

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE BILL 131

54TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2020

This document incorporates amendments that have been adopted during the current legislative session. The document is a tool to show the amendments in context and is not to be used for the purpose of amendments.

AN ACT

RELATING TO PUBLIC HEALTH; ENACTING THE TOBACCO PRODUCTS ACT;
RAISING THE AGE LIMIT FOR SALES OF TOBACCO PRODUCTS; PROVIDING
LICENSURE REQUIREMENTS FOR TOBACCO PRODUCT RETAILERS,
MANUFACTURERS AND DISTRIBUTORS; PRESCRIBING POWERS AND DUTIES
TO THE ALCOHOLIC BEVERAGE CONTROL DIVISION OF THE REGULATION
AND LICENSING DEPARTMENT; PROHIBITING CERTAIN ACTS PERTAINING
TO THE MANUFACTURE, SALE OR DISTRIBUTION OF TOBACCO PRODUCTS;
ESTABLISHING FEES; CREATING A FUND; PROVIDING ADMINISTRATIVE
AND CRIMINAL PENALTIES; REPEALING THE TOBACCO PRODUCTS, E-
CIGARETTE AND NICOTINE LIQUID CONTAINER ACT SFC →; ~~MAKING AN~~

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APPROPRIATION ← SFC.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be cited as the "Tobacco Products Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the Tobacco Products Act:

A. "child-resistant packaging" means packaging or a container that is designed or constructed to be significantly difficult for children under five years of age to open or obtain a toxic or harmful amount of the substance contained therein within a reasonable time and not difficult for a normal adult to use properly, but does not mean packaging or a container that all such children cannot open or obtain a toxic or harmful amount within a reasonable time;

B. "contraband tobacco products" means any tobacco products possessed, sold, bartered or given in violation of the Tobacco Products Act;

C. "delivery sale" means a sale of tobacco products to a consumer in New Mexico in which:

(1) the consumer submits an order for the sale by telephone, over the internet or through the mail or another delivery system; and

(2) the tobacco product is shipped through a delivery service;

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D. "delivery service" means a person, including the United States postal service, that is engaged in the delivery of letters, packages or containers;

E. "director" means the director of the alcoholic beverage control division of the regulation and licensing department;

F. "distribute" means to purchase and store a product and to offer the product for resale to retailers or consumers;

G. "distributor" means a person that distributes tobacco products in New Mexico, but does not include:

- (1) a retailer;
- (2) a manufacturer; or
- (3) a common or contract carrier;

H. "division" means the alcoholic beverage control division of the regulation and licensing department;

I. "e-cigarette":

(1) means 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 or inhalation of which simulates smoking; and

(2) includes any such device, or any part thereof, whether manufactured, distributed, marketed or sold as an e-cigarette, e-cigar, e-pipe or any other product, name or

descriptor; but

(3) does not include any product regulated as a drug or device by the United States food and drug administration under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. Section 301 et seq.;

J. "electronic nicotine delivery system" means an electronic device, including e-cigarettes, whether composed of a heating element and battery or an electronic circuit, that provides a vapor or aerosol of nicotine, the use or inhalation of which simulates smoking;

K. "knowingly attractive to minors" means packaging or labeling that contains:

(1) a cartoon-like character that mimics characters primarily aimed at entertaining minors;

(2) an imitation or mimicry of trademarks or trade dress of products that are or have been primarily marketed toward minors; or

(3) a symbol or celebrity image that is primarily used to market products to minors;

L. "licensee" means a holder of a license issued by the division pursuant to the Tobacco Products Act;

M. "manufacturer" means a person that manufactures, fabricates, assembles, processes or labels tobacco products or imports from outside the United States, directly or indirectly, a tobacco product for sale or distribution in the United

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States;

N. "minor" means an individual who is younger than twenty-one years of age;

O. "nicotine liquid" means a liquid or other substance containing nicotine where the liquid or substance is sold, marketed or intended for use in an electronic nicotine delivery system;

P. "person" means an individual, corporation, firm, partnership, copartnership, association or other legal entity;

Q. "retailer" means a person, whether located within or outside of New Mexico, that sells tobacco products at retail to a consumer in New Mexico; provided that the sale is not for resale;

R. "self-service display" means a display to which the public has access without the assistance of a retailer or the retailer's employee; and

S. "tobacco product" means a product made or derived from tobacco or nicotine that is intended for human consumption, whether smoked, chewed, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means, including cigars, cigarettes, chewing tobacco, pipe tobacco, snuff, e-cigarettes or electronic nicotine delivery systems.

**SECTION 3. [NEW MATERIAL] PROHIBITED SALES--
MANUFACTURING--LABELING--MARKETING--SAFETY REQUIREMENTS.--**

A. A person shall not knowingly, intentionally or

.217605.1AIC February 16, 2020 (1:35pm)

negligently sell, offer to sell, barter or give a tobacco product to a minor.

B. A licensee shall not sell, offer to sell or deliver a tobacco product in a form other than an original manufacturer-sealed package Sfl→, **except for individually sold cigars or loose leaf pipe tobacco**←Sfl.

C. A licensee shall not sell, offer to sell or deliver nicotine liquid in this state unless such liquid is in child-resistant packaging, except that for the purpose of this subsection, "nicotine liquid" does not include nicotine liquid in a cartridge that is pre-filled and sealed by the manufacturer and that is not intended to be opened by the consumer.

D. A manufacturer shall not produce and a distributor or retailer shall not sell tobacco products that are knowingly attractive to minors.

SECTION 4. [NEW MATERIAL] DIVISION--LICENSE ISSUANCE-- MANUFACTURE, DISTRIBUTION OR SALE OF TOBACCO PRODUCTS.--

A. Except as provided in Subsection C of this section, the division shall issue licenses for the manufacture, distribution or sale of tobacco products in New Mexico to applicants who meet the requirements of the Tobacco Products Act.

B. The division shall issue or renew a license for the:

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(1) manufacture of tobacco products for a term of one year;

(2) distribution of tobacco products for a term of one year; and

(3) retail sale of tobacco products for a term of one year.

C. A license shall not be issued, retained, transferred or renewed pursuant to the Tobacco Products Act if any of the following conditions apply:

(1) the applicant has had a manufacturer, distributor or retailer license revoked by the division or by another state;

(2) the applicant is not in compliance with Subsection G of Section 7-12-9.1 NMSA 1978;

(3) the location for the license or license transfer is within three hundred feet of a school; provided that this restriction does not apply to a location at which tobacco products have been lawfully manufactured, distributed or sold prior to July 1, 2020; or

(4) the location for the license would result in a violation of a zoning or other ordinance of a governing body in which the proposed location would exist.

SECTION 5. [NEW MATERIAL] MANUFACTURER LICENSE REQUIREMENTS--APPLICATION AND RENEWAL REQUIREMENTS--FEES.--

A. A person shall not manufacture tobacco products

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at any location in the state without first obtaining a manufacturer license issued by the division to that person for that location.

B. An application for a manufacturer license or manufacturer license renewal shall be submitted on a form prescribed by the division and shall include:

(1) the name, telephone number, mailing address and email address of the applicant and:

(a) if the applicant is a firm, partnership or association, the name and address of each of its members contributing ten percent or more of the total value of contributions made to the firm, partnership or association and each member entitled to ten percent or more of the profits earned by the firm, partnership or association; or

(b) if the applicant is a corporation, the name and address of its registered agent, the names and addresses of all officers and directors and those stockholders owning ten percent or more of the voting stock of the corporation;

(2) the address of the applicant's principal place of business and every location where the applicant manufactures tobacco products;

(3) documentation as required by the division affirming that the applicant will comply with applicable and proper tobacco products manufacturing practices as required

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pursuant to 21 USCA Section 387d(a) and will comply with any applicable health directives issued by the department of health pursuant to the Public Health Act;

(4) documentation as required by the division affirming that the applicant will submit the applicable ingredient listing to the federal secretary of health and human services as required pursuant to 21 USCA Section 387d(a)(1); and

(5) a nonrefundable application fee not to exceed Sf12→~~eight hundred fifty dollars (\$850)~~←Sf12 Sf12→**seven hundred fifty dollars (\$750)**←Sf12 per location or a renewal fee not to exceed Sf12→~~five hundred dollars (\$500)~~←Sf12 Sf12→**four hundred dollars (\$400)**←Sf12 per location.

SECTION 6. [NEW MATERIAL] DISTRIBUTOR LICENSE

REQUIREMENTS--APPLICATION AND RENEWAL REQUIREMENTS--FEES.--

A. A person shall not distribute tobacco products from any location in the state without first obtaining a distributor license issued by the division to that person for that location.

B. An application for a distributor license or distributor license renewal shall be submitted on a form prescribed by the division and shall include:

(1) the name, telephone number, mailing address and email address of the applicant and:

(a) if the applicant is a firm,

.217605.1AIC February 16, 2020 (1:35pm)

partnership or association, the name and address of each of its members contributing ten percent or more of the total value of contributions made to the firm, partnership or association and each member entitled to ten percent or more of the profits earned by the firm, partnership or association; or

(b) if the applicant is a corporation, the name and address of its registered agent, the names and addresses of all officers and directors and those stockholders owning ten percent or more of the voting stock of the corporation;

(2) the address of the applicant's principal place of business and every location from which the applicant distributes tobacco products; and

(3) a nonrefundable application fee not to exceed Sf12→~~eight hundred fifty dollars (\$850)~~←Sf12 Sf12→**seven hundred fifty dollars (\$750)**←Sf12 per location or a renewal fee not to exceed Sf12→~~five hundred dollars (\$500)~~←Sf12 Sf12→**four hundred dollars (\$400)**←Sf12 per location.

SECTION 7. [NEW MATERIAL] RETAILER LICENSE REQUIREMENTS--APPLICATION AND RENEWAL REQUIREMENTS--FEES.--

A. A person shall not sell tobacco products at any location in the state without first obtaining a retailer license issued by the division to that person or that person's employer for that location.

B. An application for a retailer license or for a

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retailer license renewal shall be submitted on a form prescribed by the division and shall include:

(1) the name, telephone number, mailing address and email address of the applicant and:

(a) if the applicant is a firm, partnership or association, the name and address of each of its members contributing ten percent or more of the total value of contributions made to the firm, partnership or association and each member entitled to ten percent or more of the profits earned by the firm, partnership or association; or

(b) if the applicant is a corporation, the name and address of its registered agent, the names and addresses of all officers and directors and those stockholders owning ten percent or more of the voting stock of the corporation;

(2) the address of the applicant's principal place of business and every location where the applicant sells tobacco products; and

(3) a nonrefundable application fee not to exceed Sf12→~~eight hundred fifty dollars (\$850)~~←Sf12 Sf12→**seven hundred fifty dollars (\$750)**←Sf12 per location or a renewal fee not exceed Sf12→~~five hundred dollars (\$500)~~←Sf12 Sf12→**four hundred dollars (\$400)**←Sf12 per location.

SECTION 8. [NEW MATERIAL] LICENSE APPLICATION INFORMATION CHANGES.--If the information submitted in an application

.217605.1AIC February 16, 2020 (1:35pm)

pursuant to the Tobacco Products Act for a license or for a license renewal changes, the licensee shall notify the division within ten business days of the change. If a change in the information required for an application results in a violation of the Tobacco Products Act, the director may impose an administrative penalty as provided in that act.

SECTION 9. [NEW MATERIAL] ISSUANCE OF LICENSES--REASONS FOR DENIAL.--

A. Beginning January 1, 2021, the division shall begin issuing licenses.

B. The division shall grant or deny an application for a license or for a license renewal made pursuant to the Tobacco Products Act after the complete application is submitted to the division. The division shall approve the application for issuance of a license or for a license renewal if the division determines that the applicant meets the requirements of the Tobacco Products Act and the rules promulgated pursuant to that act.

C. If a complete application for a license or for a license renewal is denied, the division shall state the reasons for the denial. The applicant may reapply within thirty days after the date of the denial. The division shall not charge a fee for a reapplication made within that period.

SECTION 10. [NEW MATERIAL] LICENSE TRANSFER--NOTICE OF CHANGES.--

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A. A license issued pursuant to the Tobacco Products Act shall not be transferred from the licensee to another person.

B. The transfer of a license from one location to another may be approved by the division, provided that the licensee shall submit an application for license location transfer to the division for review. The division shall allow the transfer unless any of the conditions provided in Sections 4 and 9 of the Tobacco Products Act apply.

SECTION 11. [NEW MATERIAL] TOBACCO PRODUCTS

ADMINISTRATION FUND--CREATED--PURPOSE.--The "tobacco products administration fund" is created as a nonreverting fund in the state treasury. The fund consists of fees and administrative penalties collected by the division pursuant to the Tobacco Products Act, appropriations by the legislature, gifts, grants and donations. Money in the fund at the end of a fiscal year shall not revert to any other fund. The division shall administer the fund, and money in the fund is SFC→~~appropriated~~←SFC SFC→**subject to appropriation by the legislature**←SFC to the division for the administration of the Tobacco Products Act. Disbursements from the fund shall be made by warrant of the secretary of finance and administration pursuant to vouchers signed by the superintendent of regulation and licensing or the superintendent's authorized representative.

.217605.1AIC February 16, 2020 (1:35pm)

SECTION 12. [NEW MATERIAL] FEES AND ADMINISTRATIVE PENALTIES RETAINED BY THE DIVISION.--All fees and administrative penalties collected by the division pursuant to the Tobacco Products Act shall be deposited into the tobacco products administration fund.

SECTION 13. [NEW MATERIAL] HEARING PROCEDURE.--If the division suspends or revokes a license or imposes an administrative penalty against a licensee, the licensee shall be entitled to a hearing pursuant to the rules promulgated by the division. The hearing shall be conducted by the director or a hearing officer appointed by the director and shall be held in the county in which the licensee is located. Hearings shall be open to the public. Subpoenas shall be issued and enforced in accordance with the provisions of Section 23 of the Tobacco Products Act.

SECTION 14. [NEW MATERIAL] DOCUMENTARY EVIDENCE OF AGE AND IDENTITY.--

A. A retailer or an employee of a retailer shall not knowingly, intentionally or negligently fail to verify the age of a consumer purchasing tobacco products.

B. Except as provided in Subsection C of this section, evidence of the age and identity of a person attempting to procure tobacco products in person shall be shown by a valid document that contains a picture of that person and is issued by a federal, state, county, municipal, tribal or

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foreign government, including a motor vehicle driver's license or an identification card.

C. For each sale made through a delivery sales method, age verification shall be completed through an independent, third-party age verification service that establishes that a consumer is of legal age by comparing information available from public records to personal information entered by the consumer during the ordering process.

D. A retailer may ship tobacco products only to a consumer whose age has been verified pursuant to Subsection C of this section.

SECTION 15. [NEW MATERIAL] VENDING MACHINES--RESTRICTIONS ON SALES OF TOBACCO PRODUCTS.--

A. Except as provided in Subsections B and C of this section, a retailer selling goods at a retail location in New Mexico shall not use a self-service display for tobacco products.

B. Tobacco products may be sold by vending machines only in age-controlled locations where minors are not permitted.

C. The sales and display of cigars may be allowed only in age-controlled locations where minors are not permitted.

SECTION 16. [NEW MATERIAL] DISTRIBUTION OF TOBACCO

.217605.1AIC February 16, 2020 (1:35pm)

PRODUCTS AS FREE SAMPLES PROHIBITED.--

A. A person shall not provide free samples of tobacco products without the express written approval of the director.

B. The provisions of Subsection A of this section shall not apply to an individual who provides free samples of tobacco products, e-cigarettes or nicotine liquid containers in connection with the practice of cultural or ceremonial activities in accordance with the federal American Indian Religious Freedom Act or its successor act.

SECTION 17. [NEW MATERIAL] SIGNS--POINT OF SALE.--A retailer shall prominently display in the place where tobacco products are sold and where a tobacco product vending machine is located a printed sign or decal that reads as follows:

"IT IS ILLEGAL FOR A PERSON UNDER 21 YEARS OF AGE TO PURCHASE TOBACCO PRODUCTS."

SECTION 18. [NEW MATERIAL] CRIMINAL PENALTIES--UNLICENSED ACTIVITIES.--A person who manufactures, distributes or sells tobacco products without a license required pursuant to the Tobacco Products Act is guilty of a misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978. Contraband tobacco products seized by the division or by a law enforcement agency as evidence of unlicensed activities shall be retained and disposed of pursuant to the Forfeiture Act. Sf13→The provisions of this section shall not

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apply to the sale of tobacco products between a minor and another minor. ←Sf13

SECTION 19. [NEW MATERIAL] MANUFACTURERS, DISTRIBUTORS AND RETAILERS--VIOLATIONS--LICENSE SUSPENSION OR REVOCATION--ADMINISTRATIVE PENALTIES.--The division may suspend or revoke a license of a licensee, require the use of identification verification software for a designated period of time or impose an administrative penalty against a licensee in an amount not to exceed ten thousand dollars (\$10,000), or any combination thereof, if the division finds that the licensee, an employee of the licensee or a contractor acting on behalf of the licensee has violated a provision of the Tobacco Products Act; provided, however, that upon a fourth violation for the sale of a tobacco product to a minor occurring at the same location within three years of the first such violation, the retailer's license issued for that location shall be permanently revoked.

SECTION 20. [NEW MATERIAL] MONITORED COMPLIANCE--INSPECTIONS.--The alcoholic beverage control division of the regulation and licensing department, the department of public safety and the appropriate law enforcement authorities in each county and municipality may conduct random, unannounced inspections of facilities where tobacco products are sold, manufactured or distributed to ensure compliance with the provisions of the Tobacco Products Act.

SECTION 21. [NEW MATERIAL] AUTHORITY OF DEPARTMENT OF

.217605.1AIC February 16, 2020 (1:35pm)

PUBLIC SAFETY.--

A. The department of public safety has authority over all investigations and enforcement activities required under the Tobacco Products Act, except for those provisions relating to the issuance, denial, suspension or revocation and administrative sanctions of licenses unless its assistance is requested by the director.

B. Following the issuance of a citation pursuant to the provisions of the Tobacco Products Act, the department of public safety or the law enforcement agency of a municipality or county shall report alleged violations of that act to the division.

C. The director may request the investigators from the department of public safety to investigate licensees or activities that the director has reasonable cause to believe are in violation of the Tobacco Products Act.

SECTION 22. [NEW MATERIAL] AUTHORITY OF THE DIVISION.--

A. The division has the authority over all matters relating to the issuance, denial, suspension, revocation and other administrative penalties or transfer of licenses under the Tobacco Products Act. The director may request the department of public safety to provide investigatory and enforcement support as deemed necessary.

B. The director has rulemaking authority pursuant to the State Rules Act.

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SECTION 23. [NEW MATERIAL] ADMINISTRATIVE AUTHORITY AND POWERS.--

A. For the purpose of administering the licensing provisions of the Tobacco Products Act, the director is authorized to examine and to require the production of any pertinent records, books, information or evidence, to require the presence of any person and to require that person to testify under oath concerning the subject matter of the inquiry and to make a permanent record of the proceedings.

B. The director, through the legal counsel for the division, is vested with the power to issue subpoenas. In no case shall a subpoena be made returnable less than five days from the date of service.

C. A subpoena issued by the division shall state with reasonable certainty the nature of the evidence required to be produced, the time and place of the hearing, the nature of the inquiry or investigation and the consequences of failure to obey the subpoena and shall bear the seal of the division and be attested to by the director.

D. After service of a subpoena upon a person, if a person neglects or refuses to appear or produce records or other evidence in response to the subpoena or neglects or refuses to give testimony, as required, the director may invoke the aid of the district courts in the enforcement of the subpoena. In appropriate cases, the court shall issue its

.217605.1AIC February 16, 2020 (1:35pm)

order requiring the person to appear and testify or produce the books or records and may, upon failure of the person to comply with the order, punish the person for contempt.

SECTION 24. [NEW MATERIAL] PREEMPTION.--When a municipality or county, including a home rule municipality or an urban county, adopts an ordinance, charter amendment or regulation pertaining to the sales of tobacco products, the ordinance, charter amendment or regulation shall be consistent with the provisions of the Tobacco Products Act.

SECTION 25. [NEW MATERIAL] APPLICABILITY.--The provisions of the Tobacco Products Act do not apply to the lawful purchase or use by a minor of a tobacco-cessation product approved by the federal food and drug administration.

~~SFC→SECTION 26. APPROPRIATION.--Three hundred fifty thousand dollars (\$350,000) is appropriated from the general fund to the alcoholic beverage control division of the regulation and licensing department for expenditure in fiscal year 2021 and subsequent fiscal years to administer the provisions of the Tobacco Products Act. Any unexpended or unencumbered balance remaining at the end of a fiscal year shall not revert to the general fund.←SFC~~

SECTION SFC→27←SFC SFC→26←SFC. REPEAL.--Sections 30-49-1 through 30-49-13 NMSA 1978 (being Laws 1993, Chapter 244, Sections 1 through 12 and Laws 2015, Chapter 98, Section 12, as amended) are repealed.

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SECTION SFC→28←SFC SFC→27←SFC. EFFECTIVE DATE.--The effective date of the provisions of SFC→Sections 1 through 25 and 27 of←SFC this act is January 1, 2021.

- 21 -

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