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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 01/29/15  
**LAST UPDATED** 03/18/15    **HB** 42/aHJC/aSPAC

**SPONSOR** Youngblood

**SHORT TITLE** Include E-cigarettes in Tobacco Products Act    **SB** \_\_\_\_\_

**ANALYST** Dunbar/Chabot

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to: HB 148; HB 213; SB 65  
 Relates to Appropriation in the General Appropriation Act

### SOURCES OF INFORMATION

Responses Received From  
 Department of Health (DOH)  
 Department of Public Safety (DPS)

### SUMMARY

#### Synopsis of SPAC amendment

The Senate Public Affairs Committee amendment to HB 42 moves to strike HJC amendments 1 2 and 3. HB 42/aHJC/aSPAC changes the Tobacco Products Act title to the “Tobacco Products, E-Cigarette and Nicotine Liquid Container Act” The bill prohibits the sales of e-cigarette and nicotine liquid containers to minors and requires nicotine liquid containers to be sold in child resistant packaging. In addition, HB 42/aHJC/aSPAC prohibits the online internet sale of e-cigarette and nicotine liquid containers to minors in New Mexico. The bill provides for penalties for violations of the act.

The major change to the bill is the addition of nicotine liquid containers to the Tobacco Products Act, E-Cigarette Act.

HB 42/aHJC/aSPAC also includes a definition of “child-resistant” package and “nicotine liquid container”.

In section 10 under “Preemption” the amendment adds language that includes home rule

municipality or urban county when such entities adopt an ordinance or regulation pertaining to the sale of items under the “Tobacco Products, E-Cigarette and Nicotine Liquid Container Act”. These sales shall be consistent with the Tobacco Products, E-Cigarette and Nicotine Liquid Container Act”.

Synopsis of HJC amendment

The House Judiciary Amendment to House Bill 42 moves the prohibition of on-line sales to minors of tobacco products and e-cigarettes from Section 7 to Section 3. It strikes “in connection with the practice of cultural or ceremonial activities by Native Americans in accordance with the federal American Indian Religious Freedom Act, 42 U.S.C. 1996 and 1996a” from exemptions of the provisions of an individual providing free samples of tobacco products.

Synopsis of Original Bill

House Bill 42 amends the title of the “Tobacco Products Act” to “Tobacco Products and E-Cigarettes Act,” to add a definition for “e-cigarette,” and to prohibit the sales of e-cigarettes to minors, including online internet sales to minors in New Mexico.

**FISCAL IMPLICATIONS**

None identified.

**SIGNIFICANT ISSUES**

DOH reports that (1) electronic smoking devices, including e-cigarettes, are battery-operated products designed to deliver nicotine, flavor, and other chemicals. They turn highly addictive nicotine, and other chemicals, into a vapor that is inhaled by the user. Most electronic smoking devices are manufactured to look like conventional cigarettes, cigars, or pipes. Some resemble everyday items such as pens and Universal Serial Bus (USB) memory sticks (U.S. Food and Drug Administration, 2013). Electronic smoking devices, including e-cigarettes, first sold primarily over the Internet and in shopping mall kiosks, are widely available now in many local convenience stores, gas stations, retail tobacco stores and standalone “vapor shops.” There is currently no federal or New Mexico state statutes or regulations governing the manufacturing, marketing, or sale of electronic smoking devices, including e-cigarettes. These products have not been proven to be safe and the health risks associated with their use are unknown (Campaign for Tobacco-Free Kids, 2013). (2) Popularity of e-cigarettes among youth has been rapidly escalating nationwide. According to the Centers for Disease Control and Prevention (CDC) (September, 2013), “... e-cigarette experimentation and recent use doubled among U.S. middle and high school students between 2011 and 2012. For students in grades 6-12, “ever use of e-cigarettes” increased from 3.3 percent to 6.8 percent, and “current e-cigarette use” increased from 1.1 percent to 2.1 percent. Another study released by CDC (August, 2014) showed a three-fold increase in the number of youth who had tried an e-cigarette but had never smoked a tobacco cigarette, from 79,000 youth in 2011 to 263,000 in youth in 2013

DOH further states that the potential for e-cigarette use to escalate among youth is enhanced by e-cigarette manufacturers using flavoring strategies once used by cigarette manufacturers. According to the Campaign for Tobacco-Free Kids (October, 2013), e-cigarette manufacturers

"are offering kid-friendly flavors reminiscent of kids' cereal (e.g., Fruit Loops and Cinnamon Toast Crunch), baked goods (chocolate chip cookies and brownies), and candy (banana Laffy Taffy, cherry crush, and gummi bear)."

According to the Food and Drug Administration (2013), the safety and efficacy of ecigarettes have not been fully studied, so it is unknown whether they are safe for their intended use; how much nicotine or other chemicals may be inhaled; whether there are any risks from the secondhand vapors for non-users; or whether the use of e-cigarettes can increase nicotine addiction among youth or lead them to try other tobacco products.

A number of states and local jurisdictions, as noted by DOH, are applying laws governing tobacco products to electronic smoking devices, including e-cigarettes. As of November 30, 2014, 40 states ban sales of e-cigarettes to minors and three states ban e-cigarette use in 100 percent smoke-free public places, including workplaces, restaurants, and bars (CDC, December 2014). Fifteen additional states ban e-cigarette use in various other locations, such as certain government facilities, public transportation, and educational campuses (Americans for Nonsmokers Rights, January 2015). In 2014, the cities of Albuquerque, Santa Fe, and Carlsbad passed local laws prohibiting the sale of electronic smoking devices, including e-cigarettes, to minors. Also in 2014, Santa Fe and Carlsbad passed laws prohibiting the use of electronic smoking devices, including e-cigarettes, in public places (work places, restaurants, and bars in Santa Fe and work places in Carlsbad). Additionally, Albuquerque Public Schools has recently prohibited the use and/or possession of tobacco products, including e-cigarettes, in the Albuquerque Public Schools 2014-15 Student Behavior Handbook.

According to DOH, the Tobacco Control Legal Consortium (Consortium) recommends that, in most circumstances, existing definitions of "tobacco products" in tobacco control laws should be broadened to include e-cigarettes and similar products. Defining e-cigarettes solely as standalone products rather than including them in a broadened definition of "tobacco products" risks disqualifying these devices from current tobacco products restrictions. Broadening the general definition of "tobacco products" to clearly include "electronic smoking devices" would subject such devices to the same legal restrictions applied to other tobacco products, such as youth access, sales, and marketing restrictions. The Consortium recommends including – in the same section of the statute or ordinance – a separate definition of e-cigarette in addition to the broadened definition of "tobacco product." The Consortium emphasizes the need for clear definitions and concise language to avoid confusion about what constitutes an e-cigarette. They advise that, "...definitions should be explicit about what they cover yet broad enough to anticipate future product innovations. This eliminates ambiguity if new products or components are released that are similar to those already in existence but would not fall under a narrow definition." (Tobacco Control Legal Consortium, 2014)

The Consortium also recommends that when analyzing a state's tobacco tax laws for possible reform, it is essential to examine the state's entire regulatory scheme affecting cigarettes and non-cigarette tobacco products, including licensing, retail sales, youth access, and other tobacco control measures

(<http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-state-taxation-cigs-2012.pdf>).

For several years now DPS has had little to no enforcement of e-cigarette sales to minors, and the possession of e-cigarettes, because of a lack of statutory authority. With the passing of this bill,

DPS will be able to take necessary enforcement action when confronted with a clear violation.

### **PERFORMANCE IMPLICATIONS**

HB 42 relates to the 2014-2016 NM State Health Improvement Plan and the FY16 NM Department of Health Strategic Plan, Result 1: Improved health outcomes for the people of New Mexico, Objective: Reduce tobacco use, Program Performance Measure: Percent of QUIT NOW enrollees who successfully quit using tobacco at 7-month follow-up.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB 42 relates to HB 148 which would prohibit smoking, including the operation of an e-cigarette, in a motor vehicle when a child is present.

HB 42 relates to HB 213 which would require liquid nicotine to be sold only in child-resistant packaging.

HB 42 relates to SB 65, which would amend and enact sections of the “Tobacco Products Tax Act” to change the title of the act to the “Tobacco and Nicotine Products Tax Act,” to impose a tax on nicotine products, to require nicotine content labeling on all nicotine products, to require sellers of nicotine products to register and comply with its provisions, and to permit the NM Taxation and Revenue Department to conduct periodic compliance checks to ensure accurate nicotine content labeling on nicotine products.

### **TECHNICAL ISSUES**

DOH raises the following concerns:

- Regarding the paragraph located in Section 30-49-7D, page 4, lines 18 and 19; it is unclear why this paragraph is in the “Vending Machine” portion of the law. It may belong in the “Prohibited Sales” section of the law (30-49-3). While this is still an evolving area of law, it seemed important to note that Commerce Clause and Commercial Speech challenges may arise with prohibiting *online* sales.
- Section 30-49-8B now prohibits and criminalizes family members and friends sharing tobacco products and e-cigarettes on private property. Current New Mexico law related to tobacco products allows family members and acquaintances to share tobacco products on private property. (This is an ambiguous part of the statute, since this current interpretation may conflict with 30-49-3A). The proposed law only protects the religious freedoms of Native Americans. Religious freedom under the New Mexico and U.S. Constitutions protect other religions as well, e.g., Rastafarianism.

BD/bb/je