LFC Requestor: Self Assigned

2025 LEGISLATIVE SESSION
AGENCY BILL ANALYSIS

Section I: General

Chamber: House
Category: Bill
Number: 268
Type: Introduced

Date (of **THIS** analysis)**:** 02/05/2025
Sponsor(s): Art De La Cruz
Short Title: TOBACCO PRODUCTS ACT CHANGES

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Section II: Fiscal Impact

APPROPRIATION (dollars in thousands)

Appropriation Contained		Recurring or Nonrecurring	Fund Affected
FY 25	FY 26		
$0	$0	N/A	N/A

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY 25	FY 26	FY 27		
$0	$ Indeterminate	$ Indeterminate	Nonrecurring	General

Potential revenue shall be deposited in the tobacco products administration fund and used for administration and enforcement of the registry.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY 25	FY 26	FY 27	3 Year Total Cost	Recurring or Non-recurring	Fund Affected
Total	$	unknown	unknown	unknown	Recurring	General

Collaboration between the Department of Justice and the Department of Health would be necessary to create and maintain a registry of electronic nicotine delivery systems and nicotine liquids. Given the need to establish and maintain a directory of electronic nicotine delivery systems and nicotine liquids that may be sold in the State, Department of Health would be required to support these efforts. The cost is unforeseeable and unknown at this time, but based on three laws passed in other states, it would appear the maintenance of the registry, staff associated costs, and enforcement costs would be significant. There is no appropriation included in this bill.

Section III: Relationship to other legislation

Duplicates: None

Conflicts with: None

Companion to: None

Relates to: None

Duplicates/Relates to an Appropriation in the General Appropriation Act: None

Section IV: Narrative

1. BILL SUMMARY

a) Synopsis

House Bill 268 (HB268) proposes to provide definitions for "snuff" and "timely filed premarket tobacco product application"; provide enforcement authority to the state department of justice in certain circumstances; require manufacturers of electronic nicotine delivery systems and nicotine liquids to register their products with the state; establish a directory of electronic nicotine delivery systems and nicotine liquids that may be sold in the state; require a surety bond in certain circumstances; require reports; provide penalties.

Is this an amendment or substitution? ☐ Yes ☒ No

Is there an emergency clause? ☐ Yes ☒ No

b) Significant Issues

According to the CDC, there are many types of e-cigarettes, including disposable devices, refillable devices, and devices with pre-filled cartridges or pods. Disposable e-cigarettes come pre-filled and may be rechargeable. They are not designed to be refilled. E-cigarettes

typically contain nicotine, the addictive substance in cigarettes and other tobacco/ synthetic products. The types of e-cigarette products that are available and being sold change rapidly. Multiple factors affect e-cigarette sales. These include the introduction of new products to the market, local and state policies regarding sales, actions undertaken by the Food and Drug Administration (FDA), and changes in global supply chains (About E-Cigarettes (Vapes) | Smoking and Tobacco Use | CDC). A premarket tobacco product application (PMTA) can be submitted by any person for any new tobacco product seeking an FDA marketing order, under section 910(b) of the Federal Food, Drug, and Cosmetic Act (FD&C Act). A PMTA must, for the "protection of public health", provide scientific data that demonstrates a product is appropriate (Premarket Tobacco Product Applications | FDA).

It would appear that the intent of HB268 is to regulate e-cigarette products and other novel nicotine products to reduce youth usage. However, tobacco manufacturers have become increasingly sophisticated in their efforts to impede the ability of states to regulate tobacco/nicotine. Tobacco manufacturers have been particularly aggressive with strategies aimed at marketing and promoting the use of nicotine products to children and youth. "Big tobacco" must engage and capture this demographic to ensure a long-term and stable business model. The registry at the center of HB268 is likely a diversion strategy aimed states that would have the burden of implementation and maintenance of a registry.

"Registry bills" have emerged as another tactic to divert state resources away from strategies that are known to be evidence-based and effective at impacting youth consumption rates. They also FDA already publishes a registry of authorized e-cigarettes, currently 34 products. Registries may distract from more meaningful regulations when it comes to restricting the sale of electronic nicotine delivery systems (i.e., e-cigarette products) that have not been approved by the FDA. According to the Public Health Law Center, strong tobacco retail licensure laws, either at the state or local level, have proven that regular inspections, compliance checks, licensure fees, zoning, density caps, and prohibitions on price promotions and discounts (to name just a few) are all more effective measures to protect against youth access to and use of e-cigarettes compared to registries (2/1/24 - State E-Cigarette Registry Bills and What to Make of Them | Public Health Law Center).

To date, the FDA has authorized only 34 e-cigarette products and related devices, all of them tobacco-flavored (E-Cigarettes, Vapes, and other Electronic Nicotine Delivery Systems (ENDS) | FDA). Registry bills require manufacturers to provide proof of an FDA-issued marketing-granted order (MGO), proof of a pending PMTA that remains under FDA review, or, in some states, proof that the manufacturer's product has received a marketing denial order (MDO) issued by the FDA, but the order was stayed by either the FDA or a federal court. Only those products that have been appropriately entered into the registry can then be sold in the enacting state. According to the Public Health Law Center, if registries completely remove e-cigarettes that never applied through the PMTA process or that have received MDOs, tens of thousands of products can still qualify for most registries because of the FDA backlog (2/1/24 - State E-Cigarette Registry Bills and What to Make of Them | Public Health Law Center). The FDA, through its PMTA review process, reviews e-cigarette marketing applications and authorizes products that are "appropriate for the protection of the public health."

This bill interferes the current FDA process and causes intended confusion around preemption and roles for regulation and enforcement and would allow scores of e-cigarettes

that FDA has not authorized to be on the registry and therefore legal to sell under state law. In states that have adopted "registry laws", Alabama, Louisiana, and Oklahoma, all are having to amend their statutes after immediate confusion ensued and costs related to the mandate became exorbitant. None of these registries are working as they were intended.

While registries may appear to provide a structured approach, their effectiveness in reducing nicotine use remains uncertain. HB268 could result in an increase in the availability of electronic nicotine delivery systems, including those marketed toward youth. Under federal law, the FDA has sole regulatory authority over these products, determining which are approved for sale. However, HB268 would allow products to be sold at the state level before receiving FDA approval, so long as manufacturers have submitted a premarket tobacco product application. This could lead to the sale of products that have not yet undergone a full FDA safety review. Additionally, the bill may create opportunities for manufacturers to make minor modifications to applications, potentially allowing continued market presence while awaiting federal review. Similar laws in Oklahoma have led to products being legally sold under state law that would likely not be approved by the FDA, these products include "Black Dragon", "Juicy Bubblegum, and "Blue Magic" Vape Registration List 10.24.2024.pdf

HB268 also presents difficulty regarding the provision related to allowing a product application that is pending to be sold in New Mexico. At this time, the FDA does not publish a list of pending applications and given the nature of federal approvals this list changes frequently. Without this information it is likely the New Mexico Department of Justice would be unable to enforce the provisions of the proposed law.

2. PERFORMANCE IMPLICATIONS

- Does this bill impact the current delivery of NMDOH services or operations?

  ☐ Yes ☒ No

- Is this proposal related to the NMDOH Strategic Plan? ☒ Yes ☐ No

  ☐ **Goal 1**: We expand equitable access to services for all New Mexicans

  ☐ **Goal 2**: We ensure safety in New Mexico healthcare environments

  ☒ **Goal 3**: We improve health status for all New Mexicans

  ☐ **Goal 4**: We support each other by promoting an environment of mutual respect, trust, open communication, and needed resources for staff to serve New Mexicans and to grow and reach their professional goals

3. FISCAL IMPLICATIONS

- If there is an appropriation, is it included in the Executive Budget Request?

  ☐ Yes ☐ No ☒ N/A

- If there is an appropriation, is it included in the LFC Budget Request?

  ☐ Yes ☐ No ☒ N/A

- Does this bill have a fiscal impact on NMDOH? ☒ Yes ☐ No

The full financial impact on the Department of Health is uncertain. The cost of one additional FTE for the Department of Health is included above in the fiscal impact section. While an indeterminate amount of potential revenue from financial penalties would be allocated to the tobacco products administration fund to administer and enforce the registry, no additional appropriations are identified to fund its creation and administration. Therefore, existing resources such as Tobacco Settlement Revenue and/or general funds currently allocated to the Department of Health may need to be reallocated to the Department of Justice to support this initiative.

4. ADMINISTRATIVE IMPLICATIONS

Will this bill have an administrative impact on NMDOH? ☒ Yes ☐ No

Collaboration between the Department of Justice and the Department of Health would be necessary to create and maintain a registry of electronic nicotine delivery systems and nicotine liquids.

5. DUPLICATION, CONFLICT, COMPANIONSHIP OR RELATIONSHIP

None

6. TECHNICAL ISSUES

Are there technical issues with the bill? ☐ Yes ☒ No

7. LEGAL/REGULATORY ISSUES (OTHER SUBSTANTIVE ISSUES)

- Will administrative rules need to be updated or new rules written? ☒ Yes ☐ No
- Have there been changes in federal/state/local laws and regulations that make this legislation necessary (or unnecessary)? ☐ Yes ☒ No
- Does this bill conflict with federal grant requirements or associated regulations? ☐ Yes ☒ No
- Are there any legal problems or conflicts with existing laws, regulations, policies, or programs? ☐ Yes ☒ No

8. DISPARITIES ISSUES

This bill will affect consumers and/or retailers of electronic nicotine delivery systems and nicotine liquids that may be sold in New Mexico. The bill will include the participation of the Department of Public Safety and Department of Justice in the investigation, enforcement, and regulations of activities required by the Tobacco Products Act. This bill will have a significant impact on all agencies named in the bill, including DOH.

All existing registries have significantly exceeded cost estimates and have required additional appropriations and legislation to fund, while none have full enforcement, probably due to this diversion of staff and resources to maintain a registry.

Youth do not often access electronic nicotine delivery systems and nicotine liquids directly at retail businesses. Even if rigidly enforced, these laws wouldn't necessarily reduce e-cigarette use among vulnerable populations. (https://www.publichealthlawcenter.org/commentary/240201/2/1/24-state-e-cigarette-registry-bills-and-what-make-them).

Bills that aim to build barriers to accessing electronic nicotine delivery systems and nicotine liquids may impact health disparities by increasing barriers to nicotine products, especially e-cigarettes, and notably among youth. E-cigarettes use in New Mexico is decreasing but remains high among high school youth (18.8%). It is particularly high in certain counties, such as McKinley (22.1%), Roosevelt (23.3%), Socorro (23.7%), Taos (25.8%) and Sandoval (22.8%). E-cigarette use is more prevalent among female high school youth (22.8%) compared to male high school youth (14.7%). E-cigarette use is common among Hispanic youth (19.0%) and LGBTQ youth (28.2%), as well. (NM Youth Risk and Resilience Survey, 2023).

9. HEALTH IMPACT(S)

Use of Nicotine through electronic nicotine delivery systems and nicotine liquids is considerably harmful to developing brains. The dependence has been shown to negatively impact mental health by amplifying feelings of anxiety, depression, and stress. There is no safe level of nicotine use for youth and the majority of products do not have FDA authorization. (https://truthinitiative.org/sites/default/files/media/files/2024/09/NYTS-Press-Release-2024.pdf).

Schools and teachers have had to deal with this public health problem as well. Youth vaping distracts students and constantly disrupts the classroom. High levels of nicotine affect students' attention span, focus and self-control. (https://truthinitiative.org/sites/default/files/media/files/2020/04/Truth_Teacher%20Report_FINAL.pdf)

The most common co-occurring mental health diagnosis categories among youths with a tobacco-related diagnosis were suicide-related diagnoses (35.3%) and depression-related diagnoses (29.8%). (CDC-national syndromic surveillance program, 2021 https://www.nmhealth.org/data/view/report/2943/). Adults with a disability were almost 3 times as likely to have a depression diagnosis and use a substance (22.2%) than those with no disability (8.2%). Substance use in this survey includes cannabis, tobacco product, and alcohol use. (2020, NM behavioral risk and resilience survey).

10. ALTERNATIVES

None

11. WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?

If HB268 is not enacted, definitions will not be provided for "snuff" and "timely filed premarket tobacco product application"; the state department of justice will not be provided with enforcement authority; manufacturers of electronic nicotine delivery systems and nicotine liquids will not be required to register their products with the state; a directory of electronic nicotine delivery systems and nicotine liquids that may be sold in the state will not be established; surety bonds in certain circumstances will not be required; reports will not be required; no penalties will be provided.

12. AMENDMENTS

None