

LFC Requester:	Boerner, Christine
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**AGENCY BILL ANALYSIS
2014 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

And

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment**
Correction **Substitute**

Date February 17, 2014
Bill No: HB15-305 Feb 17

Sponsor: Rep. Paul Bandy **Reviewing** Attorney General's Office
Short No Sales of E-Cigarettes to **Person Writing** Ari Biernoff
Title: Minors **Phone:** 827-6086 **Email** abiernoff@nmag.gov

SECTION II: FISCAL IMPACT **FOR LFC OFFICIAL PURPOSES******
AGO STAFF SHOULD LEAVE SHADED AREAS BLANK

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY14	FY15		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

Duplicates/Relates to Appropriation in the General Appropriation Act

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY14	FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates, Relates to, Conflicts with, Companion to:

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion Letter. This is a staff analysis in response to the agency's, committee's, or legislator's request.

BILL SUMMARY

Summary Synopsis:

The Tobacco Products Act, NMSA 1978, §§ 30-49-1 *et seq.* (the "Act"), forbids the sale of tobacco products to minors, forbids minors from procuring tobacco products, limits sales of tobacco products to face-to-face transactions, and imposes penalties for violation of those provisions.

HB 15 would amend the Act to make those provisions also apply to electronic cigarettes (e-cigarettes), which are battery-powered devices that provide doses of nicotine and other additives to the user in an aerosol. Specifically, HB 15 would define e-cigarette as "any electronic oral device, whether composed of a heating element and battery or an electronic circuit, that provides a vapor of nicotine or any other substances the use of inhalation of which simulates smoking." HB 15 at 2 (§ 30-49-2(A)(1)). Every material reference in the Act to "tobacco product" would be amended to "tobacco product or an e-cigarette."

The House Health, Government and Indian Affairs Committee gave HB 15 a Do Pass on February 1, 2014, with an amendment exempting "the lawful purchase or use by a minor of a tobacco-cessation product approved by the federal food and drug administration" from the Act's coverage. The House Judiciary Committee gave HB 15 a Do Pass on February 10, 2014, without amendment. HB 15 was approved on the House floor on February 13, 2014, with an amendment exempting "the lawful purchase or use by a minor of a tobacco-cessation product approved by the federal food and drug administration" from the Act's coverage, and further directing the Public Education Department to revise its tobacco, alcohol and drug free school districts policy to include e-cigarettes, no later than August 1, 2014. As thus amended, HB 15 passed the Senate Public Affairs Committee on February 14, 2014 and is scheduled to be heard by the Senate Judiciary Committee on February 17, 2014.

FISCAL IMPLICATIONS WITH ENACTING THIS BILL

N/A

SIGNIFICANT LEGAL ISSUES

Although at present there are no restrictions on e-cigarette sales to minors, or indeed any other regulations on the sale or use of e-cigarettes at all, “states traditionally ha[ve] the authority to regulate commercial activity that they deem harmful to the public.” *Williams v. Morgan*, 478 F.3d 1316, 1322 (11th Cir. 2007) (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)). In particular, New Mexico has previously restricted youth access to certain products. *See, e.g., State v. Chavez*, 2009-NMSC-035, ¶ 25, 146 N.M. 434 (Legislature determined that marijuana is dangerous substance for minors).

HB 15’s definition of “e-cigarette” conceivably covers a battery-powered device with a heating element that vaporizes anything from nicotine to liquid methamphetamine to sugar water. The Legislature should consider the scope of the problem that it perceives this legislation will address (e.g. youth consumption of nicotine; youth consumption of a product that may not itself contain nicotine but that may encourage or facilitate future tobacco or nicotine consumption) and define accordingly the range of products to be regulated by the Act.

As presently amended, HB 15 exempts from the Act’s coverage “the lawful purchase or use by a minor of a tobacco-cessation product approved by the federal food and drug administration.” Several years ago, the tobacco industry fought the United States Food and Drug Administration’s (“FDA”) efforts to regulate e-cigarettes as smoking-cessation devices. A federal appeals court agreed with the industry that the FDA could not regulate e-cigarettes as smoking cessation devices, but the court also determined that the FDA *could* regulate e-cigarettes as tobacco products. *See Sottera, Inc. v. FDA*, 627 F.3d 891 (D.C. Cir. 2010). While the federal government to date has not approved any e-cigarette as a “tobacco-cessation product,” the amendment to HB 15 makes clear that if that approval is conferred in the future, such a product could be sold to or consumed by a minor without violating the Act.

HB 15 also directs the state Public Education Department to revise its tobacco, alcohol and drug-free school districts policy (*see* 6.12.4.1 – 6.12.4.8 NMAC) to include e-cigarettes. The Legislature is on firm ground in mandating the creation of school district policies to forbid the use on school property of certain chemical substances, such as tobacco and alcohol. *See In re Alberto L.*, 2002-NMCA-107, ¶ 17, 133 N.M. 1; *see also Commonwealth v. Teeter*, 2008 PA Super. 272, ¶ 22, 961 A.2d 890 (Pa. Super. Ct. 2008).

PERFORMANCE IMPLICATIONS WITH ENACTING THIS BILL

HB 15 could impose additional burdens on the Alcohol and Gaming Division of the Regulation and Licensing Department and on county and local law enforcement, who are responsible under the Act for conducting inspections to ensure retail compliance with the Act (*see* Act, § 30-49-10); on district attorneys’ offices who are responsible for prosecuting violations of the Act (*see* Act, § 30-49-12(A)); and on school districts, who would be required to add e-cigarettes to their tobacco, alcohol, and drug-free policies (*see* Act, Section 13 [new material]).

ADMINISTRATIVE IMPLICATIONS WITH ENACTING THIS BILL

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP WITH BILLS INTRODUCED THIS SESSION

None at this time.

TECHNICAL ISSUES OR DRAFTING ERROR

N/A

OTHER SUBSTANTIVE LEGAL ISSUES

The Act does not define “tobacco products,” although if the Legislature enacted HB 15, the Act would define “e-cigarettes.” By way of comparison, the Tobacco Products Tax Act, NMSA 1978, § 7-12A-2(G), defines “tobacco products” as “any product, other than cigarettes, made from or containing tobacco.” The Legislature should consider clarifying that in the context of the Tobacco Products Act, “tobacco products” refers to all merchandise containing any amount of tobacco, including cigarettes.

ALTERNATIVES TO ENACTING THIS BILL

There are no related alternative bills that have prefiled.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Presently, there are no restrictions on e-cigarette sales to minors, or indeed any limitations on the sale or use of e-cigarettes whatsoever. If the Legislature does not enact HB 15 or its functional equivalent, retailers may continue to lawfully sell e-cigarettes to persons of any age, and minors may continue to lawfully purchase or otherwise obtain e-cigarettes.

AMENDMENTS NEEDED TO IMPROVE THIS BILL

The Legislature may wish to consider various possible amendments to HB 15, including:

- Whether to require that any e-cigarette that contains nicotine must prominently disclose on each packet sold that the product contains nicotine, a proven highly addictive substance.
- Whether to incorporate a recordkeeping requirement on retailers or distributors that would allow the State to verify sales of addictive products regulated by the Act (i.e. cigarettes, other tobacco products, and if HB 15 is enacted, e-cigarettes).
- Whether to maintain HB 15’s preemption of local regulations regarding youth access to e-cigarettes (*see* Act, § 30-49-11), or to instead allow local communities to develop responses that are tailored to their particular needs or concerns;
- Whether to add any provision for public education, or a delay in enactment of the bill, since e-cigarettes today are legal for New Mexicans of any age to purchase and use;
- Whether to extend HB 15 to ban internet sales of regular cigarettes/other tobacco products to youth (the Act currently exempts internet and phone sales from its coverage, *see* Act, § 30-49-7(C)).