

**FORTY-NINTH LEGISLATURE  
FIRST SESSION, 2009**

March 18, 2009

Mr. Speaker:

Your **BUSINESS AND INDUSTRY COMMITTEE**, to whom has been referred

**SENATE BILL 219**

has had it under consideration and reports same with recommendation that it **DO PASS**, amended as follows:

1. On page 1, line 16, after "AMENDING" insert "AND IMPOSING".

2. On page 1, line 18, after "SAMPLES" insert "; AMENDING THE CIGARETTE ENFORCEMENT ACT; AMENDING THE TOBACCO ESCROW FUND ACT; REQUIRING ADDITIONAL DOCUMENTATION PRIOR TO DELIVERY SALES OF CIGARETTES; REQUIRING CERTAIN TOBACCO PRODUCTS MANUFACTURERS AND IMPORTERS TO POST BONDS; GRANTING ADDITIONAL POWERS TO THE ATTORNEY GENERAL; IMPOSING JOINT AND SEVERAL LIABILITY ON CERTAIN TOBACCO PRODUCTS MANUFACTURERS AND IMPORTERS.".

3. On page 1, between lines 20 and 21, insert the following sections:

"Section 1. Section 6-4-12 NMSA 1978 (being Laws 1999, Chapter 208, Section 1) is amended to read:

"6-4-12. DEFINITIONS.--As used in [~~this act~~] Sections 6-4-12 and 6-4-13 NMSA 1978:

A. "adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the master settlement agreement;

B. "affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns", "is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, of ten percent or more, and the term "person" means an individual, partnership, committee, association, corporation or any other organization or group of persons;

C. "allocable share" means Allocable Share as that term is defined in the master settlement agreement;

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D. "cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains:

(1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; [~~or~~]

(2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or

(3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in [~~clause (1) of this definition~~] Paragraph (1) of this subsection. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette", 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette";

E. "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;

F. "qualified escrow fund" means an escrow arrangement with a federally or state chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least one billion dollars (\$1,000,000,000) where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing or directing the use of the funds' principal except as consistent with Subsection B of Section [~~2 of this act~~] 6-4-13 NMSA 1978;

G. "released claims" means Released Claims as that term is defined in the master settlement agreement;

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H. "releasing parties" means Releasing Parties as that term is defined in the master settlement agreement;

I. "tobacco product manufacturer" means an entity that after the date of enactment of this act directly (and not exclusively through any affiliate):

(1) manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the master settlement agreement) that will be responsible for the payments under the master settlement agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the master settlement agreement and that pays the taxes specified in subsection II(z) of the master settlement agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

(2) is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(3) becomes a successor of an entity described in Paragraph (1) or (2) of this subsection.

The term "tobacco product manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within Paragraph (1), (2) or (3) of this subsection; and

J. "units sold" means the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected [~~by the state on packs (or "roll-your-own" tobacco containers) bearing the excise tax stamp of the state~~], ounces of "roll-your-own" tobacco sold and sales of products bearing tax-exempt stamps on packs or "roll-your-own" tobacco containers. The secretary of taxation and revenue shall promulgate such [~~regulations~~] rules as are necessary to ascertain

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the amount of state excise tax paid on the cigarettes of such tobacco product manufacturer for each year."

Section 2. Section 6-4-14 NMSA 1978 (being Laws 2003, Chapter 114, Section 1) is amended to read:

"6-4-14. SHORT TITLE.--~~[This act]~~ Sections 6-4-14 through 6-4-24 NMSA 1978 may be cited as the "Tobacco Escrow Fund Act"."

Section 3. Section 6-4-17 NMSA 1978 (being Laws 2003, Chapter 114, Section 4) is amended to read:

"6-4-17. CERTIFICATION BY TOBACCO PRODUCT MANUFACTURER.--

A. No later than April 30 of each year, a tobacco product manufacturer 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 requesting such information as the attorney general deems reasonably necessary to make the determination required by Section 6-4-18 NMSA 1978, 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]~~ Subsection 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

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with Section [~~7 of the Tobacco Escrow Fund Act~~] 6-4-20 NMSA 1978;

(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 number for the state;

(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

(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

(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~~] the brand families in the preceding or current calendar year.

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D. In its certification, a nonparticipating manufacturer located outside of the United States shall also:

(1) certify that it has provided a declaration, on a form prescribed by the attorney general, from each of its importers into the United States of any of its brand families to be sold in New Mexico that the importer accepts joint and several liability with the nonparticipating manufacturer for all escrow deposits due in accordance with Section 6-4-13 NMSA 1978, for all penalties assessed in accordance with Section 6-4-13 NMSA 1978 and for payment of all costs and attorney fees imposed in accordance with the Tobacco Escrow Fund Act or Section 6-4-13 NMSA 1978; and

(2) certify that it has appointed a resident agent for service of process in New Mexico in accordance with Section 6-4-20 NMSA 1978.

~~[D.]~~ E. 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

(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.

~~[E.]~~ F. 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.

~~[F.]~~ G. 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.

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~~[G.]~~ H. 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 4. Section 6-4-18 NMSA 1978 (being Laws 2003, Chapter 114, Section 5) is amended to read:

"6-4-18. 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]~~ name or brand family if:

(1) the participating manufacturer fails to provide the required certification or to make a payment calculated by an independent auditor to be due from it under the master settlement agreement except to the extent that it is disputing such payment;

~~[(1)]~~ (2) 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]~~ 6-4-17 NMSA 1978; or

~~[(2)]~~ (3) the attorney general concludes that:

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

(b) ~~[all]~~ any 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

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nonparticipating manufacturer;

(c) for a nonparticipating manufacturer or a tobacco product manufacturer that became a participating manufacturer after the master settlement agreement in New Mexico or in any other state, or any of its principals, the nonparticipating manufacturer or tobacco product manufacturer fails to provide reasonable assurance that it will comply with the requirements of the Tobacco Escrow Fund Act; or

(d) the manufacturer has knowingly failed to disclose any material information required or knowingly made any material false statement in the certification of any supporting information or documentation provided.

B. As used in this section, "reasonable assurances" means information and documentation establishing to the satisfaction of the attorney general that a failure to pay in New Mexico or elsewhere was the result of a good faith dispute over the payment obligation.

~~[B.]~~ C. 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.]~~ D. 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 5. A new section of the Tobacco Escrow Fund Act, Section 6-4-18.1 NMSA 1978, is enacted to read:

"6-4-18.1. [NEW MATERIAL] BOND REQUIREMENTS FOR NEWLY QUALIFIED AND ELEVATED RISK NONPARTICIPATING MANUFACTURERS.--

A. The attorney general may require a nonparticipating manufacturer to post a bond for the first three years of the manufacturer's listing in the directory or for a longer period if the manufacturer has been determined to pose an elevated risk for noncompliance with the Tobacco Escrow Fund Act. The attorney



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general may consult with other states to determine the viability of a potential nonparticipating manufacturer and may impose additional requirements to protect state interests.

B. Notwithstanding any other provision of law, if a nonparticipating manufacturer is to be listed in the directory, and if the attorney general reasonably determines that a nonparticipating manufacturer that has filed a certification pursuant to Section 6-4-17 NMSA 1978 poses an elevated risk for noncompliance with the Tobacco Escrow Fund Act, the nonparticipating manufacturer and any of its brand families shall not be included in the directory until the nonparticipating manufacturer, or its United States importer that undertakes joint and several liability for the manufacturer's performance in accordance with Section 6-4-20 NMSA 1978, has posted bond in accordance with this section.

C. The bond shall be posted by a corporate surety located within the United States in an amount equal to the greater of fifty thousand dollars (\$50,000) or the amount of escrow the manufacturer, in either its current or predecessor form, was required to deposit as a result of its previous calendar year sales in New Mexico. The bond shall be written in favor of the state of New Mexico and shall be conditioned on the performance by the nonparticipating manufacturer or its United States importer that undertakes joint and several liability for the manufacturer's performance in accordance with all of its obligations under the Tobacco Escrow Fund Act or Section 6-4-13 NMSA 1978 during the year in which the certification is filed and the next succeeding calendar year.

D. A nonparticipating manufacturer may be deemed to pose an elevated risk for noncompliance with this section or Section 6-4-13 NMSA 1978 if:

(1) the nonparticipating manufacturer or any of its affiliates has underpaid an escrow obligation within the past three calendar years, unless:

(a) the manufacturer did not make underpayment knowingly or recklessly and the manufacturer promptly cured the underpayment within one hundred eighty days of notice; or

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(b) the underpayment or lack of payment is the subject of a good faith dispute as documented to the satisfaction of the attorney general and the underpayment is cured within one hundred eighty days of entry of a final order establishing the amount of the required escrow payment;

(2) any state has removed the manufacturer or its brands or brand families or an affiliate or any of the affiliate's brands or brand families from the state's tobacco directory for noncompliance with the state law at any time within the past three calendar years; or

(3) any state has litigation pending against, or an unsatisfied judgment against, the manufacturer or any of its affiliates for escrow or for penalties, costs or attorney fees related to noncompliance with the state escrow laws.

E. As used in this section, "newly qualified nonparticipating manufacturer" means a nonparticipating manufacturer that has not previously been listed in the directory."

Section 6. Section 6-4-20 NMSA 1978 (being Laws 2003, Chapter 114, Section 7) is amended to read:

"6-4-20. 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 located outside of the United States shall, as an additional condition precedent to having its brand families listed or retained in the directory, cause each of its importers of any of its brand families to be sold in New

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Mexico to appoint, and continually engage without interruption, the services of an agent in the state in accordance with the provisions of this section. All obligations of a nonparticipating manufacturer imposed by this section with respect to appointment of its agent shall also apply to the importers with respect to appointment of their agents.

~~[B.]~~ C. 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]~~ Subsections A and B 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.

~~[C.]~~ D. 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 7. A new section of the Tobacco Escrow Fund Act, Section 6-4-20.1 NMSA 1978, is enacted to read:

"6-4-20.1. [NEW MATERIAL] JOINT AND SEVERAL LIABILITY.--For each nonparticipating manufacturer located outside the United States, each importer into the United States of the nonparticipating manufacturer's brand families that are sold in New Mexico shall bear joint and several liability with the nonparticipating manufacturer for deposit of all escrow amounts due under Section 6-4-13 NMSA 1978, payment of all penalties imposed in accordance with Section 6-4-13 NMSA 1978 and payment of all costs and attorney fees imposed

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in accordance with the Tobacco Escrow Fund Act."

Section 8. Section 6-4-22 NMSA 1978 (being Laws 2003, Chapter 114, Section 9) is amended to read:

"6-4-22. 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 for sale or possess for [~~sale~~] any purpose other than personal use 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~~] 7-12-9.1 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~~] any purpose other than personal use 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~~] any purpose other than personal use.

D. Cigarettes that have been sold, offered for sale or possessed for [~~sale~~] any purpose other than personal use 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

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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. A tobacco product manufacturer, stamping agent or importer of cigarettes, or any officer, employee or agent of any such entity, who knowingly makes any materially false statement in any record required by the Tobacco Escrow Fund Act or Section 6-4-13 NMSA 1978 to be filed with the attorney general is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

~~[F.]~~ G. 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.

H. The attorney general may issue a civil investigative demand based on reasonable belief that any person may be in possession, custody or control of an original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other document or recording relevant to the subject matter of an investigation of a probable violation of the Tobacco Escrow Fund Act. The attorney general may, prior to the institution of a civil proceeding, execute in writing and cause to be served upon the person a civil investigative demand requiring the person to produce documentary material and permit the inspection and copying of the material.

I. For the purposes of this section, fewer than one thousand cigarettes shall be presumed to be for personal use."

Section 9. A new Section 6-4-24.1 NMSA 1978 is enacted to read:

"6-4-24.1. [NEW MATERIAL] ATTORNEY GENERAL AUTHORITY--AUDIT AND INVESTIGATION.--The attorney general or the attorney general's authorized representative may conduct audits and investigations of:

A. a nonparticipating tobacco product manufacturer and

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its importers;

B. a tobacco product manufacturer as defined in Section 6-4-12 NMSA 1978 that became a participating manufacturer after the master settlement agreement execution date, as defined at section II(aa) of the master settlement agreement, and its importers;

C. exclusive distributors, retail dealers, stamping agents and wholesale dealers; and

D. persons or entities engaged in delivery sales."

Section 10. A new Section 6-4-24.2 NMSA 1978 is enacted to read:

"6-4-24.2. [NEW MATERIAL] PRESUMPTION.--In any action under Section 6-4-13 NMSA 1978, reports of numbers of cigarettes stamped submitted pursuant to Subsection A of Section 6-4-21 NMSA 1978 shall be admissible evidence and shall be presumed to state accurately the number of cigarettes stamped during the time period by the stamping agent that submitted the report, absent a contrary showing by the nonparticipating manufacturer or importer. Nothing in this section shall be construed as limiting or otherwise affecting the state's right to maintain that such reports are incorrect or do not accurately reflect a nonparticipating manufacturer's sales in the state during the time period in question, and the presumption shall not apply in the event that the state does so maintain."".

4. Renumber the succeeding sections accordingly.

5. On page 13, between lines 22 and 23, insert the following section:

"Section 18. Section 7-12-17 NMSA 1978 (being Laws 1971, Chapter 77, Section 14, as amended) is amended to read:

"7-12-17. REPORTING REQUIREMENTS--PENALTY.--

A. Each person who sells in New Mexico cigarettes manufactured by that person or who receives on consignment or buys cigarettes either directly from the manufacturer or from any out-of-state person for resale in New Mexico shall report to the department

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by the twenty-fifth day of each month that person's sales of cigarettes during the preceding month in each municipality and within that portion of each county outside of the municipalities located in that county. The department shall then advise the state treasurer of the proportion of the total sales of cigarettes for the month within each municipality and within that portion of each county outside of municipalities. The reports of such persons shall, upon receipt by the department, become public records.

B. Any person who sells in New Mexico cigarettes manufactured by that person or who receives on consignment or buys cigarettes for resale in New Mexico who willfully fails to render accurately the reports required by this section and any municipal or county officer who approves any expenditure or expends funds distributed from the county and municipality recreational fund for any purposes other than permitted by Section 7-12-15 NMSA 1978 is guilty of a petty misdemeanor.

C. Any tobacco product manufacturer, stamping agent or importer of cigarettes, or any officer, employee or agent of any such entity, who knowingly makes a materially false statement in any record required to be kept by the Cigarette Tax Act, or in any report or return required to be filed with the department by the Cigarette Tax Act is guilty of a fourth degree felony."

6. Renumber the succeeding sections accordingly.

7. On page 20, between lines 5 and 6, insert the following sections:

"Section 23. Section 57-2A-4 NMSA 1978 (being Laws 2000, Chapter 77, Section 4) is amended to read:

"57-2A-4. DOCUMENTATION.--

A. On the first business day of each month, each person licensed or registered to affix a state tax stamp to cigarettes pursuant to Section [~~7-12-9~~] 7-12-9.1 NMSA 1978 shall file with the department for all cigarettes imported into the United States to which the person has affixed a tax stamp in the preceding month:

[A.] (1) copies of:

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~~[(1)]~~ (a) the permit issued pursuant to 26 USCA 5713 to the person importing the cigarettes into the United States allowing the person to import the cigarettes; and

~~[(2)]~~ (b) the customs form containing, with respect to the cigarettes, the internal revenue tax information required by the federal bureau of alcohol, tobacco, firearms and explosives;

~~[B.]~~ (2) a statement signed under penalty of perjury by the person affixing the state tax stamp identifying the brand and brand styles of all the cigarettes, the quantity of each brand style, the supplier of the cigarettes and the person to whom the cigarettes were conveyed for resale and a separate statement by that person under penalty of perjury, which is not confidential or exempt from public disclosure, identifying only the brands and the brand styles of the cigarettes; and

~~[G.]~~ (3) a statement signed under penalty of perjury by an officer of the manufacturer or importer of the cigarettes certifying that the manufacturer or importer has complied with the package health warning and ingredient reporting requirements of 15 USCA Sections 1333 and 1335a with respect to the cigarettes, including a statement indicating whether the manufacturer is or is not a participating manufacturer within the meaning of that federal law.

B. Prior to making a delivery sale or mailing, shipping or otherwise delivering cigarettes in connection with a delivery sale, each person shall file with the department and with the attorney general a statement setting forth the person's name and trade name and the address of the person's principal place of business and any other place of business.

C. Not later than the tenth day of each month, each person who has made a delivery sale or mailed, shipped or otherwise delivered cigarettes in connection with a delivery sale during the previous calendar month shall file with the department and with the attorney general a report in the format prescribed by the attorney general, which may include an electronic format, that provides for each delivery sale:



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(1) the name and address of the customer to whom the delivery sale was made;

(2) the brand or brands of cigarettes that were sold in the delivery sale; and

(3) the quantity of cigarettes that were sold in the delivery sale.

D. Any person who satisfies the requirements of Section 376 of Title 15 of the United States Code shall be deemed to satisfy the requirements of this section.

E. For purposes of any penalty that may be imposed for a violation of Subsection B or C of this section, a failure to file a particular statement or report with both the department and the attorney general shall constitute a single violation."

Section 24. Section 57-2A-10 NMSA 1978 (being Laws 2000, Chapter 77, Section 10) is amended to read:

"57-2A-10. GENERAL PROVISIONS.--

A. The Cigarette Enforcement Act shall be enforced by the department and the attorney general; provided that, at the request of the department, the state police and all local police authorities shall enforce the provisions of the Cigarette Enforcement Act.

B. For the purpose of enforcing the Cigarette Enforcement Act, the department or the attorney general may request information from any state or local agency, and may share information with, and request information from, any federal agency and any agency of any other state or any local agency thereof.

C. In addition to any other remedy provided by law, including enforcement as provided in Subsection A of this section, any person may bring an action for appropriate injunctive or other equitable relief for a violation of the Cigarette Enforcement Act; actual damages, if any, sustained by reason of the violation; and, as determined by the court, interest on the damages from the date of the complaint, taxable costs and reasonable [~~attorney's~~] attorney

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fees. If the trier of fact finds that the violation is flagrant, it may increase recovery to an amount not in excess of three times the actual damages sustained by reason of the violation."

Section 25. Section 57-12-2 NMSA 1978 (being Laws 1967, Chapter 268, Section 2, as amended) is amended to read:

"57-12-2. DEFINITIONS.--As used in the Unfair Practices Act:

A. "person" means, where applicable, natural persons, corporations, trusts, partnerships, associations, cooperative associations, clubs, companies, firms, joint ventures or syndicates;

B. "seller-initiated telephone sale" means a sale, lease or rental of goods or services in which the seller or [~~his~~] the seller's representative solicits the sale by telephoning the prospective purchaser and in which the sale is consummated entirely by telephone or mail, but does not include a transaction:

(1) in which a person solicits a sale from a prospective purchaser who has previously made an authorized purchase from the seller's business; or

(2) in which the purchaser is accorded the right of rescission by the provisions of the federal Consumer Credit Protection Act, 15 U.S.C. 1635 or regulations issued pursuant thereto;

C. "trade" or "commerce" includes the advertising, offering for sale or distribution of any services and any property and any other article, commodity or thing of value, including any trade or commerce directly or indirectly affecting the people of this state;

D. "unfair or deceptive trade practice" means an act specifically declared unlawful pursuant to the Unfair Practices Act, a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of [~~his~~] the person's trade or commerce, [~~which~~] that may, tends to or does deceive or mislead any person and includes:

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(1) representing goods or services as those of another when the goods or services are not the goods or services of another;

(2) causing confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(3) causing confusion or misunderstanding as to affiliation, connection or association with or certification by another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that ~~he~~ the person does not have;

(6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(7) representing that goods or services are of a particular standard, quality or grade or that goods are of a particular style or model if they are of another;

(8) disparaging the goods, services or business of another by false or misleading representations;

(9) offering goods or services with intent not to supply them in the quantity requested by the prospective buyer to the extent of the stock available, unless the purchaser is purchasing for resale;

(10) offering goods or services with intent not to supply reasonable expectable public demand;

(11) making false or misleading statements of fact

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concerning the price of goods or services, the prices of competitors or one's own price at a past or future time or the reasons for, existence of or amounts of price reduction;

(12) making false or misleading statements of fact for the purpose of obtaining appointments for the demonstration, exhibition or other sales presentation of goods or services;

(13) packaging goods for sale in a container that bears a trademark or trade name identified with goods formerly packaged in the container, without authorization, unless the container is labeled or marked to disclaim a connection between the contents and the trademark or trade name;

(14) using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive;

(15) stating that a transaction involves rights, remedies or obligations that it does not involve;

(16) stating that services, replacements or repairs are needed if they are not needed; ~~[or]~~

(17) ~~[failure]~~ failing to deliver the quality or quantity of goods or services contracted for; ~~[and]~~ or

(18) violating the Tobacco Escrow Fund Act; and

E. "unconscionable trade practice" means an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts ~~[which]~~ that to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid."".

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8. Renumber the succeeding section accordingly.,  
and thence referred to the **JUDICIARY COMMITTEE.**

Respectfully submitted,

\_\_\_\_\_  
Debbie A. Rodella, Chair

Adopted \_\_\_\_\_  
(Chief Clerk)

Not Adopted \_\_\_\_\_  
(Chief Clerk)

Date \_\_\_\_\_

The roll call vote was 8 For 0 Against  
Yes: 8  
No: 0  
Excused: Alcon, Powdrell-Culbert, Taylor, Trujillo  
Absent: None

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