

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 02/15/09

SPONSOR Garcia, MJ **LAST UPDATED** _____ **HB** _____

SHORT TITLE Limiting Alcohol Advertising Near Youth Act **SB** 514

ANALYST Wilson

REVENUE (dollars in thousands)

| Estimated Revenue | | | Recurring or Non-Rec | Fund Affected |
|-------------------|---------|---------|-------------------------|------------------------|
| FY09 | FY10 | FY11 | | |
| | Unknown | Unknown | Recurring | Current School Fund |

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY09 | FY10 | FY11 | 3 Year Total Cost | Recurring or Non-Rec | Fund Affected |
|--------------|------|----------------------------|----------------------------|----------------------|-------------------------|------------------|
| Total | | Indeterminate See Below | Indeterminate See Below | | Recurring | General Fund |

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB36, HB78

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH)
 Higher Education Department (HED)
 Public Education Department (PED)
 Regulation & Licensing (RLD)

SUMMARY

Synopsis of Bill

Senate Bill 514 creates the Limiting Alcohol Advertising Near Youth Act and will prohibit the outdoor advertisement of alcoholic beverages within 500 feet of any public playground, school or child care facility. The bill does not prohibit signage within a licensed premises; signs that contain the name or slogan of the licensed premises for the purpose of identifying the licensed premises; neon or electrically charged signs allowed by the Alcohol and Gaming Division or by

local ordinance on the licensed premise promoting a particular brand of alcoholic beverages; radio or television advertisements; advertisements on public conveyance vehicles, race cars, bicycles, boats, or aircraft or on clothing worn by bicyclists participating in an organized bicycle race; or labels affixed to containers authorized by law. Public service messages regarding the hazards of alcohol or encouraging minors to refrain from drinking are not prohibited, however, such messages in conjunction with signage positively depicting, marketing or promoting alcohol will not be allowed. County or municipal governments will be permitted to enact ordinances that are more restrictive than those in the Limiting Alcohol Advertising Near Youth Act.

A person may seek an exemption from Alcohol & Gaming Division (AGD) to place a sign within 500 feet of a public playground, school or child care facility. The exemption could be granted if the applicant demonstrates that the 500 foot limitation denies the applicant a reasonably necessary opportunity to communicate truthful information to regarding alcoholic beverages to adult consumers. In considering the exemption, AGD could consider the percentage of the adult population that lives or works in the area; the availability of other forms of advertising and the relative costs; and any advertising practice codes or guidelines the applicant voluntarily agrees to comply with.

AGD will be tasked with appointing a youth alcohol advertising monitor to administer and enforce the Limiting Alcohol Advertising Near Youth Act. The monitor is empowered to inspect advertisements; initiate appropriate action to bring compliance; and investigate complaints and make findings of fact. A person aggrieved by a finding may appeal the finding to the AGD.

SB 514 sets forth penalties for a violation of the Limiting Alcohol Advertising Near Youth Act. A first offense will carry a fine of \$500 plus \$50 per day for each day a violation continues. A second offense will carry a fine of \$1,000.00 plus \$100 per day for each day a violation continues and a third offense will carry a fine of \$5,000 and \$500 per day for each day a violation continues. The Limiting Alcohol Advertising Near Youth Act could also be enforced through a civil action. Courts will be authorized to grant permanent or temporary injunctions; assess costs of any investigation, inspection or monitoring survey, preparation for legal action and attorneys fees against a person violating the Limiting Alcohol Advertising Near Youth Act; costs incurred in removing correcting or terminating the adverse effects resulting from the violation; or the enter a finding that, after two or more violations, the advertisement constitutes a public nuisance. Monies collected by AGD under the Limiting Alcohol Advertising Near Youth Act will be placed in the current school fund.

FISCAL IMPLICATIONS

The amount of revenue that could be generated by SB 514 cannot be determined at this time as it will be dependent upon the number and nature of future violations of the act.

To administer this bill, AGD will require at least two FTE to act as a monitor who will conduct inspections and investigations and to initiate appropriate action against licensees for violations of the Act. AGD estimates at least \$150,000 per year in recurring salary and benefits costs as well as monies for vehicle, travel and per diem costs that will be necessary to conduct the inspections statewide.

The monies collected by AGD in enforcing this bill will not go to the general fund, but will be collected for the benefit of the current school fund. AGD is a general fund agency and procedures to separate these monies will need to be instituted.

SIGNIFICANT ISSUES

RLD provided the following:

SB 514 provides a procedure for an applicant to request an exemption from AGD to allow otherwise prohibited signage within 500 feet of a playground, school or child care facility. The standards used for AGD to permit an exemption are vague and will be difficult to quantify. One standard is the percentage of the adult population that resides or work in the area. There is no definition or determination as to the radius of the “area”. Additionally, obtaining an accurate percentage of adults who live and work in the area at any given time will be problematic. Calculating the availability of other types of advertising and their costs will be time consuming and will take attention away from other enforcement activities such as sales to minors or to intoxicated persons.

In regard to enforcement authority, SB 514 states that the monitor may take appropriate action to bring about compliance, but does not indicate what “appropriate action” is. SB 514 does not specifically grant the power to issue Cease & Desist Orders or to issue administrative citations.

The appeals section states that a person aggrieved by the finding of the monitor, most likely an AGD staff member, will be appealed to AGD. Subsection D of Section 8 permits AGD to bring a civil action in district court to enforce the provisions of the Act; however, subsection E states that a party that is found to have violated the Act may appeal pursuant to Section 6. Section 6 only references appeals to (as opposed to from) AGD. This could be interpreted to mean that a district court decision must be appealed to an administrative agency. Under the Liquor Control Act, appeals are normally made to the district court. The appeal should be to a higher court, usually the court of appeals.

PED provided the following:

Because this bill seeks to regulate and impose civil penalties upon those who advertise alcohol on billboards near schools and parks, it implicates the free speech clause of the 1st Amendment to the U.S. Constitution as it relates to so-called “commercial speech”. According to the U.S. Supreme Court, in determining the constitutionality of laws affecting commercial speech, a court must consider four factors: (1) whether the expression is protected by the First Amendment, (2) whether the asserted governmental interest is substantial, (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.

In *Lorillard Tobacco v. Reilly*, the U.S. Supreme Court struck down on non-1st Amendment grounds a comprehensive Massachusetts rule prohibiting outdoor advertising of alcohol products within 1,000 feet of a school or playground.

In 2007, House Joint Memorial 64 was introduced requesting a task force to study the relationship between youth exposure to alcohol advertising and youth access to and consumption of alcohol and to recommend methods of restricting youth exposure to alcohol advertising.

Reported from the NM Youth Risk and Residency Survey, 2007:

- New Mexico ranks 17th compared to other states on current alcohol use.
- New Mexico ranks 17th compared to other states in binge drinking.

ADMINISTRATIVE IMPLICATIONS

The oversight functions required under this bill will require additional staff and monies to implement and undertake. At least two additional FTE will be required to travel statewide conducting inspection and prosecuting violators.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB 514 relates to HB 36, Prohibit Certain Alcohol Beverage Sales which proposes to add two new sections to the Liquor Control Act and to HB 78, Malt Beverages as Spirituous Liquor, which proposes to add five new sections to the Tax Administration Act and the Liquor Control Act.

OTHER SUBSTANTIVE ISSUES

DOH provided the following:

Alcohol is the most commonly used drug among America's youth. More young people drink alcohol than smoke tobacco or use marijuana. Research demonstrates that alcohol advertising and promotions have a direct effect on the frequency and extent of underage drinking. A 2008 report released by The Center for Alcohol Marketing and Youth provides the following findings:

- On average, youth see 23 ads for alcohol every month.
- A 2006 study found that each additional ad exposure increased youth drinking by 1%. For every additional dollar per capita spent on alcohol advertising in a local market, underage drinkers consumed 3% more alcohol.
- A 2007 study of 1786 sixth graders in South Dakota found youth who were exposed to alcohol marketing were 50% more likely to be drinking one year later.
- Youth exposure to alcohol in movies, alcohol signage near schools, and youth ownership of alcohol promotional items are all associated with a greater likelihood of underage drinking.
- Studies suggest that advertising impacts the beliefs of youth about alcohol, their intention to drink, drinking practices, and drinking problems. (Center for Alcohol Marketing and Youth, "Alcohol Marketing and Youth: An Overview," January 2008)

In 2006, the Federal Sober Truth on Preventing Underage Drinking Act (STOP Underage Drinking) was passed to authorize measures to reduce teen access to alcohol and called for public health monitoring of alcohol advertising toward youth.

According to the website of the Center on Alcohol Marketing and Youth (CAMY) of Georgetown University, the leading national clearinghouse for information on alcohol marketing to youth, since 2001, at least seven peer-reviewed longitudinal studies have

found that young people with greater exposure to alcohol marketing are more likely to start drinking than their peers. One of these studies focused specifically on alcohol advertising around schools and concluded that “exposure to outdoor alcohol advertising around schools is associated with subsequent youth intentions to use alcohol.”

In 2003, CAMY issued a report specifying twelve steps states can take to regulate and reduce the negative impact of alcohol advertising on youth. These included placing restrictions on both the content and the placement of alcohol advertising. According to CAMY’s analysis, restrictions on advertising placement have proven to be more constitutionally defensible than restrictions on content. In 2007, a New Mexico panel convened in response to 2007 House Joint Memorial 64 adopted six of CAMY’s twelve recommendations, including the recommendation to prohibit alcohol advertising near schools, public playgrounds, and churches.

It is also important to note that both the Distilled Spirits Council of the United States (DISCUS), the national trade association representing producers and marketers of distilled spirits sold in the United States, and the Beer Institute Advertising and Marketing Code cite guidelines for billboard advertisements. Both sets of guidelines state that billboard advertisements shall be located at least 500 linear feet from established and conspicuously identified elementary and secondary schools, places of worship, or public playgrounds.

Underage drinking is widespread in New Mexico. Forty-three percent of New Mexico high school students report being a current drinker. Almost 65.7 percent of these current drinkers are binge drinkers, consuming five or more drinks in one episode. New Mexico has the highest rate in the nation for youth drinking alcohol before the age of 13. Binge drinking is strongly associated with other risky behaviors. A national study found that youth who binge drink are five times as likely as nondrinkers or current drinkers to have been pregnant or have gotten someone pregnant; four times as likely to have attempted suicide; and, eleven times as likely to have ridden in a car with a drinking driver. In addition, students who binge drink report poor academic performance.

The direct costs to New Mexico of underage drinking were estimated in 2005 to be \$243 million as a result of youth violence, traffic accidents, high-risk sex, property crime, and other problems.