

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE BILL 131

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

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; MAKING AN
APPROPRIATION.

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".

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underscored material = new
[bracketed material] = delete

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

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

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

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

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

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

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

24 E. "director" means the director of the alcoholic
25 beverage control division of the regulation and licensing

1 department;

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

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

7 (1) a retailer;

8 (2) a manufacturer; or

9 (3) a common or contract carrier;

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

12 I. "e-cigarette":

13 (1) means any electronic oral device, whether
14 composed of a heating element and battery or an electronic
15 circuit, that provides a vapor of nicotine or any other
16 substances the use or inhalation of which simulates smoking;
17 and

18 (2) includes any such device, or any part
19 thereof, whether manufactured, distributed, marketed or sold as
20 an e-cigarette, e-cigar, e-pipe or any other product, name or
21 descriptor; but

22 (3) does not include any product regulated as
23 a drug or device by the United States food and drug
24 administration under the Federal Food, Drug, and Cosmetic Act,
25 21 U.S.C. Section 301 et seq.;

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

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

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

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

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

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

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

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

24 O. "nicotine liquid" means a liquid or other
25 substance containing nicotine where the liquid or substance is

1 sold, marketed or intended for use in an electronic nicotine
2 delivery system;

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

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

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

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

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

20 A. A person shall not knowingly, intentionally or
21 negligently sell, offer to sell, barter or give a tobacco
22 product to a minor.

23 B. A licensee shall not sell, offer to sell or
24 deliver a tobacco product in a form other than an original
25 manufacturer-sealed package.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 A. A person shall not manufacture tobacco products
20 at any location in the state without first obtaining a
21 manufacturer license issued by the division to that person for
22 that location.

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

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

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

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

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

17 (3) documentation as required by the division
18 affirming that the applicant will comply with applicable and
19 proper tobacco products manufacturing practices as required
20 pursuant to 21 USCA Section 387d(a) and will comply with any
21 applicable health directives issued by the department of health
22 pursuant to the Public Health Act;

23 (4) documentation as required by the division
24 affirming that the applicant will submit the applicable
25 ingredient listing to the federal secretary of health and human

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1 services as required pursuant to 21 USCA Section 387d(a)(1);
2 and

3 (5) a nonrefundable application fee not to
4 exceed eight hundred fifty dollars (\$850) per location or a
5 renewal fee not to exceed five hundred dollars (\$500) per
6 location.

7 SECTION 6. [NEW MATERIAL] DISTRIBUTOR LICENSE
8 REQUIREMENTS--APPLICATION AND RENEWAL REQUIREMENTS--FEES.--

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

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

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

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

24 (b) if the applicant is a corporation,
25 the name and address of its registered agent, the names and

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1 addresses of all officers and directors and those stockholders
2 owning ten percent or more of the voting stock of the
3 corporation;

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

7 (3) a nonrefundable application fee not to
8 exceed eight hundred fifty dollars (\$850) per location or a
9 renewal fee not to exceed five hundred dollars (\$500) per
10 location.

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

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

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

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

22 (a) if the applicant is a firm,
23 partnership or association, the name and address of each of its
24 members contributing ten percent or more of the total value of
25 contributions made to the firm, partnership or association and

1 each member entitled to ten percent or more of the profits
 2 earned by the firm, partnership or association; or

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

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

11 (3) a nonrefundable application fee not to
 12 exceed eight hundred fifty dollars (\$850) per location or a
 13 renewal fee not exceed five hundred dollars (\$500) per
 14 location.

15 SECTION 8. [NEW MATERIAL] LICENSE APPLICATION INFORMATION
 16 CHANGES.--If the information submitted in an application
 17 pursuant to the Tobacco Products Act for a license or for a
 18 license renewal changes, the licensee shall notify the division
 19 within ten business days of the change. If a change in the
 20 information required for an application results in a violation
 21 of the Tobacco Products Act, the director may impose an
 22 administrative penalty as provided in that act.

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

25 A. Beginning January 1, 2021, the division shall

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1 begin issuing licenses.

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

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

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

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

20 B. The transfer of a license from one location to
21 another may be approved by the division, provided that the
22 licensee shall submit an application for license location
23 transfer to the division for review. The division shall allow
24 the transfer unless any of the conditions provided in Sections
25 4 and 9 of the Tobacco Products Act apply.

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1 SECTION 11. [NEW MATERIAL] TOBACCO PRODUCTS

2 ADMINISTRATION FUND--CREATED--PURPOSE.--The "tobacco products
3 administration fund" is created as a nonreverting fund in the
4 state treasury. The fund consists of fees and administrative
5 penalties collected by the division pursuant to the Tobacco
6 Products Act, appropriations by the legislature, gifts, grants
7 and donations. Money in the fund at the end of a fiscal year
8 shall not revert to any other fund. The division shall
9 administer the fund, and money in the fund is appropriated to
10 the division for the administration of the Tobacco Products
11 Act. Disbursements from the fund shall be made by warrant of
12 the secretary of finance and administration pursuant to
13 vouchers signed by the superintendent of regulation and
14 licensing or the superintendent's authorized representative.

15 SECTION 12. [NEW MATERIAL] FEES AND ADMINISTRATIVE

16 PENALTIES RETAINED BY THE DIVISION.--All fees and
17 administrative penalties collected by the division pursuant to
18 the Tobacco Products Act shall be deposited into the tobacco
19 products administration fund.

20 SECTION 13. [NEW MATERIAL] HEARING PROCEDURE.--If the

21 division suspends or revokes a license or imposes an
22 administrative penalty against a licensee, the licensee shall
23 be entitled to a hearing pursuant to the rules promulgated by
24 the division. The hearing shall be conducted by the director
25 or a hearing officer appointed by the director and shall be

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1 held in the county in which the licensee is located. Hearings
2 shall be open to the public. Subpoenas shall be issued and
3 enforced in accordance with the provisions of Section 23 of the
4 Tobacco Products Act.

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

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

10 B. Except as provided in Subsection C of this
11 section, evidence of the age and identity of a person
12 attempting to procure tobacco products in person shall be shown
13 by a valid document that contains a picture of that person and
14 is issued by a federal, state, county, municipal, tribal or
15 foreign government, including a motor vehicle driver's license
16 or an identification card.

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

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

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1 of this section.

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

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

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

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

14 SECTION 16. [NEW MATERIAL] DISTRIBUTION OF TOBACCO
15 PRODUCTS AS FREE SAMPLES PROHIBITED.--

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

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

25 SECTION 17. [NEW MATERIAL] SIGNS--POINT OF SALE.--A

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1 retailer shall prominently display in the place where tobacco
2 products are sold and where a tobacco product vending machine
3 is located a printed sign or decal that reads as follows:

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

6 SECTION 18. [NEW MATERIAL] CRIMINAL PENALTIES--UNLICENSED
7 ACTIVITIES.--A person who manufactures, distributes or sells
8 tobacco products without a license required pursuant to the
9 Tobacco Products Act is guilty of a misdemeanor and shall be
10 sentenced in accordance with the provisions of Section 31-19-1
11 NMSA 1978. Contraband tobacco products seized by the division
12 or by a law enforcement agency as evidence of unlicensed
13 activities shall be retained and disposed of pursuant to the
14 Forfeiture Act.

15 SECTION 19. [NEW MATERIAL] MANUFACTURERS, DISTRIBUTORS
16 AND RETAILERS--VIOLATIONS--LICENSE SUSPENSION OR REVOCATION--
17 ADMINISTRATIVE PENALTIES.--The division may suspend or revoke a
18 license of a licensee, require the use of identification
19 verification software for a designated period of time or impose
20 an administrative penalty against a licensee in an amount not
21 to exceed ten thousand dollars (\$10,000), or any combination
22 thereof, if the division finds that the licensee, an employee
23 of the licensee or a contractor acting on behalf of the
24 licensee has violated a provision of the Tobacco Products Act;
25 provided, however, that upon a fourth violation for the sale of

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1 a tobacco product to a minor occurring at the same location
2 within three years of the first such violation, the retailer's
3 license issued for that location shall be permanently revoked.

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

12 SECTION 21. [NEW MATERIAL] AUTHORITY OF DEPARTMENT OF
13 PUBLIC SAFETY.--

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

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

25 C. The director may request the investigators from

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1 the department of public safety to investigate licensees or
2 activities that the director has reasonable cause to believe
3 are in violation of the Tobacco Products Act.

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

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

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

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

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

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

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

7 D. After service of a subpoena upon a person, if a
8 person neglects or refuses to appear or produce records or
9 other evidence in response to the subpoena or neglects or
10 refuses to give testimony, as required, the director may invoke
11 the aid of the district courts in the enforcement of the
12 subpoena. In appropriate cases, the court shall issue its
13 order requiring the person to appear and testify or produce the
14 books or records and may, upon failure of the person to comply
15 with the order, punish the person for contempt.

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

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

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

9 **SECTION 27. REPEAL.**--Sections 30-49-1 through 30-49-13
10 NMSA 1978 (being Laws 1993, Chapter 244, Sections 1 through 12
11 and Laws 2015, Chapter 98, Section 12, as amended) are
12 repealed.

13 **SECTION 28. EFFECTIVE DATE.**--The effective date of the
14 provisions of Sections 1 through 25 and 27 of this act is
15 January 1, 2021.