

New Mexico Notes

Thanks to the oil and natural gas industry, New Mexico is going into the 2020 30-day Legislative Session with about a one billion dollar surplus. The 30-day session is when the Legislature determines a state budget for FY 2021, but they have managed to introduce 726 bills ranging from Agriculture to Water Rights. This year's budget, 7.61 billion dollars passed the House on a straight party line vote and is now in Senate Finance, which I am sure, will not look anything like what was sent over by the House. Other bills that affect our industry include:

House Bill 173 creates a new gasoline and special fuel surtax of 10 cent per gallon starting in FY21. The surtax is to increase by 5 cents per gallon on July 1st of each following year until July 1, 2026 when the Taxation and Revenue Department (TRD) will calculate the rate of the gasoline surtax using a formula based on the consumer price index. The surtaxes are in addition to the existing gasoline and special fuel taxes. The bill provides for distribution of the surtaxes to the state road fund, a new clean infrastructure fund and a new gasoline and special fuel excise surtax low-income rebate fund.

The bill also enacts the gasoline and special fuel excise surtax low-income rebate, which is based on the taxpayer's modified gross income and the amount it is over the federal property guidelines. The bill also creates a new clean infrastructure fund in the state treasury, to be administered by the Department of Transportation (DOT) in accordance with a clean infrastructure plan seeking to reduce air pollution, which DOT is tasked to create by December 31, 2020 and update every three years thereafter. Money in the new fund would include appropriation, gifts, grants, donations, income from investment of the fund, and other sources. This bill was tabled in the Appropriations Committee.

SB115 - Synopsis of Bill: Senate Bill 115 enacts the Cannabis Regulation Act (CRA), a comprehensive plan for regulation and licensing of commercial cannabis production and distribution, and sale and consumption (of up to two ounces of flowers or 16 grams of extract) by persons age 21 or older. It creates a new Cannabis Control Division (CCD) in RLD, which is charged with promulgating rules and policies related to licensing and regulating the activities authorized by the Act. Unrestricted commercial sales begin January 1, 2022, but existing medical cannabis licenses can begin selling to other non-medical consumers beginning January 1, 2021, subject to a DOH determination of adequate supply for the medical cannabis program.

SB 115 also enacts the Cannabis Tax Act, which imposes a cannabis excise tax of nine percent applied to the price paid for cannabis. That tax does not apply to retail sales of medical cannabis pursuant to the Lynn and Erin Compassionate Use Act (LECUA). It also allows for the adoption of ordinances by both municipalities and counties of an excise tax on cannabis of no more than four percent, which may be imposed in any number of one-sixteenth percent increments applied to the price of cannabis product; as drafted, the provisions governing these local body excise taxes do not appear to exempt medical cannabis.

Revenue from the excise tax is distributed as follows:

- Six percent to the cannabis industry equitable opportunity investment fund, a new fund administered by EDD created to provide financial assistance to starting and existing Cannabis industry businesses owned by members of communities disproportionately affected by past federal and state drug policies;
- Twenty percent to the low-income medical patient subsidy fund, a new fund administered by DOH to support resident qualified patients under LECUA who are sick and indigent or higher use patients who need assistance in obtaining medical cannabis;
- Thirty-five percent to the community grants reinvestment fund, a new fund administered by DOH for the purpose of a) drug education, including promoting cannabis abstinence for persons under 21; b) reinvesting in communities disproportionately affected by past federal and state drug policies, including supporting job placement, mental health treatment, and substance use disorder treatment; and c) funding research on substance use and abuse and other related programs, including funding housing for those using or in treatment for substance abuse. SB 115 was tabled in the Senate Judiciary Committee.

SB 131 - Synopsis of Bill: Senate Bill 131 creates the Tobacco Products Act and places licensing activities within the Alcoholic Beverage Control Division (ABC) of the Regulation and Licensing Department.

The Act incorporates all tobacco products and defines tobacco products as any product made from tobacco or nicotine, intended for human consumption, including cigars, cigarettes, chewing tobacco, pipe tobacco, snuff, e-cigarettes, and electronic nicotine delivery systems. The Act excludes products regulated as a drug or device by the U.S. Food and Drug Administration.

Specifically, the bill:

- Creates and requires licensure for the following tobacco product related activities: manufacture, distribution, and retail sales. Such regulation to include: qualifications of licensure, including issuance, renewals, fines and revocations; inspection and monitoring; and record keeping.

- Allows ABC to promulgate rules in order to administer the Act.
 - Requires ABC to begin issuing licenses to manufacturers, distributors, and retailers of tobacco products. The licenses are non-transferrable from person to person, but may be transferred to a different location with approval.
 - Provides fees to be charged: Manufacturers, up to \$1,000, license fee, for a one-year license, per location; Distributors, up to \$1,000, application fee, for a one-year license, per location; Retailers, up to \$1,000, application fee for a one-year license.
 - Provides for administrative penalties for violations of the Act. The bill provides that ABC may suspend or revoke a license, require the use of identification verification software, or impose an administrative penalty in an amount not more than ten thousand dollars (\$10,000), or any combination thereof. Upon the fourth violation for sale of a tobacco product to a minor at the same location within a three-year time period, the license issued for that location shall permanently be revoked.
 - Grants RLD and the Department of Public Safety (DPS) authority to enforce the Act. RLD is limited to authority over the administrative requirements. The Act allows for RLD, DPS, and local law enforcement to conduct inspections of any place tobacco products are sold, manufactured, or distributed.
 - Defines “minor” under the Tobacco Products Act to mean an individual who is younger than twenty-one years of age. This bill removes criminal penalties for minors attempting to purchase tobacco products. The bill prohibits the sale of tobacco products that are knowingly attractive to minors and the sale of tobacco products from vending machines unless the vending machine is in age-controlled locations off limits to minors.
 - Eliminates the current loophole, in which the only persons penalized for the sale to a minor are the individual employees while the business establishment is not held accountable. This creates accountability on the entity profiting from the sale of the product.
 - Creates the non-reverting “tobacco products administration fund” which will include application fees and administrative penalties collected by ABC, in order to administer the Act. The bill provides a continual appropriation of money in the fund to ABC.
 - Repeals NMSA 1978, Sections 30-49-1 through 30-49-13 (the Tobacco Products, E-cigarette and Nicotine Liquid Container Act)
- The effective date of this bill is July 1, 2020.

FISCAL IMPLICATIONS

This bill creates a new fund and provides for continuing appropriations. LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the Legislature to establish spending priorities. However, this particular issue could be resolved with an amendment – see the technical issues section below.

The bill creates the tobacco products administration fund for monies generated by licensing fees and administrative penalties.

The appropriation of \$350 thousand contained in this bill is a recurring expense to the general fund. The appropriation is made to the newly created tobacco products administration fund and any unexpended or unencumbered balance remaining at the end of a fiscal year does not revert to the general fund.

SIGNIFICANT ISSUES

New Mexico is one of 11 states that do not currently have some kind of tobacco retailer licensing law. This bill creates a licensing structure for all tobacco retailers, manufacturers, and distributors and includes a broader definition of “tobacco product.”

Additionally, no state currently has enacted a comprehensive e-cigarette regulatory bill. If passed, New Mexico would be the first state to create such a framework for e-cigarettes.

According to the NM Department of Health (DOH), this bill proposes comprehensive tobacco retailer licensing that would be expected to increase compliance with existing state and federal tobacco laws. The licensing portion of this bill would allow New Mexico regulatory agencies to better understand who is selling tobacco products and where they are being sold. DOH also notes that holding retailers, distributors, and manufacturers accountable is considered an important step to reducing youth access to tobacco products, and the penalties proposed by this bill are consistent with enforcement priorities recently set forth by the U.S. Food and Drug Administration.

Regarding the bill’s removal of criminal penalties for “minors,” DOH states there is evidence that laws penalizing youth tobacco possession, use, and purchase are not effective and pose enforcement challenges. The bill’s proposal of a minimum age of 21 for purchasing tobacco products is consistent with federal minimum age of sale laws. On December 20, 2019, the President signed

legislation amending the Federal Food Drug and Cosmetic Act, and raising the federal minimum age of sale of tobacco products from 18 to 21 years. It is now illegal for any retailer to sell any tobacco product - including cigarettes, cigars, and e-cigarettes - to a person under the age of 21.

According to the Regulation and Licensing Department (RLD), implementing a comprehensive tobacco retail licensing structure will increase compliance with tobacco laws, including the recent federal legislation raising the legal age to buy tobacco products to 21 years of age, and enhances the ongoing efforts to prevent youth from using tobacco products in the first place.

Enactment of this legislation would add New Mexico to the ranks of the 39 other states that regulate tobacco products.

TECHNICAL ISSUES

As noted above under fiscal implications, this bill provides for a continuing appropriation. This issue could be resolved by amending page 13, line 13 by striking “appropriated” and inserting in lieu thereof “subject to appropriation by the legislature.”

Upcoming Events

The NMPMA Convention and Trade Show will be held August 17-19, 2020, at Sandia Resort and Casino in Albuquerque, New Mexico. Mark your calendars!