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HOUSE BILL 137

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

Gail C. Beam

FOR THE TOBACCO SETTLEMENT REVENUE OVERSIGHT COMMITTEE

AN ACT

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.

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.

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

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

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

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

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

17 E. "distributor" means a person that sells
18 cigarettes in New Mexico manufactured by that person or that
19 receives on consignment or buys cigarettes either directly from
20 the manufacturer or from an out-of-state person for resale in
21 New Mexico;

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

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

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

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

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

11 K. "tobacco product manufacturer" means "tobacco
12 product manufacturer" as defined in Subsection I of Section
13 6-4-12 NMSA 1978; and

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

16 Section 4. CERTIFICATION BY TOBACCO PRODUCT
17 MANUFACTURER. --

18 A. No later than April 30 of each year, a tobacco
19 product manufacturer whose cigarettes are sold in this state,
20 whether directly or through a distributor, retailer or similar
21 intermediary, shall execute and deliver to the attorney
22 general, in the manner and on the form prescribed by the
23 attorney general, a certification pursuant to this section.

24 The certification shall:

- 25 (1) be made under penalty of perjury;

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

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

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

9 C. In its certification, a nonparticipating
10 manufacturer shall:

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

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

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

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

1 established;

2 (b) the account number of the fund and
3 the subaccount number for the state;

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

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

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

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

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

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

3 (1) in the case of a participating
4 manufacturer, the participating manufacturer affirms that the
5 brand family is to be deemed its cigarettes for purposes of
6 calculating its payments under the master settlement agreement
7 for the relevant year; or

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

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

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

22 G. Nothing in this section shall limit or otherwise
23 affect the state's right to maintain that a brand family
24 constitutes cigarettes of a different tobacco product
25 manufacturer for purposes of calculating payments under the

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1 master settlement agreement or for purposes of Section 6-4-13
2 NMSA 1978.

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

5 A. The attorney general shall develop, maintain and
6 publish on its web site a directory listing all tobacco product
7 manufacturers that have provided current, accurate and complete
8 certifications as required by the Tobacco Escrow Fund Act and
9 all brand families that are listed in those certifications.

10 The attorney general shall not include or retain in the
11 directory a nonparticipating manufacturer or brand family if:

12 (1) the nonparticipating manufacturer fails to
13 provide the required certification or the attorney general
14 determines that its certification is not in compliance with
15 Section 4 of the Tobacco Escrow Fund Act; or

16 (2) the attorney general concludes that:
17 (a) all escrow payments required by
18 Section 6-4-13 NMSA 1978 for any period for any brand family,
19 whether or not listed by the nonparticipating manufacturer,
20 have not been fully paid into a qualified escrow fund governed
21 by a qualified escrow agreement that has been approved by the
22 attorney general; or

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

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1 the nonparticipating manufacturer.

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

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

11 Section 6. REMOVAL AND NONINCLUSION IN DIRECTORY--
12 NOTICE--APPEAL. --

13 A. If the attorney general determines to remove
14 from or not to include in the directory a tobacco product
15 manufacturer or a brand family, the attorney general shall
16 provide written notice to the tobacco product manufacturer of
17 the preliminary determination to remove or not to include the
18 tobacco product manufacturer or its brand family in the
19 directory. The written notice shall specifically state the
20 reasons for the attorney general's preliminary determination
21 and, if applicable, advise the tobacco product manufacturer of
22 actions it can take to be in compliance with the Tobacco Escrow
23 Fund Act and Section 6-4-13 NMSA 1978 and to be included or
24 have a brand family included in the directory.

25 B. Within ten days of receipt of the written

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1 notice, the tobacco product manufacturer shall take all
2 necessary actions to address the issues presented in the
3 attorney general's notice to the satisfaction of the attorney
4 general. If the tobacco product manufacturer does not respond
5 or does not remedy the issues raised in the notice to the
6 satisfaction of the attorney general, the attorney general
7 shall make a final determination and shall remove from or not
8 include in the directory the tobacco product manufacturer or
9 the brand family. The final determination shall be in writing
10 and may be appealed to the district court pursuant to the
11 provisions of Section 39-3-1.1 NMSA 1978.

12 Section 7. AGENT FOR SERVICE OF PROCESS. --

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

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1 B. A nonparticipating manufacturer shall provide
2 written notice to the attorney general thirty calendar days
3 prior to the termination of the authority of an agent appointed
4 pursuant to Subsection A of this section. No less than five
5 calendar days prior to the termination of an existing agent
6 appointment, a nonparticipating manufacturer shall provide to
7 the attorney general the name, address and telephone number of
8 its newly appointed agent for service of process and shall
9 provide any other information relating to the new appointment
10 as may be requested by the attorney general. In the event an
11 agent terminates an agency appointment, the nonparticipating
12 manufacturer shall notify the attorney general of the
13 termination within five calendar days and shall include proof
14 to the satisfaction of the attorney general of the appointment
15 of a new agent.

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

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

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1 A. A distributor shall submit to the department by
2 the twenty-fifth day of each month a list by brand family of
3 the total number of cigarettes for which the distributor
4 affixed tax stamps or otherwise paid the tax due during the
5 previous calendar month, and any other information that the
6 department or attorney general may require. A distributor
7 shall maintain and make available to the department and
8 attorney general all invoices and documentation of sales of all
9 nonparticipating manufacturer cigarettes and any other
10 information relied upon in reporting to the department and
11 attorney general for a period of five years.

12 B. The department and attorney general shall share
13 information received pursuant to the Tobacco Escrow Fund Act,
14 and may share information with other federal, state or local
15 agencies for purposes of enforcement of that act, enforcement
16 of Section 6-4-13 NMSA 1978 or enforcement of corresponding
17 laws of other states.

18 C. The attorney general may require from a
19 financial institution where a nonparticipating manufacturer has
20 established a qualified escrow fund verification of the amount
21 of money in the fund on behalf of the state, including the
22 balance, dates and amounts of deposits and dates and amounts of
23 withdrawals.

24 D. The attorney general and the department may
25 require a distributor or tobacco product manufacturer to submit

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1 additional information as necessary to determine compliance
2 with the Tobacco Escrow Fund Act, including samples of the
3 packaging or labeling of each brand family.

4 E. The attorney general may promulgate rules
5 requiring a nonparticipating manufacturer to make escrow fund
6 deposits in quarterly installments and may require information
7 sufficient to determine the adequacy of the amount of the
8 installment deposit.

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

14 Section 9. PENALTIES AND OTHER REMEDIES. --

15 A. It is unlawful for a person to:

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

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

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

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1 Subsection A of this section.

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

10 D. Cigarettes that have been sold, offered for sale
11 or possessed for sale in this state in violation of Subsection
12 A of this section are contraband and are subject to seizure,
13 forfeiture and destruction.

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

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

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1 of the action and reasonable attorney fees.

2 Section 10. GENERAL PROVISIONS. --

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

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

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

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

18 Section 11. CONSTRUCTION OF ACT. -- The provisions of the
19 Tobacco Escrow Fund Act do not amend or alter Sections 6-4-12
20 and 6-4-13 NMSA 1978. If a court finds that a provision of the
21 Tobacco Escrow Fund Act and of Sections 6-4-12 and 6-4-13 NMSA
22 1978 conflict and cannot be harmonized, Sections 6-4-12 and
23 6-4-13 NMSA 1978 shall control. If a provision of the Tobacco
24 Escrow Fund Act causes Sections 6-4-12 and 6-4-13 NMSA 1978 to
25 no longer constitute a qualifying or model statute as those

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1 terms are defined in the master settlement agreement, that
2 provision shall be invalid.

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

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