

CHAPTER 25

AN ACT concerning certain tobacco product manufacturers and supplementing Title 52 of the Revised Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

C.52:4D-4 Findings, declarations relative to enforcement of the Model Statute.

1. The Legislature finds and declares that facilitating the diligent enforcement of P.L.1999, c.148 (C.52:4D-1 et seq.), the so-called "Model Statute" contemplated by the "Master Settlement Agreement" which settled tobacco-related litigation between the settling states, including New Jersey, and leading United States tobacco product manufacturers, is beneficial to the public interest. The Model Statute requires tobacco product manufacturers that are not participants in the Master Settlement Agreement to pay into a qualified escrow fund to guarantee a source of compensation to pay any future judgment or settlement that may be reached with the State. Overall tobacco industry compliance with the provisions of the Model Statute will be encouraged by requiring cigarette distributors to stamp and distribute only cigarettes of tobacco product manufacturers that are in compliance with the act and by requiring holders of certificates of authority under P.L.1990, c.39 (C.54:40B-1 et seq.) and other persons that collect or pay the tax on a tobacco product as defined in section 2 of P.L.1990, c.39 (C.54:40B-2) that is also defined as a cigarette under section 2 of P.L.1999, c.148 (C.52:4D-2) to distribute only the tobacco products of tobacco product manufacturers that are in compliance with the act. The establishment of additional procedural enhancements and penalties related to these requirements will aid the State in its continuing diligent enforcement of this law and thereby safeguard the Master Settlement Agreement and the effectuation of the goals of the tobacco litigation settlement, which in turn will have a salutary effect on the fiscal soundness of the State and the public health.

C.52:4D-5 Definitions relative enforcement of the Model Statute.

2. As used in this act, unless the context otherwise requires, the following words and terms shall have the following meanings:

"Brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, "menthol," "lights," "kings," and "100's" and includes any similar use of a brand name, alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.

"Cigarette" has the same meaning as that term is defined in section 2 of P.L.1999, c.148 (C.52:4D-2).

"Director" means the Director of the Division of Taxation in the Department of the Treasury.

"Licensed distributor" means a person that is authorized pursuant to P.L.1948, c.65 (C.54:40A-1 et seq.), to affix tax stamps or impress or attach metered impressions of tax to packages or other containers of cigarettes or any person that is required to pay the excise tax imposed pursuant to P.L.1948, c.65 (C.54:40A-1 et seq.).

"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.

"Non-Participating Manufacturer" means any tobacco product manufacturer that is not a participating manufacturer.

"Participating Manufacturer" has the meaning given that term in Section II(jj) of the Master Settlement Agreement and all amendments thereto.

"Qualified escrow fund" has the same meaning as prescribed for that term under section 2 of P.L.1999, c.148 (C.52:4D-2).

"Tobacco product manufacturer" has the same meaning as prescribed for that term under section 2 of P.L.1999, c.148 (C.52:4D-2).

"Units sold" has the same meaning as prescribed for that term under section 2 of P.L.1999, c.148 (C.52:4D-2).

C.52:4D-6 Certification by tobacco product manufacturer as to compliance.

3. a. Every tobacco product manufacturer whose cigarettes are sold in this State, whether directly or through a distributor, retailer or similar intermediary or intermediaries, annually shall execute and deliver in the manner prescribed by the Attorney General a certification to the director and Attorney General no later than April 30, certifying under penalty of perjury that, as of the date of such certification, such tobacco product manufacturer either is a participating manufacturer or is in full compliance with the requirements of P.L.1999, c.148 (C.52:4D-1 et seq.).

(1) A participating manufacturer shall include in its certification a complete list of its brand families. The participating manufacturer shall update such list no later than 30 days prior to any addition or modification to brand families by executing and delivering a supplemental certification to the Attorney General.

(2) A non-participating manufacturer shall include in its certification a complete list of all of its brand families: (a) separately listing brand families of cigarettes and the number of units sold for each brand family that were sold in the State during the preceding calendar year; (b) all of its brand families that have been sold in the State at any time during the current calendar year; (c) indicating, by an asterisk, any brand family sold in the State during the preceding calendar year that is no longer being sold in the State as of the date of the certification; and (d) identifying by name and address any other manufacturer of those brand families in the preceding calendar year. The non-participating manufacturer shall update the list no later than 30 days prior to any addition or modification to its brand families by executing and delivering a supplemental certification to the Attorney General.

(3) In the case of a non-participating manufacturer, the certification shall further certify: (a) that the non-participating manufacturer is registered to do business in the State or has appointed a resident agent for service of process and provided notice thereof as required by subsection b. of section 6 of this act; (b) that the non-participating manufacturer has (i) established and continues to maintain a qualified escrow fund; and (ii) executed a qualified escrow agreement that has been reviewed and approved by the Attorney General and that governs the qualified escrow fund; (c) that the non-participating manufacturer is in full compliance with P.L.1999, c.148 (C.52:4D-1 et seq.), and this act, and any regulations promulgated pursuant thereto; (d) (i) the name, address and telephone number of the financial institution at which the non-participating manufacturer has established the qualified escrow fund required pursuant to section 3 of P.L.1999, c.148 (C.52:4D-3), and all regulations promulgated thereto; (ii) the account number of the qualified escrow fund and sub-account number for the State of New Jersey; (iii) the amount the non-participating manufacturer placed in the fund for units sold in the State during the preceding calendar year, the date and amount of each of those deposits, and such evidence or verification as may be deemed necessary by the Attorney General to confirm the foregoing; and (iv) the amounts of and dates of any withdrawal or transfer of funds the non-participating manufacturer made at any time from the fund or from any other qualified escrow fund into which it has ever made escrow payments pursuant to section 3 of P.L.1999, c.148 (C.52:4D-3) and all regulations promulgated thereto.

b. A tobacco product manufacturer shall not include a brand family in its certification unless:

(1) in the case of a participating manufacturer, that participating manufacturer affirms that the brand family is to be deemed to be cigarettes of the participating manufacturer 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; and

(2) in the case of a non-participating manufacturer, that non-participating manufacturer affirms that the brand family is to be deemed to be cigarettes of the non-participating manufacturer for purposes of calculating its units sold pursuant to section 3 of P.L.1999, c.148 (C.52:4D-3).

Nothing in this section shall be construed as limiting or otherwise affecting 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 P.L.1999, c.148 (C.52:4D-1 et seq.).

c. A tobacco product manufacturer shall maintain all invoices and documentation of sales and any other information relied upon for the certification for a period of five years, unless

otherwise required by law to maintain them for a longer period of time.

C.52:4D-7 Development publication of directory listing compliers.

4. a. Not later than 60 days after enactment of this act, the Attorney General shall develop and publish through the Internet a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection a. of section 3 of this act in a timely manner, pursuant to the initial schedule provided in section 9 of this act, and all brand families that are listed in those certifications, except as noted below.

b. The Attorney General shall not include or retain in the directory the name or brand families of any non-participating manufacturer that fails to provide the required certification or whose certification the Attorney General determines is not in compliance with paragraph (2) or paragraph (3) of subsection a. of section 3 of this act, unless the Attorney General has determined that the violation has been cured to the satisfaction of the Attorney General.

c. The Attorney General shall not include or retain a tobacco product manufacturer or brand family in the directory if the Attorney General concludes that (1) in the case of a non-participating manufacturer all escrow payments required pursuant to section 3 of P.L.1999, c.148 (C.52:4D-3), for any period for any brand family, whether or not listed by that non-participating 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 (2) all outstanding final judgments, including interest thereon, for violations of P.L.1999, c.148 (C.52:4D-1 et seq.) have not been fully satisfied for that brand family and that manufacturer.

d. The Attorney General shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand families to keep the directory in conformity with the requirements of this act.

C.52:4D-8 Unlawful practices.

5. It shall be unlawful for any person: a. to affix a tax stamp or impress or attach a metered impression of tax to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory established pursuant to section 4 of this act, or, b. to sell, offer or possess for sale in this State, cigarettes of a tobacco product manufacturer or brand family not included in the directory established pursuant to this act.

C.52:4D-9 Registered agent necessary for listing of non-resident, non-participating manufacturer.

6. a. Any non-resident or foreign non-participating manufacturer that has not registered to do business in this State as a foreign corporation or business entity shall, as a condition precedent to having its brand families listed or retained in the directory established pursuant to section 4 of this act, appoint and continually engage without interruption the services of an agent in New Jersey to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of the act and P.L.1999, c.148 (C.52:4D-1 et seq.), may be served in any manner authorized by law. Such service shall constitute legal and valid service of process on the non-participating manufacturer. The non-participating manufacturer shall provide the name, address, telephone number and proof of the appointment and availability of such agent to the Attorney General.

b. A non-participating manufacturer shall provide notice to the director and Attorney General not later than 30 calendar days prior to termination of the authority of an agent and shall further provide proof to the satisfaction of the Attorney General of the appointment of a new agent no less than five calendar days prior to the termination of an existing agent appointment. If an agent terminates an agency appointment, the non-participating manufacturer shall notify the director and Attorney General of that termination within five calendar days and shall include proof to the satisfaction of the Attorney General of the appointment of a new agent.

c. A non-participating manufacturer whose products are sold in this State, without appointing or designating an agent as herein required shall be deemed to have appointed the Secretary of State as that agent and may be proceeded against in the courts of this State by service of process upon the Secretary of State; provided however, that the appointment of the

Secretary of State as that agent shall not satisfy the condition precedent to having its brand families listed or retained in the directory established pursuant to section 4 of this act.

C.52:4D-10 Submission of information.

7. a. Within 20 days after the end of each calendar quarter, and more frequently if so directed by the director, each licensed distributor and each holder of a certificate of authority pursuant to section 6 of P.L.1990, c.39 (C.54:40B-6) shall submit such information as the director requires to facilitate compliance with this section, including, but not limited to, a list by brand family of the total number of cigarettes or in the case of roll your own, the equivalent stick count, for which the licensed distributor affixed stamps or impressed or attached metered impressions or for which the holder of the certificate of authority otherwise paid the tax due for such cigarettes during the previous calendar quarter. Each licensed distributor and holder of a certificate of authority shall, for a period of five years, maintain, and make available to the director and the Attorney General, all invoices and documentation of sales of all cigarettes sold by the licensed distributor or holder of a certificate of authority that were manufactured by a non-participating manufacturer and any other information relied upon in reporting to the director.

b. The director is authorized to disclose to the Attorney General any information received under this act or requested by the Attorney General for purposes of determining compliance with and enforcing the provisions of this act. The director and Attorney General shall share with each other the information received under this act, and may share such information with other federal, State or local agencies only for purposes of enforcement of this act, P.L.1999, c.148 (C.52:4D-1 et seq.), or the corresponding laws of other states.

c. The Attorney General may require at any time that a non-participating manufacturer provide from the financial institution in which the manufacturer has established a qualified escrow fund for the purpose of compliance with P.L.1999, c.148 (C.52:4D-1 et seq.), proof of the amount of money in the fund being held on behalf of the State and the dates of deposits, and listing the amounts of all withdrawals from the fund and the dates thereof.

d. In addition to the information required to be submitted pursuant to this section, the director or Attorney General may require a stamping agent, licensed distributor, holder of a certificate of authority pursuant to section 6 of P.L.1990, c.39 (C.54:40B-6), or tobacco product manufacturer to submit any additional information including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to enable the Attorney General to determine whether a tobacco product manufacturer is in compliance with this act.

e. To promote compliance with the provisions of this act, the Attorney General may promulgate regulations requiring a tobacco product manufacturer subject to the requirements of paragraph (2) of subsection a. of section 3 of this act to make the escrow deposits required in more frequent installments during the year in which the sales covered by the deposits are made. The Attorney General may require production of information sufficient to enable the Attorney General to determine the adequacy of the amount of the installment deposit.

C.52:4D-11 Additional penalties.

8. a. In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that any person has violated section 5 of this act or any regulation adopted pursuant thereto, the director may revoke or suspend the license of any person pursuant to section 203 of P.L.1948, c.65 (C.54:40A-5) or revoke or suspend the holder's certificate of authority pursuant to procedures applicable to the suspension of a license set forth in section 203 of P.L.1948, c.65 (C.54:40A-5). Each stamp or metered impression affixed and each offer to sell cigarettes in violation of section 5 of this act shall constitute a separate violation. For each violation hereof, the director may also impose a civil penalty in an amount not to exceed the greater of 500% of the retail value of the cigarettes sold or \$5,000 upon a determination of violation of section 5 of this act or any regulations adopted pursuant thereto.

b. Any cigarettes that have been sold, offered for sale or possessed for sale in this State in violation of section 5 of this act shall be deemed contraband, without regard to whether the violation was knowing under section 607 of P.L.1948, c. 65 (C.54:40A-30), and those cigarettes

shall be subject to seizure and forfeiture as provided in section 607, and all cigarettes so seized and forfeited shall be destroyed and not resold.

c. The Attorney General, on behalf of the director, may seek an injunction to restrain a threatened or actual violation of section 5 of this act, or subsection a. or subsection b. of section 7 of this act by a licensed distributor or a holder of a certificate of authority pursuant to section 6 of P.L.1990, c.39 (C.54:40B-6) and to compel the licensed distributor or holder of a certificate of authority to comply with the requirements provided therein. In any action brought pursuant to this section, the State shall be entitled to recover the costs of investigation, costs of the action and reasonable attorney fees.

d. It shall be unlawful for any person to sell or distribute cigarettes or 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 the State in violation of section 5 of this act. A violation of this subsection shall be a crime of the third degree.

C.52:4D-12 Determination to list, remove from list, review.

9. a. A determination of the Attorney General to not list or to remove from the directory a brand family or tobacco product manufacturer shall be subject to review in the manner prescribed by the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

b. No person shall be issued a license or granted a renewal of a license to act as a stamping agent, or a certificate of authority pursuant to section 6 of P.L.1990, c.39 (C.54:40B-6), unless that person has certified in writing, under penalty of perjury that the person will comply fully with this section.

c. Notwithstanding the dates otherwise prescribed in this act:

(1) the first report required after enactment of this act by a licensed distributor or a holder of a certificate of authority pursuant to subsection a. of section 7 of this act shall be due 30 days after enactment of this act;

(2) the first certification required after enactment of this act by a tobacco product manufacturer described in subsection a. of section 3 of this act shall be due 45 days after enactment of this act; and

(3) the first publication required after enactment of this act of the directory described in subsection a. of section 4 of this act shall be completed within 90 days after the enactment of this act.

d. The Attorney General may promulgate regulations necessary to effect the purposes of this act.

e. In any action brought by the State to enforce this act, the State shall be entitled to recover the costs of investigation, expert witness fees, costs of the action and reasonable attorney fees.

f. If a court determines that a person has violated this 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. Unless otherwise expressly provided, the remedies or penalties provided by this act are cumulative, and in addition to the remedies or penalties available under all other laws of this State.

10. This act shall take effect immediately.

Approved February 27, 2003.