

November 20, 2020

Phillip A. Sanchez, Division Counsel
Alcoholic Beverage Control Division
New Mexico Regulation and Licensing Department
2550 Cerrillos Road
Santa Fe, New Mexico 87504

Re: **Proposed new rules 15.8.2 NMAC, Definitions; 15.8.3 NMAC, Applications and Renewals; 15.8.4 NMAC, General Operations Requirements; 15.8.5 NMAC, Prohibited Acts; 15.8.6 NMAC, Fines and Penalties; 15.8.7 NMAC, Hearing Procedure; and 15.8.8 NMAC, Miscellaneous Fees**

Dear Mr. Sanchez:

The above referenced organizations appreciate the opportunity to submit comments regarding the Alcohol Beverage Control Division's proposed new rules in the state of New Mexico; specifically on the following areas: *15.8.2 NMAC, Definitions; 15.8.3 NMAC, Applications and Renewals; 15.8.4 NMAC, General Operations Requirements; 15.8.5 NMAC, Prohibited Acts; 15.8.6 NMAC, Fines and Penalties; 15.8.7 NMAC, Hearing Procedure; and 15.8.8 NMAC, Miscellaneous Fees.*

Our organizations serve thousands of individuals facing serious, acute, and chronic health conditions across New Mexico. Some of these health conditions are directly related to the use of tobacco products. We work closely with federal, state, local and tribal governments on implementing comprehensive tobacco licensing and prevention policies aimed at reducing tobacco use among adults and youth. Tobacco use is a leading cause of preventable disease and death and a major risk factor in the development of cardiovascular disease^[1]. While cigarette smoking rates have decreased in recent years, the number of youth and adolescents using new forms of tobacco, such as e-cigarettes or vaping, has skyrocketed placing decades of progress at risk^[2].

We have an informed perspective on what is considered an effective tobacco licensing program that includes strong accountability measures to prevent sale of tobacco products to minors; a stricter and graduated penalty structure for all specified violations; and a fee structure that sufficiently funds administration of the program. Therefore, we fully support the Alcohol Beverage Control Division's position on section 15.8.2 (Definitions), section 15.8.3 (Applications and Renewals), section 15.8.4 (General Operations Requirements), section 15.8.5 (Prohibited Acts), section 15.8.6 (Fines and Penalties) and section 15.8.8 (Miscellaneous Fees).

We are particularly pleased to see the application and renewal fees being proposed in section 15.8.3 are established at the maximum amount allowed in the Tobacco Products Act. **We strongly believe that any fees collected must be high enough to cover the cost of enforcement and operations.**

Additionally, we strongly support the graduated penalty structures proposed in section [15.8.6.9](#) (PENALTIES FOR VIOLATION OF SALES TO MINORS), section [15.8.6.10](#) (PENALTIES FOR ALL OTHER VIOLATIONS INVOLVING MINORS) and section [15.8.6.11](#) (PENALTIES FOR NON-AGE

^[1] U.S. Department of Health and Human Services. The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014.

^[2] Smith TT, Nahhas GJ, Carpenter MJ, et al. Intention to Quit Vaping Among United States Adolescents. JAMA Pediatr. Published online August 17, 2020. doi:10.1001/jamapediatrics.2020.

SPECIFIC VIOLATIONS). These proposed penalties deliver a strong and balanced approach designed to deter retailers from violating any provisions of the Tobacco Products Act and hold them accountable when they do.

However, our organizations are deeply disappointed and very concerned that the proposed rules fail to include a strong enforcement component. Strong enforcement and compliance are critical to the success of this program and instrumental in reducing the use of tobacco and e-cigarette rates among the New Mexico youth. The recent release of youth tobacco use data supports the need to go further and to do much more by implementing more stringent tobacco control practices that address all flavors and all products. Policy efforts to exercise regulatory authority over e-cigarettes, such as removing flavors — including menthol and mint — from the market and prohibiting flavored tobacco products of any kind are needed, now more than ever. One in five high school students are using e-cigarettes and more than 80% of those young people using flavored e-cigarettes^[3]. While we have made some progress, millions of kids are still using these products and flavors continue to attract new youth users. A 2019 New Mexico Department of Health survey found that 34 percent of New Mexico high school students used e-cigarettes at least once in the last 30 days. The same survey conducted in 2017, found that rate to be at 24 percent. It is evident from this survey that e-cigarette use among New Mexico youth continues to grow at an alarming rate, creating the next generation of youth who are addicted to nicotine and who could potentially suffer from heart disease, stroke, hypertension, lung cancer, and among other health issues.

The proposed rule in sub-section [15.8.7.8](#) (A): COMPLAINTS AND INVESTIGATION is NOT definitive in its intent to effectively monitor and prevent the sale of tobacco products, including e-cigarettes, to minors. It conveys a false sense of security to New Mexicans, especially to parents of underage children, that the Alcohol Beverage Control Division is serious about stopping the tobacco sales to minors. Therefore, we strongly recommend that this section be amended to include stronger enforcement language, such as the following:

“The division, the department of public safety and/or appropriate law enforcement authorities must/shall conduct a minimum of at least one compliance check for violations of minimum legal sales age per tobacco retail license per year. Any violations found through compliance checks must/shall also require a subsequent recheck within three months of the violation.”

The proposed rule in sub-section [15.8.7.8](#) (A) sends an unequivocal message to the tobacco industry and its retail outlets that the state of New Mexico is not serious about monitoring their activities, including aggressively marketing to youth and selling tobacco products to those underage. The Alcohol Beverage Control Division would be in the dark without proper enforcement checks even with minor administrative requirements such as whether tobacco retailers are properly displaying their licenses or posters; and whether the signs that read “IT IS ILLEGAL FOR A PERSON UNDER 21 YEARS OF AGE TO PURCHASE TOBACCO PRODUCTS” are placed at the location. Without a strong enforcement program, the proposed rule in sub-section [15.8.7.8](#) (A) fails to uphold the fundamental intent of the Tobacco Products Act to effectively curtail the illegal sale of tobacco products, including e-cigarettes, to New Mexican children.

Other items of interest:

During our review of the proposed rule, we found a few items that may require the attention of the Alcohol Beverage Control Division prior to publication of the final rule. This list is not meant to be exhaustive, but we hope the information will be constructive to the Division’s efforts to develop a clean regulation.

^[3] Creamer MR, Everett Jones S, Gentzke AS, Jamal A, King BA. Tobacco Product Use Among High School Students — Youth Risk Behavior Survey, United States, 2019. MMWR Suppl 2020;69(Suppl-1):56–63. DOI: <http://dx.doi.org/10.15585/mmwr.su6901a7>

- [15.8.3.11](#) RETAILER LICENSE REQUIREMENTS:
Unlike the proposed rules in sub-section [15.8.3.9](#) (E) and sub-section [15.8.3.10](#) (C), the proposed retail license requirements in section [15.8.3.11](#) does not require “**Documentation as required by the division establishing compliance with all state Taxation and Revenue Department requirements.**” This could be an oversight; and if not, we request adding this provision to the proposed section [15.8.3.11](#).
- [15.8.3.18](#) (B) BUSINESS NAME CHANGE:
“**DBA name change, or any change, shall not be knowingly attractive to minors.**”
We request the Division to provide clarity on what constitutes “knowingly attractive to minors.”
- [15.8.4.12](#) (A) (B) POSTERS:
A. Licensees that sell tobacco products directly to the public shall display a printed sign or decal, in full public view within the licensed location at a point of sale and where a tobacco product vending machine is located, that reads “IT IS ILLEGAL FOR A PERSON UNDER 21 YEARS OF AGE TO PURCHASE TOBACCO PRODUCTS.”
B. The sign or decal shall be of a size prescribed by the director, except that the licensee may make the sign or decal larger than what is prescribed. The division will provide access to an electronic copy to be printed and displayed by licensee.
There is typographical error in the second sentence. It should read, [t]he division will provide access to an electronic copy to be printed and displayed by the licensee.
We request the Division to establish minimum standards based on best practices for signs and decals that could be easily read. We also request that these signs and decals be in both English and Spanish and comply with color-blind requirements.
The signs "**It is illegal for a person under the age of 21 to purchase tobacco products.**" is no longer reflective of the law. It should say "**It is illegal for a retailer to sell tobacco products to a person under the age of 21.**"
- [15.8.6.12](#) COMPROMISING LIABILITY: **The division is authorized to compromise the penalty for any violations of the act or of any division regulation or order when it is deemed in the best interest of the state. [[15.8.6.12](#) NMAC – N, 1/1/2021]**
We request the Division to clarify whether this allows partial or full compromise of penalties when “deemed in the best interest of the state,” and under what circumstances the Division anticipates using this provision.

In conclusion, our organizations believe the recommendations outlined here will make for a stronger and more effective tobacco licensing program that will have long-term benefits in reducing youth tobacco use including smoking and e-cigarette use rates in New Mexico. We appreciate the opportunity to provide our recommendations on the proposed rule and are pleased to support the Alcohol Beverage Control Division’s efforts to implement the tobacco licensing program. If we can be of further assistance, please do not hesitate to contact any of our organizations. For questions or to discuss our comments further, please contact Mahesh Sita, Government Relations Director, The American Heart Association, at mahesh.sita@heart.org or 505-490-5621.

Sincerely,

New Mexico Chronic Disease Prevention Council
New Mexico Allied Council on Tobacco

Health Equity Alliance for LGBTQ+ New Mexicans (HEAL+ NM)
The American Lung Association
The American Cancer Society Cancer Action Network
The American Heart Association
Campaign for Tobacco-Free Kids

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