LFC Requester:	Noah Montano

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO
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(Analysis must be uploaded as a PDF)

SECTION I: GENERAL INFORMATION

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

Date Prepared: February 6, 2025 *Check all that apply:*
Bill Number: HB 268 Original *X* Correction __
Amendment __ Substitute __

Sponsor: Art De La Cruz
Short Title: Tobacco Products Act Changes

Agency Name and Code Number: Regulation and Licensing Department - 420
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		
N/A	N/A	N/A	N/A

(Parenthesis ( ) indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		
	127	127	Recurring	Tobacco Products Administration Fund

(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		2,520		2,520	Nonrecurring	Tobacco Products Administration Fund*

			570	570	Recurring	Tobacco Products Administration Fund*

(Parenthesis ( ) Indicate Expenditure Decreases)

*The projected balance for the Tobacco Products Administration Fund is only one million nine hundred thousand dollars ($1,900,000) for the start of FY26. Thus, it appears the Tobacco Products Administration Fund would not be able to fund the full amount needed to cover the costs involved if this legislation is enacted. Likely General Fund dollars would be required to cover the remaining expenses.

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

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: House Bill 268 (HB 268) amends the Tobacco Products Act (TPA) to add a new section requiring every tobacco manufacturer of an electronic nicotine delivery system or nicotine liquid sold for retail sale or to a consumer in this state to execute and deliver to the Alcoholic Beverage Control Division (ABC) a certification prescribed by ABC, under penalty of perjury, that the manufacturer is compliant with this new section of the TPA and:

- Has received a marketing granted order for the electronic delivery system or nicotine liquid from the United States Food and Drug Administration (FDA) pursuant to 21 U.S.C. § 387j for tobacco product manufacturers to market a new tobacco product; or
- the manufacturer submitted a "timely filed premarket tobacco product application" which
    - has been approved, received marketing granted order; or
    - remains under review by the FDA; or
    - has received a marketing denial order but remains stayed by the FDA, or court order is rescinded by the FDA or vacated by a court.
- At this time, the FDA has only approved and issued thirty-four (34) marketing granted orders, in contrast, the State of Oklahoma has a registration containing over twelve thousand (12,000) products.

HB 268 defines a "timely filed premarket tobacco product application" as an application submitted to the FDA pursuant to 21 U.S.C. § 387j 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 FDA on or before September 9, 2020, and accepted for filing.

The certifications by tobacco manufacturers are due by August 1, 2025, and annually thereafter, and must list the brand name, product name, category and flavor of each electronic nicotine delivery system and nicotine liquor sold in the state. Documentation of the status of the application by the FDA is required. Any material changes in the certification status are to be reported to ABC within thirty (30) days.

HB 268 requires payment of two hundred and fifty dollars ($250) for each electronic nicotine delivery system and nicotine liquid each time a manufacturer submits an annual certification form for that electronic nicotine delivery system and nicotine liquid.

Information submitted by manufacturers shall not be public records subject to inspection under Section 14-2-1 NMSA 1978. However, by October 1, 2025, ABC is required to publish on its official website, a directory listing all electronic nicotine delivery systems, nicotine liquid manufacturers and nicotine liquids for which certifications have been approved. HB 268 requires ABC to update the directory monthly. ABC is also required to establish a process to provide relevant licensees and other parties, notice of the initial publication of the directory and of changes made each month.

ABC can deny or remove a manufacturer or its products certification if the manufacturer provided inaccurate, incomplete, or false information, made material misrepresentations or omissions, failed to pay the required fees, or sold products before the manufacturer or the products were certified.

HB 268 provides how ABC is to enforce the provisions of the bill. Before removing manufacturers or products from the directory, ABC must provide thirty (30) days' notice to the manufacturer. Thereafter, the manufacturer has fifteen days to cure the deficiencies noted by ABC or to establish that the manufacturer or product should be included in the directory. Retailers will have thirty (30) days after the removal of a manufacturer or its products from the directory to sell such products that were in the retailer's inventory as of the date of removal. Thirty (30) days after removal from the directory, products identified in the notice of removal are subject to seizure from distributors and retailers, forfeiture and destruction, and may not be purchased or sold in the state.

On the date ABC first makes the directory available on its official website, electronic nicotine delivery systems and nicotine liquids that are not included in the directory may not be sold for retail sale in this state or to a consumer in this state. Retailers will have sixty (60) days after the directory is published on ABC's website to sell products that were in inventory and are not included in the directory. Distributors will have sixty (60) days to remove those products intended for sale in the state from inventory. Thereafter, such products are subject to seizure, forfeiture and destruction and cannot be sold in this state.

HB 268 provides that the holder of products at the time of confiscation will be responsible for the cost of such actions.

A determination by ABC not to include or to remove a manufacturer or its product from the directory may be appealed to the district court pursuant to Section 39-1-1.1 NMSA 1978.

HB 268 provides civil penalties for selling or offering for sale electronic nicotine delivery systems and nicotine liquids that are not in the directory:

a. First offense carries a penalty of five hundred dollars ($500) for each individual product offered for sale;
b. The penalty for a second offense within three (3) years shall be no less than seven hundred and fifty dollars ($750) and no more than one thousand dollars ($1,000) per product, and thirty (30) day license suspension;
c. The penalty for a third offense within three (3) years shall be no less than one thousand dollars ($1,000) and no more than one thousand five hundred dollars ($1,500) per product, and ninety (90) day license suspension; and
d. The penalty for a fourth or subsequent violation within three (3) years shall be no less than one thousand five hundred dollars ($1,500) and no more than two thousand five

hundred dollars ($2,500) per product, and permanent license revocation.

These penalties would be levied upon the retailer and/or distributor selling the product, but not the manufacturer who failed to register the product.

HB 268 provides civil penalties, including a penalty of ten thousand dollars ($10,000) per product against a manufacturer who sells electronic nicotine delivery systems or nicotine liquids that are not listed in the directory. A manufacturer is guilty of a misdemeanor for each false representation of information required by a certification form. Second or subsequent violations by manufacturers constitute deceptive trade practices pursuant to the Unfair Practices Act.

Fees and penalties collected for violations will be deposited in the Tobacco Products Administration Fund and used for administration and enforcement of this new section.

HB 268 requires manufacturers not registered to do business in this state to designate a registered agent and to post a twenty-five-thousand-dollar ($25,000) surety bond.

HB 268 also defines "snuff" as any finely cut, ground or powdered tobacco that is not intended to be smoked, but does not include finely cut, ground or powdered tobacco that is intended to be placed in the nasal cavity.

HB 268 adds the state Department of Justice (DOJ) to the authority of the Department of Public Safety (DPS) in Section 61-37-21 of the TPA and requires that the DPS or municipal or county law enforcement report any alleged violations of this new section to ABC and DOJ. The DOJ is given concurrent authority over all investigations and enforcement activities related to this section, and the DOJ may request that ABC take appropriate actions with respect to imposing fines and suspending or revoking licenses.

FISCAL IMPLICATIONS

- The Regulation and Licensing Department (RLD) will need to add this new Certification as an option in NM-PLUS licensing and permitting system.
    - The System will need to be programmed with application requirements including uploading supporting documentation for this certification.
    - Integration of these new requirements, not only allowing for register certification but on going "updating" capabilities by manufactures, into the Salesforce platform which NM-PLUS is built on, will cost RLD an estimated one million five hundred thousand dollars ($1,500,000). With an additional four hundred fifty thousand dollars ($450,000) cost for tech team support consisting of a Project Manager, Business Analyst, and Developer, for the approximate six (6) months it will take RLD to complete integration.
- ABC will need two (2) additional full-time employees (depending on the number of electronic nicotine delivery systems and nicotine liquid products are submitted for certification), to process the certification applications.
    - As of February 6, 2025, the State of Louisiana has 509 vape products on its directory. https://atc.louisiana.gov/resources/vape-directory-information/
- In addition to creating the Certification in NM-PLUS, RLD and ABC will have to create the directory of authorized electronic nicotine delivery systems and nicotine liquids directory and publish it on ABC's website. The directory will need to be continuously updated and changes to the directory will have to be published on ABC's website

monthly.

- Monthly maintenance of the directory change publications are expected to be approximately three hundred thousand dollars ($300,000) including outside user Salesforce Licensing utilized by the manufacturers to add to the registered list and amending already registered products.
- Additionally, RLD will require two (2) additional FTE at an approximate cost to the department at one hundred eighty thousand dollars ($180,000) annually [ninety thousand dollars ($90,000) each] to review the initial applications, and ongoing updates.

SIGNIFICANT ISSUES

States cannot authorize tobacco products, including electronic nicotine delivery systems and nicotine liquids, for sale. The United States Food and Drug Administration is only governing body that is allowed to approve these products in the US. At the end of 2025, there were three (3) FDA authorized manufacturers and thirty-four (34) FDA authorized e-cigarette products. Yet the State of Oklahoma had 12,214 authorized e-cigarette products.

HB 268, which allows a manufacturer to get products certified in New Mexico which have not been authorized by the FDA by allowing a product to be included in the required directory even though the product remains under review by the FDA, or the product has received a denial order that remains stayed by the FDA or court order rescinded by the FDA or that has been vacated by a court.

HB 268 allows non-FDA authorized electronic nicotine delivery systems and nicotine liquids to be sold to citizens of this state before it can legally be marketed and continue to be sold for a period of thirty (30) days after the FDA has determined that it cannot be legally marketed.

HB 268 requires ABC to prepare certifications for tobacco manufacturers to complete and submit by the August 1, 2025, deadline, and to have a directory of allowed manufacturers and products to be published on its website by October 1, 2025.

The definition of a "timely filed premarket tobacco product application" requires that the product have been marketed in the United States as of August 8, 2016, that was submitted to the FDA on or before September 9, 2020, and accepted for filing.

A product that was submitted to the FDA for approval almost five (5) years ago and is still not received an FDA authorized electronic nicotine delivery system or nicotine liquid be allowed to be sold to the citizens of New Mexico.

If HB 268 made FDA approval the sole requirement before receiving certification in New Mexico. This would allow only FDA approved products to be sold to New Mexico consumers.

PERFORMANCE IMPLICATIONS

RLD would be required to make monthly updates to the certification list and have those updates published for licensees and the public at the same rate of frequency.

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The consequences of HB 268 not being enacted will be that electronic nicotine delivery system manufacturers and nicotine liquids manufacturers will not have an avenue to sell non-FDA approved products to New Mexico Tobacco Products distributors and retailers. Thus, New Mexico consumers will not be able to purchase the thousands of nicotine liquids and electronic nicotine delivery systems that have not been determined by the FDA as safe.

AMENDMENTS