

AN ACT

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RELATING TO TOBACCO; ENACTING THE TOBACCO ESCROW FUND ACT;
PROVIDING FOR A DIRECTORY TO BE MAINTAINED BY THE ATTORNEY GENERAL;
IMPOSING REPORTING AND CERTIFICATION REQUIREMENTS; PROHIBITING
CONDUCT RELATING TO CIGARETTES AND CERTAIN OTHER TOBACCO
PRODUCTS; PROVIDING CIVIL AND CRIMINAL PENALTIES; DECLARING AN
EMERGENCY.

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

Section 1. SHORT TITLE.--This act may be cited as the "Tobacco Escrow Fund Act".

Section 2. FINDINGS AND PURPOSE.--The legislature finds that violations of Section 6-4-13 NMSA 1978 threaten the integrity of the master settlement agreement and that enacting procedural requirements will safeguard the agreement and aid in its enforcement.

Section 3. DEFINITIONS.--As used in the Tobacco Escrow Fund Act:

A. "brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers such as "menthol", "lights", "kings" and "100s", and includes the use of a brand name, trademark, logo, symbol, motto, selling message, recognizable pattern of colors or other indicia similar to or identifiable with a previously known brand of cigarettes;

B. "cigarette" means "cigarette" as defined in Subsection D of Section 6-4-12 NMSA 1978;

C. "department" means the taxation and revenue department;

D. "directory" means a listing of tobacco product manufacturers and brand families that is developed, maintained and published by the attorney general;

E. "distributor" means a person required to affix stamps on cigarette packages pursuant to Section 7-12-5 NMSA 1978 or required to pay excise tax imposed on cigarettes pursuant to Section 7-12A-3 NMSA 1978. "Distributor" does not include a retailer of cigarette packages upon which stamps were already affixed when the packages were received by that retailer;

F. "master settlement agreement" means the settlement agreement and related documents entered into on November 23, 1998 by the state and leading United States tobacco product manufacturers;

G. "nonparticipating manufacturer" means a tobacco product manufacturer that is not a participating manufacturer;

H. "participating manufacturer" means a tobacco product manufacturer that is a "participating manufacturer" as defined in Section II(jj) of the master settlement agreement and subsequent amendments to that section;

I. "qualified escrow fund" means "qualified escrow fund" as defined in Subsection F of Section 6-4-12 NMSA 1978;

J. "secretary" means the secretary of taxation and revenue;

K. "tobacco product manufacturer" means "tobacco product manufacturer" as defined in Subsection I of Section 6-4-12 NMSA 1978; and

L. "units sold" means "units sold" as defined in Subsection J of Section 6-4-12 NMSA 1978.

Section 4. CERTIFICATION BY TOBACCO PRODUCT MANUFACTURER.--

A. No later than April 30 of each year, a tobacco product manufacturer

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whose cigarettes are sold in this state, whether directly or through a distributor, retailer or similar intermediary, shall execute and deliver to the attorney general, in the manner and on the form prescribed by the attorney general, a certification pursuant to this section. The certification shall:

(1) be made under penalty of perjury;

(2) state that as of the date of the certification, the tobacco product manufacturer is either a participating or a nonparticipating manufacturer; and

(3) include the information required pursuant to Subsections B or C of this section.

B. In its certification, a participating manufacturer shall include a complete list of its brand families.

C. In its certification, a nonparticipating manufacturer shall:

(1) certify that it is registered to do business in the state or has appointed an agent for service of process and has provided written notice to the attorney general in accordance with Section 7 of the Tobacco Escrow Fund Act;

(2) certify that it is in full compliance with Section 6-4-13 NMSA 1978, the Tobacco Escrow Fund Act and any rules promulgated pursuant to that act, including all annual payments as may be required by the attorney general;

(3) certify that it has established and maintains a qualified escrow fund governed by a qualified escrow agreement that has been reviewed and approved by the attorney general and provide:

(a) the name, address and telephone number of the financial institution where the fund is established;

(b) the account number of the fund and the subaccount

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number for the state;

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(c) the amounts placed in the fund for cigarettes sold in the state during the preceding calendar year, including the date and amount of each deposit and any other evidence or verification of the amounts as the attorney general deems necessary; and

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(d) the amount and date of each withdrawal or transfer of funds made at any time from the fund or from any other qualified escrow fund into which the nonparticipating manufacturer has made escrow payments pursuant to Section 6-4-13 NMSA 1978; and

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(4) include a complete list of its brand families and:

(a) separately list the number of units sold in the state for each brand family during the preceding calendar year, indicating any brand family sold in the state during the preceding calendar year that is no longer being sold as of the date of certification; and

(b) indicate all of its brand families that have been sold in the state at any time during the current calendar year, identifying by name and address any other manufacturer of such brand families in the preceding or current calendar year.

D. A tobacco product manufacturer may not include a brand family in its certification unless:

(1) in the case of a participating manufacturer, the participating manufacturer affirms that the brand family is to be deemed its cigarettes for purposes of calculating its payments under the master settlement agreement for the relevant year in the volume and shares determined pursuant to the master settlement

agreement; or

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(2) in the case of a nonparticipating manufacturer, the nonparticipating manufacturer affirms that the brand family is to be deemed its cigarettes for purposes of Section 6-4-13 NMSA 1978.

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E. A tobacco product manufacturer shall update the list of its brand families thirty days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the attorney general.

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F. A tobacco product manufacturer shall maintain all invoices and documentation of sales and other information relied upon for its certification to the attorney general for a period of five years, unless otherwise required by law to maintain them for a greater period of time.

G. Nothing in this section shall limit or otherwise affect the state's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the master settlement agreement or for purposes of Section 6-4-13 NMSA 1978.

Section 5. DIRECTORY OF TOBACCO PRODUCT MANUFACTURERS AND CIGARETTE BRANDS.--

A. The attorney general shall develop, maintain and publish on its web site a directory listing all tobacco product manufacturers that have provided current, accurate and complete certifications as required by the Tobacco Escrow Fund Act and all brand families that are listed in those certifications. The attorney general shall not include or retain in the directory a nonparticipating manufacturer or brand family if:

(1) the nonparticipating manufacturer fails to provide the required certification or the attorney general determines that its certification is not in

compliance with Section 4 of the Tobacco Escrow Fund Act; or

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(2) the attorney general concludes that:

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(a) all escrow payments required by Section 6-4-13

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NMSA 1978 for any period for any brand family, whether or not listed by the nonparticipating manufacturer, have not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the attorney general; or

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(b) all outstanding final judgments, including interest thereon, for violations of Section 6-4-13 NMSA 1978 have not been fully satisfied for the brand family or the nonparticipating manufacturer.

B. The attorney general shall update the directory as necessary by adding or removing a tobacco product manufacturer or a brand family to keep the directory in conformity with the requirements of the Tobacco Escrow Fund Act.

C. A distributor shall provide a current electronic mail address to the attorney general for the purpose of receiving notifications as may be required pursuant to the Tobacco Escrow Fund Act.

Section 6. MAINTENANCE OF DIRECTORY--NOTICE.--

A. If the attorney general determines to remove from or to not include a tobacco product manufacturer or brand family in the directory, the attorney general shall provide by email or other practicable means notice of the preliminary determination to the tobacco product manufacturer's registered agent for service of process in the state; provided, however, that if one of the bases of removal or non-inclusion in the directory is the failure to satisfy Section 7 of the Tobacco Escrow Fund Act, the determination shall be final and no preliminary notice shall be necessary. The

tobacco product manufacturer shall have ten business days from the date of the attorney general's notice of the preliminary determination to the registered agent for service of process in the state to establish, to the attorney general's satisfaction, compliance with Section 6-4-13 NMSA 1978 and the Tobacco Escrow Fund Act.

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B. If the tobacco product manufacturer fails to establish said compliance within the ten-day period set forth above, the attorney general shall remove from or not include the tobacco product manufacturer or brand family in the directory. The determination to remove from or to not include a tobacco product manufacturer or brand family in the directory may be appealed to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

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Section 7. AGENT FOR SERVICE OF PROCESS.--

A. A nonparticipating manufacturer not registered to do business in the state shall, as a condition precedent to having its name or its brand families listed and retained in the directory, appoint and continually engage without interruption a registered agent in this state for service of process on whom all process and any action or proceeding arising out of the enforcement of the Tobacco Escrow Fund Act or Section 6-4-13 NMSA 1978 may be served. The nonparticipating manufacturer shall provide to the attorney general the name, address and telephone number of its agent for service of process and shall provide any other information relating to its agent as may be requested by the attorney general.

B. A nonparticipating manufacturer shall provide written notice to the attorney general thirty calendar days prior to the termination of the authority of an agent appointed pursuant to Subsection A of this section. No less than five calendar days prior to the termination of an existing agent appointment, a nonparticipating

manufacturer shall provide to the attorney general the name, address and telephone number of its newly appointed agent for service of process and shall provide any other information relating to the new appointment as may be requested by the attorney general. In the event an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the attorney general of the termination within five calendar days and shall include proof to the satisfaction of the attorney general of the appointment of a new agent.

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C. A nonparticipating manufacturer whose products are sold in this state without appointing or designating an agent as required by this section shall be deemed to have appointed the secretary of state as agent and may be proceeded against in the courts of this state by service of process upon the secretary of state; provided that the appointment of the secretary of state as agent shall not satisfy any other requirement of the Tobacco Escrow Fund Act.

Section 8. REPORTING OF INFORMATION--ESCROW INSTALLMENTS.--

A. A distributor shall submit to the department by the twenty-fifth day of each month a list by brand family of the total number of cigarettes, or equivalent stick count in the case of roll-your-own, for which the distributor affixed tax stamps or otherwise paid the tax due during the previous calendar month, and any other information that the department or attorney general may require. A distributor shall maintain and make available to the department and attorney general all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the department and attorney general for a period of five years.

B. The department and attorney general shall share information

received pursuant to the Tobacco Escrow Fund Act, and may share information with other federal, state or local agencies for purposes of enforcement of that act, enforcement of Section 6-4-13 NMSA 1978 or enforcement of corresponding laws of other states.

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C. The attorney general may require proof from a nonparticipating manufacturer that it has established a qualified escrow fund with verification of the amount of money in the fund exclusive of interest, including the balance, dates and amounts of deposits and dates and amounts of withdrawals.

D. The attorney general and the department may require a distributor or tobacco product manufacturer to submit additional information as necessary to determine compliance with the Tobacco Escrow Fund Act, including samples of the packaging or labeling of each brand family.

E. The attorney general may promulgate rules requiring a nonparticipating manufacturer to make escrow fund deposits annually and may require information sufficient to determine the adequacy of the amount of the annual deposit.

F. The attorney general or the department may seek an injunction to compel compliance with this section. In any action brought pursuant to this subsection, the state shall be entitled to recover the costs of investigation, costs of the action and reasonable attorney fees.

Section 9. PENALTIES AND OTHER REMEDIES.--

A. It is unlawful for a person to:

(1) affix a tax stamp or otherwise pay the tax due on a package or other container of cigarettes of a tobacco product manufacturer or a brand family that is not included in the directory; or

(2) sell, offer or possess for sale cigarettes of a tobacco product manufacturer or a brand family that is not included in the directory.

B. The secretary may revoke or suspend the registration or license of a person licensed or registered pursuant to Section 7-12-9 or 7-12A-7 NMSA 1978 that violates Subsection A of this section.

C. Each stamp affixed, payment of tobacco tax, offer to sell, possession for sale or sale of cigarettes in violation of Subsection A of this section constitutes a separate violation. For each violation, the secretary may impose a civil penalty in an amount not to exceed the greater of five thousand dollars (\$5,000) or five hundred percent of the retail value of the cigarettes sold, offered for sale or possessed for sale.

D. Cigarettes that have been sold, offered for sale or possessed for sale in this state in violation of Subsection A of this section are contraband, are subject to seizure and forfeiture and shall be destroyed.

E. It is unlawful for a person to sell, distribute, acquire, hold, own, possess, transport, import or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in violation of Subsection A of this section. A person who violates this subsection is guilty of a misdemeanor and shall be sentenced in accordance with Section 31-19-1 NMSA 1978.

F. The attorney general or the department may seek an injunction to compel compliance with or to restrain a threatened or actual violation of Subsection A of this section. In any action brought pursuant to this subsection, the state shall be entitled to recover the costs of investigation, costs of the action and reasonable attorney fees, if the state prevails.

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Section 10. GENERAL PROVISIONS.--

A. The attorney general and the secretary shall promulgate rules to effectuate the purposes of the Tobacco Escrow Fund Act.

B. In an action brought by the state to enforce the provisions of the Tobacco Escrow Fund Act, the state shall be entitled to recover the costs of investigation, costs of the action and reasonable attorney fees, if the state prevails.

C. If a court determines that a person has violated a provision of the Tobacco Escrow Fund Act, the court shall order any profits, gain, gross receipts or other benefit from the violation to be disgorged and paid to the state treasurer for deposit in the general fund.

D. The remedies and penalties provided in the Tobacco Escrow Fund Act are cumulative to each other and to penalties and remedies available under other laws.

Section 11. CONSTRUCTION OF ACT.--If a court finds that a provision of the Tobacco Escrow Fund Act and of Sections 6-4-12 and 6-4-13 NMSA 1978 conflict and cannot be harmonized, Sections 6-4-12 and 6-4-13 NMSA 1978 shall control. If a provision of the Tobacco Escrow Fund Act causes Sections 6-4-12 and 6-4-13 NMSA 1978 to no longer constitute a qualifying or model statute as those terms are defined in the master settlement agreement, that provision shall be invalid.

Section 12. EMERGENCY.--It is necessary for the public peace, health and safety that this act take effect immediately.

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