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## FISCAL IMPACT REPORT

ORIGINAL DATE 1/30/2020  
 SPONSOR Lopez LAST UPDATED 2/06/2020 HB \_\_\_\_\_  
 SHORT TITLE Flavored E-Cigarette Products Prohibition SB 91  
 ANALYST Chilton

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

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Uncertain, probably initially minimal	Uncertain, probably initially minimal	Uncertain, probably initially minimal	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to 2019 HB256 (passed); HB552, SB166, SB338, SB450 and 2020 HB23 and HB195. Identical to 2019 HB260 and SB343.

### SOURCES OF INFORMATION

LFC Files

Response Received From  
 Department of Health (DOH)

No Response Received  
 Taxation and Revenue Department (TRD)

### SUMMARY

#### Synopsis of Bill

Senate Bill 91, Flavored E-Cigarette Products Prohibition, regulates e-cigarette products in two principal ways:

- 1) Flavored e-cigarette products are prohibited to be sold or purchased by purchasers of all ages,
- 2) Penalties are prescribed for those selling e-cigarette products to a minor and to minors (defined as those less than 18 years old) purchasing these products, and
- 3) Provision of free samples of e-cigarette products of any kind to a minor, or of flavored e-cigarette products to any person is prohibited.

Sections of the bill and their effects are listed in the table below, along with sections of statute amended (if applicable).

Section of SB 91	Provisions	Sections of NMSA 1978 Amended
1	Makes it unlawful to sell or give flavored e-cigarette products to anyone, and makes it unlawful to attempt to procure them.	(new)
2	Adds to definitions in statute a definition of “characterizing flavor”, “e-cigarette product”, “tobacco product”, and “flavored e-cigarette product.”	30-49-2
3	Regarding vending machines: e-cigarette products would be added to other tobacco products that could be sold in vending machines only if they were inaccessible to minors	30-49-7
4	Free samples of flavored e-cigarettes could not be provided to anyone.	30-49-8
5	Prescribes signs that must be posted at retailers selling tobacco products stating that minor purchasing tobacco products (including e-cigarettes) could be fined up to \$100 and the retailer selling a tobacco product could be fined up to \$1 thousand.	30-49-9
6	Amends the penalty provision of the act to include the penalties noted under Section 5, above.	30-49-12

### FISCAL IMPLICATIONS

There would be a small initial cost of changing regulations to meet the requirements of the bill.

As the aim of the bill is to discourage use of e-cigarettes, especially among minors, a decrease in use would translate into a diminution of tobacco product taxes. This decrease in use would eventually be compounded by fewer young people becoming addicted to nicotine and becoming long-term users of tobacco products. These decreases in revenue would almost surely be eventually more than compensated for by a decrease in medical costs to state and other insurers related to treating tobacco-related illnesses and premature deaths.

There is no appropriation within the bill.

### SIGNIFICANT ISSUES

According to multiple studies, e-cigarette use is associated with long-term use of tobacco products of all types. One study, from the University of North Carolina, concluded as follows: “As more and more youth use electronic cigarettes, combined with research showing the health consequences of vaping -- including nicotine addiction -- researchers found that non-menthol flavors attract youth and adults to use e-cigarettes and that the use of flavored e-cigarettes contributes to multiple pathways linked to higher e-cigarette use among youth. (Science Daily, October 2019, <https://www.sciencedaily.com/releases/2019/10/191024122559.htm>).”

In addition to e-cigarette use being associated with severe respiratory disease. According to the Centers for Disease Control and Prevention (CDC), much of this disease has been associated with the use of marijuana products in e-cigarettes. According to the CDC, *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products.* ([https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html)):

As of January 21, 2020, a total of 2,711 hospitalized EVALI cases or deaths have been reported to CDC from all 50 states, the District of Columbia, and two U.S. territories (Puerto Rico and U.S. Virgin Islands). Sixty deaths have been confirmed in 27 states and the District of Columbia (as of January 21, 2020).

Further CDC data and DOH comments follow:

In September 2009, the Family Smoking Prevention and Tobacco Control Act (TCA) gave the U.S. Food and Drug Administration (FDA) authority over tobacco products. TCA allowed for the FDA to have the authority to impose a ban on cigarettes with certain characterizing flavors, except menthol and tobacco (<https://bit.ly/2Tz5v9w>). However, according to a November 2018 publication by the Campaign for Tobacco Free Kids, “Despite the FDA’s ban on flavored cigarettes, the overall market for flavored tobacco products is growing.” (<https://bit.ly/2MOgr0v>). The publication notes that tobacco companies in recent years have significantly stepped up the introduction and marketing of flavored tobacco products other than cigarettes, particularly e-cigarettes and cigars, as well as smokeless tobacco and hookah. As of November 2018, at least two states and over one hundred localities have passed restrictions on the sale of flavored tobacco products, although laws differ in their application to specific products and store types (<https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>).

The Centers for Disease Control (CDC) reports that “Flavoring has become the leading reason for current tobacco use among adolescents. The concurrent use of flavored products is prevalent among youths. E-cigarettes were the leading flavored product and often used with other flavored tobacco products” ([www.cdc.gov/pcd/issues/2018/17\\_0389.htm](http://www.cdc.gov/pcd/issues/2018/17_0389.htm)).

In New Mexico, flavored tobacco use was highest among high school tobacco users (72%) and young adults ages 18-29 (74%). By comparison, 49% of adults ages 30 and older reported using flavored tobacco (2015 NM Youth Risk and Resiliency Survey and 2016 Tobacco Evaluation Survey). New Mexico’s unit sales of flavored e-cigarettes as a percentage of all e-cigarettes sold (30.8%) was significantly higher than the U.S. average (18.9%) and the highest among all states in 2015-2016 ([www.cdc.gov/pcd/issues/2018/17\\_0576.htm](http://www.cdc.gov/pcd/issues/2018/17_0576.htm)).

The 2016 *Surgeon General’s Report on E-Cigarette Use Among Youth and Young Adults* concluded that the marketing of e-cigarettes is focused on promoting flavors and utilizing approaches that have been used in the past for marketing conventional tobacco products to youth and young adults (<https://bit.ly/2IJ9Pm4>).

In December 2018, the *Surgeon General’s Advisory on E-Cigarette Use Among Youth* officially declared e-cigarette use among youth an “epidemic” in the United States. The *Advisory* stated “Most e-cigarettes contain nicotine..... Nicotine exposure during

adolescence can impact learning, memory, and attention..... Many e-cigarettes come in kid friendly flavors. In addition to making e-cigarettes more appealing to young people, some of the chemicals used to make certain flavors may also have health risks.” The Surgeon General urged officials to act now by using a variety of policies and strategies, specifically including limiting access to flavored tobacco products by young people (<https://bit.ly/2BseGAB>).

Restrictions on flavor in other states include: 1) general prohibitions or within certain buffer zones; 2) prohibition of menthol; 3) restriction of flavors used in e-cigarettes; and, 4) exemptions for certain retailers (Public Health Law Center, Tobacco Control Legal Consortium, <https://bit.ly/2t6OdVF>). It is not clear whether “characterizing flavor” as defined in HB260 would include menthol, as other state laws specifically list “menthol.”

## CONFLICTS and RELATIONSHIPS

### 2019 Bills

Identical to 2019 HB 260 and SB 343

#### Related to 2019 bills:

HB 256 (passed), Add E-cigarettes to clean indoor air act

HB 552, E-cigarette and nicotine liquid act

SB 166, Increase cigarette and e-cigarette tax rates

SB 338, No indoor e-cigarette use

SB 450, E-cigarette and nicotine liquid act

### 2020 Bills

HB 23 and identical SB 9, E-cigarette and e-liquid act

HB 195, Tobacco products act

## OTHER SUBSTANTIVE ISSUES

### As pointed out by DOH,

Youth purchase, use, and possession laws pose significant enforcement challenges by diverting enforcement officials’ attention away from preventing retailers from selling tobacco products to kids. Laws that penalize youth tobacco possession, use, and purchase may divert policy attention from effective tobacco control strategies, relieve the tobacco industry of responsibility for its marketing practices, and reinforce the tobacco industry’s espoused position that smoking is for adults only (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1766089/pdf/v012p000i6.pdf>).

Laws that penalize children that are not strictly enforced can breed disrespect for the law by young people, thereby having a negative effect (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1766089/pdf/v012p000i6.pdf>).

## TECHNICAL ISSUES

The bill could also ban menthol flavoring.

The bill could be amended to remove the penalty for the youth purchasing or possessing the flavored e-cigarette product.

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

New Mexicans will be exposed to flavored e-cigarette products that may cause disease or nicotine addiction and children will be exposed to second-hand inhaled products and an increased likelihood of short- and long-term disease due to flavored and unflavored nicotine-containing products.

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