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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/8/2007

SPONSOR Ortiz y Pino LAST UPDATED 2/9/07 HB \_\_\_\_\_

SHORT TITLE Ban Use of Aspartame SB 498

ANALYST Hanika Ortiz

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$.1 see narrative			Recurring	General fund

Duplicates HB 391

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AGO)  
 Department of Health (DOH)  
 Environment Department (NMED)  
 Health Policy Commission (HPC)  
 Public Education Department (PED)

### SUMMARY

#### Synopsis of Bill

Senate Bill 498 amends Sections 25-2-2 & 25-2-3 NMSA 1978 of the New Mexico Food Act to prohibit the receipt and delivery of adulterated or misbranded food; and bans the manufacture, sale or delivery of any food containing aspartame and its derivative compounds in New Mexico. Aspartame is defined in the Act as an artificial sweetener with the technical name L-aspartyl-L-phenylalanine methyl ester. Aspartame is an artificial sweetener with trademark names as: Equal, NutraSweet and Canderel, and is an ingredient for 6,000 consumer food and beverages sold worldwide.

### FISCAL IMPLICATIONS

The additional regulatory burden to ensure products with aspartame are not manufactured, sold or delivered into the state falls within the authority of NMED.

Senate Bill 498 provides no funding to regulate aspartame. NMED reports it may cost as much as \$3.75 million yearly for an additional 50 inspectors to provide inspections and enforcement, including the monitoring of internet sales of food. The estimate is based on the assumption that a

ban could create illicit businesses for trade of aspartame creating enforcement issues. NMED's staff of 47 inspectors have a full workload inspect food facilities, liquid waste systems and swimming pools. The cost estimate does not include additional space, computers, regulatory equipment or other items necessary to enforce the ban.

### **SIGNIFICANT ISSUES**

The AGO reports a serious risk of litigation from opponents of this bill and the federal government on grounds of federal preemption because the FDA has authorized the use of aspartame in the United States. The doctrine of preemption is based on the Supremacy Clause of Article VI of the United States Constitution. The purpose of the preemption doctrine is to allow congress to promulgate a uniform federal policy without states frustrating it through either legislation or judicial interpretation.

The AGO further reports state action that directly burdens interstate commerce is prohibited where it conflicts with federal regulations, and where Congress has evidenced intent to completely preempt the area of regulation involved. This constitutional grant to Congress under the commerce clause of the power to regulate commerce between the states implies the subordination of the states to that power.

### **PERFORMANCE IMPLICATIONS**

In 1996, the US Federal Drug Administration (FDA) removed all restrictions from aspartame, allowing it to be used in all foods with a warning that the sweetener contains phenylalanine. The FDA receives more complaints related to aspartame than any other food additive. Recent studies have recommended further investigation that food products containing aspartame may be neurotoxic and carcinogenic.

### **ADMINISTRATIVE IMPLICATIONS**

In July 2006, a proposition was brought before the Environmental Improvement Board (EIB) to restrict the sale and use of aspartame. The EIB did not hold a hearing on this issue based on advice from the Attorney General stating that the EIB does not have the authority or jurisdiction to make a ruling on products containing aspartame.

PED will be required to restate nutrition rules and recommendations to ensure all food service programs in New Mexico public schools ban products containing aspartame.

### **DUPLICATION**

Duplicates HB 391

### **ALTERNATIVES**

DOH recommends a warning be placed on all food products stating that there is a possibility that food products containing aspartame may be hazardous to one's health.

HPC recommends the NMED and DOH publish educational materials targeted for school age children and the public about possible dangerous side effects of consuming products that contain aspartame, and identify sugar substitutes that are considered safe.

AGO provides additional information relating to the following statement: “The Legislature could consider the merits of passing a law regarding labeling, or granting express powers to an agency to label, or granting express powers to ban the product in vending machines in public schools, or granting express powers to an agency to make certain public service announcements.

These options, in greater detail, are:

### **LABELING**

When a state law may be construed to attempt to govern a federal government process, it must undergo a preemption analysis. The general rule is that a state may label a product if it has a state statute authorizing labeling and the particular label is not preempted under the Federal Food, Drug, and Cosmetic Act. It has been played out under a series of results. On one hand, the FDA preempted California’s attempt to label tuna cans with warnings on methylmercury. On the other hand, states have successfully passed laws or regulations on labeling ranging from Alaska’s requirement that farm-raised salmon be specially labeled, Iowa’s limits on the use of the word ‘honey’ and New Hampshire’s requirement that ‘maple syrup’ be made solely from the sap of a maple tree.

A product with aspartame already has a FDA issued warning. It reads: “Phenylketonurics: Contains Phenylalanine.” This label is “necessary because a high plasma level of phenylalanine is associated with mental retardation in a small number of individuals with a genetic disorder that results in a lessened ability to metabolize phenylalanine.” Proponents of an additional state issued warning label may argue that the FDA does not intend to occupy the field of labels because it has issued just one label and for a limited purpose. Opponents of a New Mexico issued warning label may argue that the FDA does intend to occupy the field and the Phenylketonurics label is strong evidence of this action.

### **BAN IN PUBLIC SCHOOLS/VENDING MACHINES**

There are two duplicate bills, SB 564 and HB 392 that propose to create a state Nutrition Council. The Council’s proposed powers would be: “in consultation with nutrition experts and the appropriate state agencies, recommend nutrition programs, public education programs and campaigns on health, nutrition and ideal weight maintenance for all state institutions and public schools, colleges and universities.”

DOH has been working on promulgating regulations to ban junk food from vending machines in our schools. Earlier this year, the Department’s chief medical officer has stated: “We haven’t come to a conclusion about aspartame.” Diana Heil, Nutrition Rules are changing schools, New Mexican, D-2 (April 15, 2006). It has also been reported that the state PED has released “sweeping, new nutrition rules for the public schools ....” Diana Heil, Nutrition Rules are changing schools, New Mexican, D-1 (April 15, 2006).

One or all of these entities appear to have authority to recommend nutrition requirements of food served in public school institutions.

**PUBLIC SERVICE ANNOUNCEMENTS**

The Cabinet Secretary of the Environment Department is currently defined as the “director” in the New Mexico Food Act. The law reads: “The director may also cause to be disseminated such information regarding food as he deems necessary in the interest of public health....” NMSA 1978, § 25-2-17(B). The law adds: “Nothing in this section shall be construed to prohibit the director from collecting, reporting and illustrating the results of his investigation.” Therefore, his announcements could likely range from educational (“Please visit the Department’s website for a copy of the transcripts of the hearing”) to providing a health warning (“Aspartame may be harmful to public health.”)

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Products containing aspartame will continue to be sold in New Mexico.

AHO/csd:yr