,300)	($17,900)	($17,600)	Recurring	General Fund – Cigarette Tax
--	($2,200)	($2,100)	($2,100)	($2,000)	Recurring	General Fund – GRT
--	($600)	($600)	($600)	($600)	Recurring	Counties - GRT
--	($2,500)	($2,400)	($2,400)	($2,300)	Recurring	Municipalities - GRT
--	Indeterminant but significant (see *Fiscal Implications)*				Recurring	Tribal Governments

Parenthesis ( ) indicate revenue decreases
*Amounts reflect most recent analysis of this legislation.

Relates to Senate Bill 235, House Bill 123, and House Bill 124

Conflicts with House Bill 94

Sources of Information

LFC Files

<u>Responses Received From</u>
Regulation and Licensing Department (RLD)
New Mexico Attorney General (NMAG)

University of New Mexico (UNM)
Human Services Department (HSD)
Department of Health (DOH)

SUMMARY

Synopsis of Senate Bill 440

Senate Bill 440 (SB440) would prohibit the sale of menthol cigarettes.

This bill does not contain an effective date, and as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

The impact of banning tobacco products is difficult to determine. Few data sources are available on consumer responses to banned flavored tobacco products, so consumer impacts are highly uncertain. Projections and studies of the revenue impact from these types of bans range from 4.1 percent in cigarette tax revenue from a menthol ban in California[1] to a 32.8 percent decline in cigarette sales from a flavor ban in Massachusetts[2]. It is important to note, in Massachusetts, neighboring states saw a significant uptick in sales as consumers simply shifted to buying their products over the state line. Nationally, 32.5 percent of cigarette sales in 2015 were menthol cigarettes.

The fiscal impact of this bill was determined by assuming a similar rate of menthol cigarette sales decline as occurred in Massachusetts following their flavored tobacco products ban because the shift to neighboring states experienced there may be similar to the shift that will likely occur to tribal areas in New Mexico (see "Significant Issues"). Using a combination of the cigarette sales impact in Massachusetts and the proportion of flavored to nonflavored cigarette sales nationally, LFC applied a sales discount factor to the cigarette sales forecast from the December 2022 Consensus Revenue Estimating Group forecast to determine the fiscal impact for each distribution of cigarette taxes.

Slightly less than half of the cigarette tax benefits the general fund. The rest is distributed to University of New Mexico and New Mexico Finance Authority for a cancer center, a health sciences center, Department of Health facilities, and a rural county cancer treatment fund. All the beneficiaries would experience a revenue decrease if the bill were enacted.

The decrease in sales will also impact gross receipts tax collections on these products. This analysis assumes roughly 75 percent of sales occur in municipalities and 25 percent in counties and an average state effective GRT rate of 4.157 percent, a combined municipal rate of 7.915 percent, and a remainder of county combined rate of 7.152 percent (FY23 effective rates less the additional 0.0125 percent rate reduction for FY24).

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[1] Tobaccoeconomics.org
[2] Asare S, Majmundar A, Westmaas JL, et al. Association of Cigarette Sales With Comprehensive Menthol Flavor Ban in Massachusetts. JAMA Intern Med. 2022.

Tribal governments will likely see an increase in both excise and gross receipts taxes as consumers purchase their preferred menthol cigarettes on tribal land. While the magnitude of this shift in consumer behavior is difficult to determine, it will likely be significant, although less than the loss experienced by the state because some consumers will switch to non-menthol cigarettes or quit using cigarettes altogether.

The Regulation and Licensing Department (RLD) indicated the existing Alcoholic Beverage Control (ABC) Division staff will be able to administer citations resulting from the prohibition. Monetary administrative penalties collected by ABC will not result in substantial revenue, with licensees complying with the act.

SIGNIFICANT ISSUES

Bans or restrictions on the sale of flavored tobacco or menthol products are gaining momentum around the country. Bans on flavored tobacco exist in five U.S. States—Massachusetts, California, New Jersey, New York, and Rhode Island—and at least 247 municipalities. California's ban was challenged unsuccessfully. On February 6, 2020, federal regulation went into effect that prohibits the sale of flavored, other than menthol or tobacco flavored, cartridge-based (closed system) electronic nicotine delivery systems. Separately, the U.S. Food and Drug Administration (FDA) has proposed a national ban on menthol cigarettes that is currently pending publication for comment. If the FDA ban takes effect, it could raise further legal arguments that the federal Tobacco Products Act preempts state action in further challenges. Further review of the California challenge and scope of the FDA rule are needed to better predict the prospective effects to Senate Bill 440, but the proliferation of similar bans in both states and municipalities supports the legal posture of Senate Bill 440 at the current time.

As sovereign nations, federally recognized Indian tribal governments and reservations are not regulated by New Mexico's Tobacco Products Act. However, they must abide by the federal policy. Given the large number of tribal areas in New Mexico, this bill could incentivize cigarette users to purchase menthol cigarettes on tribal land instead of through retailers subject to the Tobacco Products Act, potentially severely limiting the health and consumption impacts of this bill. This shift in purchasing behavior will also like dull any substitution effects of consumers switching from menthol to non-menthol tobacco products, further hurting state revenues.

This bill narrows the gross receipts tax (GRT) base. Many of the efforts over the last few years to reform New Mexico's taxes have focused on broadening the GRT base and lowering the rates. Narrowing the base leads to continually rising GRT rates, increasing volatility in the state's largest general fund revenue source. Higher rates compound tax pyramiding issues and force consumers and businesses to pay higher taxes on all other purchases without an exemption, deduction, or credit.

The University of New Mexico notes the following:

> The University of New Mexico Comprehensive Cancer Center (UNMCCC) is a recipient of cigarette tax revenues in support of funding debt service of existing NMFA capital bonds and clinical research and basic research programs. The restrictions selling cigarettes as a result of passage of this bill could result in a reduction in the purchase of cigarettes and other tobacco related products. It is possible that passage of this bill could

result in a decrease in the amount of cigarette tax revenue received by the UNMCCC.

Cigarette tax proceeds currently fund debt service on bonds that were issued by the New Mexico Finance Authority for UNM Comprehensive Cancer Center capital projects. The funds also support cancer center operations. During the 2021 session, the legislature authorized the NMFA to issue new bonds for the UNM Comprehensive Cancer Center radiation oncology and laboratory expansion in the amount of $22 million (SB223, Regular Session 2021). The bonds backed by these revenue were issued in 2016 and 2021 with maturity dates of 2025 and 2036 respectively. The net proceeds of the Cigarette Tax proceeds to UNM Health Sciences and Cancer Center after bond repayment over the last three fiscal years were: $3.3 million in FY20, $3.7 million in FY21 and $2.3 million in FY22.

If the proposed restrictions reduce the existing distribution to the UNMCCC, that likely would have an impact on existing education and clinical programs.

The Human Services Department notes the following:

HSD estimates the bill could result in medical cost-savings of $35 million. This estimate is based on HSD-MAD 2022 tobacco-related medical illnesses cost, $129.9 million weighted by two factors: cigarette sales in 2021 (in US convenience stores) as a percentage of all tobacco product sales (75 percent); and menthol cigarettes sales in 2018 as a percentage of total cigarette sales (36 percent).

The Department of Health Notes the following:

In 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. Based on the evidence, 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 Center for Disease Control and Prevention (CDC) report, 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.”

A recent study showed that when certain flavored e-cigarettes are restricted, youth navigate to those still available. For example, youth use of mint and menthol e-cigarettes increased sharply in 2019 after Juul 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.

According to the 2022 National Youth Tobacco Survey, 14.1 percent of high school students and 3.3 percent of middle school students were current e-cigarette users. These shifts indicate that eliminating all flavored e-cigarettes could have a larger impact. Over 46 percent of high school e-cigarette users are vaping at least 20 days a month and 30 percent are daily users. Also, 85 percent of youth e-cigarette users use flavored products. Currently, 14 states and at least 360 localities have passed restrictions on the sale of flavored tobacco products.

Prohibiting the sale of flavored tobacco products, including menthol cigarettes, as proposed in SB440, would be expected to positively impact youth and young adult populations in New Mexico.

ADMINISTRATIVE IMPLICATIONS

Existing Alcoholic Beverage Control (ABC) Division staff will be able to administer any additional citations resulting from the prohibition.

The Office of the Attorney General is responsible for overseeing the Tobacco Master Settlement Agreement (MSA) and works closely with other state agencies regarding the regulation, accounting, and enforcement of tobacco sales and other provisions of the MSA. Senate Bill 440 would necessarily involve attention by the NMAG and related agencies in this ongoing work.

TECHNICAL ISSUES

The provisions in this bill would go into effect two weeks before the start of a fiscal year. LFC recommends an effective date of July 1, 2023.

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.

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