61-37-2 Definitions

As used in the Tobacco Products Act:

A. "Characterizing flavor" means:

1) a taste or smell, other than the taste or smell of tobacco, imparted either prior to, or during the consumption of, a tobacco product including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, or any candy, dessert, alcoholic beverage, herb, or spice; or

2) a cooling or numbing sensation imparted during consumption of a tobacco product.

B. ~~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;

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

~~**D.** 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;~~

means the sale of any tobacco product to any person for personal consumption and not for resale when the sale is conducted by any means other than an in-person, over-the-counter sales transaction in a tobacco retail establishment. Delivery sale includes the sale of any tobacco product when the sale is conducted by telephone, other voice transmission, mail, the internet, or app-based service. Delivery sale includes but is not limited to delivery by licensees or third parties by any means, including curbside pick-up, pick-up locker, or via shipment by a common carrier.

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

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

G. ~~F.~~ "distribute" ~~means to purchase and store a product and to offer the product for resale to retailers or consumers;~~ **means to purchase and store a tobacco product for resale to retailers or sell or offer for sale a tobacco product to a retailer for resale.**

H. ~~G.~~ "distributor" means a person that**:**

(1) distributes tobacco products in New Mexico**; or**

(2) purchases or acquires tobacco products from a person located outside of New Mexico and brings or causes the tobacco products to be brought into New Mexico for distribution or retail; but does not include

(1) a retailer;

(2) a manufacturer;

(3) an importer; or

(4) a common or contract carrier;

I. ~~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;~~

J. "Electronic smoking device" means any device that may be used to deliver any aerosolized or vaporized substance to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah. Electronic smoking device includes any component, part, or accessory of the device, and also includes any substance that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine. Electronic smoking device does not include any product that has been approved by the U.S. Food and Drug Administration to be marketed and for sale as "drugs," "devices," or "combination products," as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

K. "Flavored tobacco product" means any tobacco product that imparts a characterizing flavor. There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a tobacco retailer, manufacturer, importer, or any employee or agent of a tobacco retailer, importer, or manufacturer has:

(1) Made a public statement or claim that the tobacco product imparts a characterizing flavor;
(2) Used text or images, or both, on the tobacco product's labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a characterizing flavor; or
(3) Taken action that would be reasonably expected to cause a consumer to believe the tobacco product imparts a characterizing flavor.

L. ~~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;

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

N. ~~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 States;

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

P. ~~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;~~

Q. "Nicotine liquid container":

(a) means a bottle or container of a liquid or other substance containing nicotine where the liquid or substance is sold, marketed or intended for use in an electronic smoking device; but

(b) does not include a liquid or other substance containing nicotine in a cartridge that is sold, marketed or intended for use in a cartridge that is sold, marketed or intended for use in an electronic smoking device; provided that such cartridge is pre-filled and sealed by the manufacturer and is not intended to be opened by the consumer.

R. "Nicotine" means any form of the chemical nicotine, including any salt or complex, from any source, and includes nicotinic alkaloids and nicotine analogs. Any communication by, or on behalf of, the manufacturer, distributor, or retailer of a tobacco product that indicates that the product contains a nicotine analog, as defined, constitutes presumptive evidence that the product contains a nicotine analog.

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

T. ~~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;

U. ~~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

V. ~~S.~~ "tobacco product" means**:**

(1) a product made or derived from tobacco or nicotine that is intended for human consumption, **or is likely to be consumed,** whether smoked, chewed, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means**, including, but not limited** to cigars, cigarettes, chewing tobacco, pipe tobacco, snuff, **snus, pouch, gum;**

(2) electronic smoking devices and any substance that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine; or

(3) any component, part, or accessory of 1) or 2), whether or not any of these contains tobacco or nicotine, including, but not limited to, filters, rolling papers, blunt or hemp wraps, hookahs, flavor enhancers, mouthpieces or pipes.

"Tobacco product" does not include any nicotine cessation product that has been approved by the U.S. Food and Drug Administration to be marketed and for sale as "drugs," "devices," or "combination products," as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

§ 61-37-3. Prohibited sales; manufacturing; labeling; marketing; safety requirements

A. A person shall not ~~knowingly, intentionally or 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, except for individually sold cigars or loose leaf pipe tobacco.

~~C.~~ A licensee shall not sell, offer to sell or deliver **any nicotine liquid container at retail in this state unless such container is in child-resistant packaging**. ~~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. No licensee, or any agent or employee of a licensee or distributor, operating in this state shall sell, offer for sale, or possess with the intent to sell or offer for sale, any flavored tobacco product to any consumer located within this state.

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

§ 61-37-7. 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 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 seven hundred fifty dollars ($750) per location or a renewal fee not to exceed four hundred dollars ($400) per location**;**

(4) a certification under penalty of perjury, that the applicant will comply with all applicable federal, Tribal, state and local tobacco laws; and

(5) any information necessary for the division to determine whether the applicant meets the requirements for issuance or renewal of a retailer license pursuant to the Tobacco Products Act.

§ 61-37-9. 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.

C. 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.

D. The division shall deny the application for issuance of a license or for a license renewal if the division determines any of the following:

1) The applicant is under 21 years or age;

2) The information presented in the application for issuance of a license or for a license renewal is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this article. A license issued on the basis of false or misleading information will be revoked pursuant to 61-37-19 NMSA 1978.

3) The required application fee for issuance of a license or for a license renewal has not been paid;

4) The applicant has been found by a court of law or administrative body to have violated a federal, Tribal, state, or local law pertaining to the sale of tobacco products within the preceding 3 years of the date of application for issuance of a license or for license renewal;

5) The applicant has had a license to sell tobacco products suspended or revoked within the preceding 12 months of the date of application for issuance of a license or for license renewal; or

6) The Applicant has not paid outstanding fees, fines, penalties, or other charges arising from a violation of federal, Tribal, state or local laws regulating tobacco products and owed to New Mexico or any county, municipality or other political subdivision of the state.

E. 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.

61-37-14 Documentary evidence of age and identity; Delivery Sales

A. A retailer or an employee of a retailer shall ~~knowingly, intentionally or negligently~~ verify the age of a consumer purchasing tobacco products.

B. ~~Except as provided in Subsection C of this section, e~~**E**vidence 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 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.~~ **No licensee or any agent or employee of licensee may sell or offer to sell any tobacco product by means of a delivery sale.**

D. ~~A retailer may ship tobacco products only to a consumer whose age has been verified pursuant to Subsection C of this section.~~ **A tobacco product shall not be sold offered for sale to a consumer in New Mexico except through an in-person transaction conducted by a retailer licensed pursuant to the Tobacco Products Act.**

§ 61-37-16~~. Distribution of tobacco products as f~~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-cigarettesor 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.

§ 61-37-18. Criminal penalties; unlicensed activities

A person who manufactures, distributes ~~or~~,-sells, **or offers to sell** 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 [Chapter 31, Article 27 NMSA 1978]. The provisions of this section shall not apply to the sale of tobacco products between a minor and another minor.

§ 61-37-19. 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.~~

A. In addition to any other penalty authorized by law, the division shall suspend or revoke a license issued pursuant to the Tobacco Products Act if, after providing the licensee notice and an opportunity for a hearing pursuant to Section 61-37-13 NMSA 1978, the division finds by a preponderance of the evidence that the licensee or an employee of the licensee acting on behalf of the licensee has violated a provision of the Tobacco Products Act or a rule promulgated pursuant to that act.

B. Except as provided in Subsection C of this section, the division shall impose the following sanctions and administrative penalties for violations occurring at the same licensed location:

(1) for a first violation, an administrative penalty of up to [ ];

(2) for a second violation occurring within 3 years of the date of the first violation, suspension of the license for ninety days and an administrative penalty of up to [ ];

(3) for a third violation occurring within 3 years of the date of the first violation, suspension of the license for one year and an administrative penalty of up to []; and

(4) for a fourth or subsequent violation occurring within 3 years of the date of the first violation, revocation of the license and an administrative penalty of up to [].

C. Upon a fourth violation of the Tobacco Products within 3 years of the date of the first such violation, the retailer license issued for that location shall be permanently revoked.

D. In addition to the suspension or revocation required pursuant to this section, the division may require the use of identification verification software for a designated period of time.

§ 61-37-20. 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~~ **shall** conduct random, unannounced inspections of facilities where tobacco products are sold, **offered for sale,** manufactured or distributed**, at least one time per 12-month period** to ensure compliance with the provisions of the Tobacco Products Act.

61-37-25 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.