

1 SENATE BILL 131

2 **54TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2020**

3 INTRODUCED BY

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5 and Elizabeth "Liz" Thomson and Joanne J. Ferrary

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10 AN ACT

11 RELATING TO PUBLIC HEALTH; ENACTING THE TOBACCO PRODUCTS ACT;
12 RAISING THE AGE LIMIT FOR SALES OF TOBACCO PRODUCTS; PROVIDING
13 LICENSURE REQUIREMENTS FOR TOBACCO PRODUCT RETAILERS,
14 MANUFACTURERS AND DISTRIBUTORS; PRESCRIBING POWERS AND DUTIES
15 TO THE ALCOHOLIC BEVERAGE CONTROL DIVISION OF THE REGULATION
16 AND LICENSING DEPARTMENT; PROHIBITING CERTAIN ACTS PERTAINING
17 TO THE MANUFACTURE, SALE OR DISTRIBUTION OF TOBACCO PRODUCTS;
18 ESTABLISHING FEES; CREATING A FUND; PROVIDING ADMINISTRATIVE
19 AND CRIMINAL PENALTIES; REPEALING THE TOBACCO PRODUCTS, E-
20 CIGARETTE AND NICOTINE LIQUID CONTAINER ACT; MAKING AN
21 APPROPRIATION.

22
23 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

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

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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

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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

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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, unless it is determined by the director upon a
7 showing by the applicant or licensee that issuing, retaining,
8 transferring or renewing the license is in the best interest of
9 the public;

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

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

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

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

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

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

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

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

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

17 (c) any additional information the
18 director may require to ensure full disclosure of the
19 applicant's structure and financial responsibility;

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

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

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

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

9 (5) a nonrefundable license fee not to exceed
10 one thousand dollars (\$1,000) per location.

11 SECTION 6. [NEW MATERIAL] DISTRIBUTOR LICENSE

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

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

17 B. An application for a distributor license or
18 distributor 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

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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; and

8 (c) any additional information the
9 director may require to ensure full disclosure of the
10 applicant's structure and financial responsibility;

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

14 (3) a nonrefundable application fee not to
15 exceed one thousand dollars (\$1,000) per location.

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

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

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

25 (1) the name, telephone number, mailing

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1 address and email address of the applicant and:

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

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

13 (c) any additional information the
14 director may require to ensure full disclosure of the
15 applicant's structure and financial responsibility;

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

19 (3) a nonrefundable application fee not to
20 exceed one thousand dollars (\$1,000).

21 SECTION 8. [NEW MATERIAL] LICENSE APPLICATION INFORMATION
22 CHANGES.--If the information submitted in an application
23 pursuant to the Tobacco Products Act for a license or for a
24 license renewal changes, the licensee shall notify the division
25 within ten business days of the change. If a change in the

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1 information required for an application results in a violation
2 of the Tobacco Products Act, the director may impose an
3 administrative penalty as provided in that act.

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

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

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

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

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

24 B. The transfer of a license from one location to
25 another may be approved by the division, provided that the

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1 licensee shall submit an application for license location
2 transfer to the division for review. The division shall allow
3 the transfer unless any of the conditions provided in Sections
4 4 and 9 of the Tobacco Products Act apply.

5 SECTION 11. [NEW MATERIAL] TOBACCO PRODUCTS

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

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

24 SECTION 13. [NEW MATERIAL] HEARING PROCEDURE.--If the
25 division suspends or revokes a license or imposes an

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1 administrative penalty against a licensee, the licensee shall
2 be entitled to a hearing pursuant to the rules promulgated by
3 the division. The hearing shall be conducted by the director
4 or a hearing officer appointed by the director and shall be
5 held in the county in which the licensee is located. Hearings
6 shall be open to the public. Subpoenas shall be issued and
7 enforced in accordance with the provisions of Section 25 of the
8 Tobacco Products Act.

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

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

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

21 C. For each sale made through a delivery sales
22 method, age verification shall be completed through an
23 independent, third-party age verification service that
24 establishes that a consumer is of legal age by comparing
25 information available from public records to personal

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1 information entered by the consumer during the ordering
2 process.

3 D. The following are defenses for a retailer or
4 distributor accused of selling or distributing tobacco products
5 to a person who is a minor:

6 (1) the consumer produced a driver's license
7 or an identification card in accordance with Subsection B of
8 this section indicating that the consumer was of legal age to
9 make the purchase; and

10 (2) for a sale made through a delivery sales
11 method, the retailer or distributor had an age verification
12 completed in accordance with Subsection C of this section
13 indicating that the consumer was of legal age to make the
14 purchase.

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

17 A. Except as provided in Subsection B of this
18 section, a retailer selling goods at a retail location in New
19 Mexico shall not use a self-service display for tobacco
20 products.

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

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

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

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

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

14 "A PERSON WHO SELLS TOBACCO PRODUCTS TO A PERSON LESS THAN
15 21 YEARS OF AGE IS SUBJECT TO A FINE OF UP TO \$1,000 AND IS
16 GUILTY OF A CRIMINAL MISDEMEANOR."

17 **SECTION 18. [NEW MATERIAL] DELIVERY SALES.--**

18 A. Before a retailer ships tobacco products for a
19 delivery sale, the retailer shall receive full payment for the
20 purchase and shall accept payment from the consumer by a:

- 21 (1) check drawn on an account in the
22 consumer's name;
23 (2) credit card issued in the consumer's name;
24 or
25 (3) debit card issued in the consumer's name.

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1 B. A retailer may ship tobacco products only to a
2 consumer whose age has been verified pursuant to Section 14 of
3 the Tobacco Products Act.

4 C. A retailer taking a delivery sale order may
5 request the email address of the consumer.

6 **SECTION 19. [NEW MATERIAL] CRIMINAL PENALTIES.--**In
7 addition to any administrative penalties that may be imposed by
8 the division, a person who violates Section 3 or Sections 16
9 through 18 of the Tobacco Products Act is guilty of a
10 misdemeanor and shall be sentenced pursuant to the provisions
11 of Section 31-19-1 NMSA 1978. Each violation is a separate and
12 distinct offense.

13 **SECTION 20. [NEW MATERIAL] CRIMINAL PENALTIES--UNLICENSED**
14 **ACTIVITIES.--**A person who manufactures, distributes or sells
15 tobacco products without a license required pursuant to the
16 Tobacco Products Act is guilty of a misdemeanor and shall be
17 sentenced in accordance with the provisions of Section 31-19-1
18 NMSA 1978. Contraband tobacco products seized by the division
19 or by a law enforcement agency as evidence of unlicensed
20 activities shall be retained as evidence to the extent
21 necessary. Contraband tobacco products no longer needed as
22 evidence shall be destroyed.

23 **SECTION 21. [NEW MATERIAL] MANUFACTURERS, DISTRIBUTORS**
24 **AND RETAILERS--VIOLATIONS--LICENSE SUSPENSION OR REVOCATION--**
25 **ADMINISTRATIVE PENALTIES.--**The division may suspend or revoke a

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1 license of a licensee, require the use of identification
2 verification software for a designated period of time or impose
3 an administrative penalty against a licensee in an amount not
4 to exceed ten thousand dollars (\$10,000), or any combination
5 thereof, if the division finds that the licensee, an employee
6 of the licensee or a contractor acting on behalf of the
7 licensee has violated a provision of the Tobacco Products Act;
8 provided, however, that upon a fourth violation for the sale of
9 a tobacco product to a minor occurring at the same location
10 within three years of the first such violation, the retailer's
11 license issued for that location shall be permanently revoked.

12 SECTION 22. [NEW MATERIAL] MONITORED COMPLIANCE--

13 INSPECTIONS.--The alcoholic beverage control division of the
14 regulation and licensing department, the department of public
15 safety and the appropriate law enforcement authorities in each
16 county and municipality may conduct random, unannounced
17 inspections of facilities where tobacco products are sold,
18 manufactured or distributed to ensure compliance with the
19 provisions of the Tobacco Products Act.

20 SECTION 23. [NEW MATERIAL] AUTHORITY OF DEPARTMENT OF
21 PUBLIC SAFETY.--

22 A. The department of public safety has authority
23 over all investigations and enforcement activities required
24 under the Tobacco Products Act, except for those provisions
25 relating to the issuance, denial, suspension or revocation and

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1 administrative sanctions of licenses unless its assistance is
2 requested by the director.

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

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

12 SECTION 24. [NEW MATERIAL] AUTHORITY OF THE DIVISION.--
13 The division has the authority over all matters relating to the
14 issuance, denial, suspension, revocation and other
15 administrative penalties or transfer of licenses under the
16 Tobacco Products Act. The director may request the department
17 of public safety to provide investigatory and enforcement
18 support as deemed necessary.

19 SECTION 25. [NEW MATERIAL] ADMINISTRATIVE AUTHORITY AND
20 POWERS.--

21 A. For the purpose of administering the licensing
22 provisions of the Tobacco Products Act, the director is
23 authorized to examine and to require the production of any
24 pertinent records, books, information or evidence, to require
25 the presence of any person and to require that person to

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1 testify under oath concerning the subject matter of the inquiry
2 and to make a permanent record of the proceedings.

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

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

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

22 SECTION 26. [NEW MATERIAL] ADMINISTRATIVE RULES AND
23 ORDERS--PRESUMPTION OF CORRECTNESS.--

24 A. The director shall issue and file as required by
25 law all rules and orders necessary to perform the duties and to

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1 administer the applicable provisions of the Tobacco Products
2 Act.

3 B. Directives issued by the director shall be in a
4 form substantially as follows:

5 (1) rules are written statements of the
6 director, of general application to licensees, interpreting and
7 exemplifying the statutes to which the rules relate;

8 (2) rulings are written statements of the
9 director interpreting the statutes to which the rulings relate
10 and are of limited application to one or a small number of
11 licensees; and

12 (3) orders are written statements of the
13 director to implement the director's decision after a hearing.

14 C. To be effective, a rule shall first be issued as
15 a proposed rule and filed for public inspection in the office
16 of the director. Distribution of the rule shall be made to
17 interested persons and their comments shall be invited. After
18 the proposed rule has been on file for thirty days and a public
19 hearing has been held, the director may issue the rule as a
20 final rule by filing as required by law.

21 D. A rule or order issued by the director is
22 presumed to be a proper implementation of the licensing
23 provisions of the Tobacco Products Act.

24 E. All rules and orders shall be applied
25 prospectively only.

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