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**SENATE BILL 801**

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

**INTRODUCED BY**

Mary Jane M. Garcia

**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. "Distributor" does not include persons who are  
22 retailers of cigarettes;

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

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1 tobacco product manufacturers;

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

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

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

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

12 K. "tobacco product manufacturer" means "tobacco  
13 product manufacturer" as defined in Subsection I of Section  
14 6-4-12 NMSA 1978; and

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

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

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

25 The certification shall:

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- 1 (1) be made under penalty of perjury;
- 2 (2) state that as of the date of the
- 3 certification, the tobacco product manufacturer is either a
- 4 participating or a nonparticipating manufacturer; and
- 5 (3) include the information required pursuant
- 6 to Subsections B or C of this section.

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

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

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

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

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

25 (a) the name, address and telephone

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1 number of the financial institution where the fund is  
2 established;

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

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

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

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

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

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

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1 year.

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

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

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

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

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

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

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1 manufacturer for purposes of calculating payments under the  
2 master settlement agreement or for purposes of Section 6-4-13  
3 NMSA 1978.

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

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

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

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

17 (2) the attorney general concludes that:

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

24 (b) all outstanding final judgments,  
25 including interest thereon, for violations of Section 6-4-13

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1 NMSA 1978 have not been fully satisfied for the brand family or  
2 the nonparticipating manufacturer.

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

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

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

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



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

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

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

. 145896. 1

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1 general.

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

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

25 Section 8. REPORTING OF INFORMATION-- ESCROW

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1       INSTALLMENTS. --

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

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

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

25              D. The attorney general and the department may

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1 require a distributor or tobacco product manufacturer to submit  
2 additional information as necessary to determine compliance  
3 with the Tobacco Escrow Fund Act, including samples of the  
4 packaging or labeling of each brand family.

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

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

15 Section 9. PENALTIES AND OTHER REMEDIES. --

16 A. It is unlawful for a person to:

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

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

24 B. The secretary may revoke or suspend the  
25 registration or license of a person licensed or registered

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1 pursuant to Section 7-12-9 or 7-12A-7 NMSA 1978 that violates  
2 Subsection A of this section.

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

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

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

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

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1 shall be entitled to recover the costs of investigation, costs  
2 of the action and reasonable attorney fees.

3 Section 10. GENERAL PROVISIONS. --

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

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

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

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

19 Section 11. CONSTRUCTION OF ACT. -- The provisions of the  
20 Tobacco Escrow Fund Act do not amend or alter Sections 6-4-12  
21 and 6-4-13 NMSA 1978. If a court finds that a provision of the  
22 Tobacco Escrow Fund Act and of Sections 6-4-12 and 6-4-13 NMSA  
23 1978 conflict and cannot be harmonized, Sections 6-4-12 and  
24 6-4-13 NMSA 1978 shall control. If a provision of the Tobacco  
25 Escrow Fund Act causes Sections 6-4-12 and 6-4-13 NMSA 1978 to

. 145896. 1

1 no longer constitute a qualifying or model statute as those  
2 terms are defined in the master settlement agreement, that  
3 provision shall be invalid.

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

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