LFC Requester:	Noah Montano

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: February 5, 2025

Bill Number: H.B. 268

Check all that apply:

Original X Correction ____

Amendment ____ Substitute ____

Sponsor: Rep. Art De La Cruz

Short Title: Tobacco Products Act Changes

Agency Name and Code Number: 305 – New Mexico Department of Justice

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis ( ) indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis ( ) indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator's request. The analysis does not represent any official policy or legal position of the NM Department of Justice.

BILL SUMMARY

Synopsis: The bill would require the Alcoholic Beverage Control Division (ABCD) of the Department of Regulation and Licensing to establish and maintain a public list ("registry") of certain electronic nicotine delivery systems and nicotine liquids (collectively electronic nicotine delivery systems "ENDS") that may be sold in New Mexico.

Section 1: of the bill proposes the introduction of two additional definitions: "snuff" and "timely filed premarket tobacco product application." Under the Bill, "snuff" is any finely cut, ground, or powdered tobacco that is not intended to be smoked but is not intended to be ingested through the nasal cavity. "Timely filed premarket tobacco product application" means an application pursuant to 21 U.S.C. § 387j (the U.S. Code which requires tobacco producers to submit information regarding their product for review of its compliance with federal tobacco standards and regulations prior to approval for commercial distribution) "for an electronic nicotine delivery system or nicotine liquid containing nicotine derived from tobacco marketed in the United States as of August 8, 2016 that was submitted to the United States food and drug administration on or before September 9, 2020 and accepted for filing."

Section 2: Section 2 amends and expands the Act to grant concurrent enforcement authority to the New Mexico Department of Justice ("NMDOJ"). Pursuant to the proposed amendment, the Department of Public Safety ("DPS") would no longer have sole authority over all investigations and enforcement activities required under the Tobacco Products Act.

Under the amendments proposed in this Section, the role of the Department of Public Safety in enforcing the Act is as follows: DPS retains the authority over all investigations and enforcement activities required under the Act, except for provisions of the Act relating to the issuance, denial, suspension, or revocation and administrative sanctions of licensees, *unless* its assistance is requested by the director of ABCD of the Regulation and Licensing Department; upon issuance of a citation pursuant to the provisions of the Act, DPS or the law enforcement agency of a municipality or county shall report the alleged violations to the division, *and, if the violations pertain to Section 3 (new Section of the 2025 Act), to the New Mexico Department of Justice*. New language in this Section states that NMDOJ has concurrent authority over *all* investigations and enforcement activities related to Section 3 of the 2025 Act.

Section 3: Section 3 of the Act introduces an *entirely new section* to the Tobacco Products

Act. This new Section pertains to electronic liquid nicotine delivery systems and nicotine liquid product registration and directories. This section requires manufacturers of ENDS that are sold in the State to annually certify with the Alcohol Beverage Control Division (ABCD) that the product 1) has received FDA marketing authorization, 2) is subject of a timely filed pending application with the FDA, or 3) has received an FDA denial order that was later stayed by the agency or a court. The bill proposes a $250 annual certification fee per product.

ABCD would be required to maintain a directory of all certifications that have been received and approved. The bill provides requirements for adding and removing manufacturers from the directory.

This section provides that retailers have 30 days upon removal from the directory to sell the manufacturers products that were in their inventory. After that 30 day time frame, the bill proposes that identified products to be seized from distributors and retailers forfeited and destroyed, with the cost of the seizure, forfeiture or destruction to be paid by the person from whom the products were confiscated.

The bill prohibits the sale of ENDS products in the State beginning August 1, 2025 or by the date the division makes the directory available.

This section also provides that a determination by the division to "not include" or "remove" a manufacturer from the directory is to be appealable to the district court.

The bill provides civil penalties for retailers or distributors that sell or offer for sale ENDS products in the State that are not listed on the Directory.

***Section 4**:* This section provides the effective date of July 1, 2025.

FISCAL IMPLICATIONS

The Act grants authority to the NMDOJ for enforcement of Section 3, therefore requiring the NMDOJ to allocate funds and resources to the enforcement of that Section. Because the section is new and extensive, the NMDOJ will likely be unable to simply restructure its current allocation of funds and, instead, will require additional resources and funds for the enforcement of Section 3. Additionally, because the Section is new, it is difficult to estimate the number of attorneys, investigators, staff, and other resources that will be required to effectively enforce compliance with Section 3. The Act, as proposed, will not provide those additional and necessary funds to the NMDOJ.

SIGNIFICANT ISSUES

1. This bill's creation of the registry is duplicative and may conflict with Federal Law. FDA already publishes a list of authorized ENDS products, which as of January 2025 includes 34 products, all of which are tobacco- or menthol-flavored. This proposed registry would also conflict with the Federal Tobacco Control Act, which requires all new tobacco products, including ENDS products, to receive FDA authorization prior to market introduction. All of the products on the registry, except the 34 FDA authorized products, would still be illegal to sell under federal law.

In December of 2024, three states Utah, Iowa and Kentucky, that had passed similar (nearly

identical) legislation were sued to prevent the implementation of these laws and are currently in litigation. Those states registries are being challenged on Supremacy Clause, Fourth Amendment, Regulatory Taking under the Fifth Amendment of the US Constitution, Equal Protection of the Fourteenth Amendment, and various other State claims.

Section 3 of the bill requires all manufacturers of ENDS products that are sold in the State to annually certify with the Division that the product (1) has received FDA marketing authorization, (2) is the subject of a timely filed pending application with FDA, or (3) has received an FDA denial order that was later stayed by the agency or a court. The FDA, through its premarket tobacco product application ("PMTA") review process, reviews ENDS product marketing applications and authorizes products that are "appropriate for the protection of the public health." This bill would allow ENDS products that FDA has not authorized to be on the registry and therefore legal to sell under state law. This would include both (1) products that FDA has not reviewed and (2) those that FDA has denied authorization to because they are not appropriate for public health (provided the denial order was later stayed).

2. As part of the annual certification process, manufacturers must submit copies of an FDA marketing granted order, an acceptance letter issued by FDA for a timely filed application, or a document issued by FDA or a court confirming that a denial order has been stayed. FDA has taken the position that the application status of an ENDS product is confidential commercial information under federal law, and is unable to provide or confirm this information with a state, making the state's ability to authenticate the certification potentially difficult.

3. The bill mandates that the ABCD shall update the directory monthly to ensure accuracy as well as establish a notification process to all licensed retailers and distributors. For an example of what this may entail on a monthly basis, Oklahoma's registry which has 12,214 products on the registry. Oklahoma is one of three states that currently have a registry.

4. The bill provides that the fees ($250/product) and any penalties collected be deposited into the tobacco products administration fund to be used for the administration and enforcement. This may not be adequate funding to maintain the registry, conduct required compliance checks of all retailers and distributor, and enforcement.

PERFORMANCE IMPLICATIONS

The bill would require the NMDOJ to allocate funds and resources to the enforcement of Section 3 of the bill. Moreover, if an applicant appeals a rejection of a certification pursuant to Section 3, the NMDOJ will be required to litigate that appeal in State District Court.

ADMINISTRATIVE IMPLICATIONS

None.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None.

TECHNICAL ISSUES
None.

OTHER SUBSTANTIVE ISSUES

None.

ALTERNATIVES
None.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL
Status quo**.**

AMENDMENTS
N/A