
THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 924 Session of
2003

INTRODUCED BY RAFFERTY, JUBELIRER, BRIGHTBILL, TARTAGLIONE,
ERICKSON, HUGHES, EARLL, LEMMOND, MOWERY, KASUNIC, CORMAN,
ORIE, STACK, C. WILLIAMS, WOZNIAK AND THOMPSON,
OCTOBER 8, 2003

SENATOR EARLL, FINANCE, AS AMENDED, OCTOBER 27, 2003

AN ACT

1 Requiring certifications by tobacco product manufacturers;
2 providing for a directory of cigarettes approved for stamping
3 and sale; conferring powers and imposing duties on the
4 Attorney General and the Department of Revenue; and imposing
5 penalties.

6 The General Assembly of the Commonwealth of Pennsylvania
7 hereby enacts as follows:

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9 CHAPTER 1

10 PRELIMINARY PROVISIONS

11 Section 101. Short title.

12 This act shall be known and may be cited as the Tobacco
13 Product Manufacturer Directory Act.

14 Section 102. Definitions.

15 The following words and phrases when used in this act shall
16 have the meanings given to them in this section unless the
17 context clearly indicates otherwise:

18 "Adjusted for inflation." Increased in accordance with the
19 formula for inflation adjustment set forth in Exhibit C of the
20 Master Settlement Agreement.

21 "Affiliate." A person who, directly or indirectly, owns or
22 controls, is owned or controlled by, or is under common
23 ownership or control with, another person. For purposes of this
24 definition, the terms "owns," "is owned" and "ownership" shall
25 mean ownership of an equity interest, or its equivalent, of 10%
26 or more.

27 "Allocable share." As that term is defined in the Master
28 Settlement Agreement.

29 "Brand family." All styles of cigarettes sold under the same
30 trademark and differentiated from one another by means of

1 additional modifiers or descriptors, including, but not limited
2 to, "menthol," "lights," "kings" and "100s". The term includes
3 any use of a brand name, alone or in conjunction with any other
4 word, trademark, logo, symbol, motto, selling message,
5 recognizable pattern of colors or any other indicia of product
6 identification identical or similar to or identifiable with a
7 previously known brand of cigarettes.

8 "Cigarette." Any product that contains nicotine, is intended
9 to be burned or heated under ordinary conditions of use and
10 consists of or contains any of the following:

11 (1) Any roll of tobacco wrapped in paper or in any
12 substance not containing tobacco.

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

18 (3) Any roll of tobacco wrapped in any substance
19 containing tobacco which, because of its appearance, the type
20 of tobacco used in the filler or its packaging and labeling,
21 is likely to be offered to or purchased by consumers as a
22 cigarette described in paragraph (1).

23 (4) Any "roll-your-own," which means any tobacco which,
24 because of its appearance, type, packaging or labeling, is
25 suitable for use and likely to be offered to or purchased by
26 consumers as tobacco for making cigarettes. For purposes of
27 this definition, 0.09 ounces of "roll-your-own" tobacco shall
28 constitute one individual cigarette.

29 "Cigarette stamping agent." Any person licensed as such
30 under Article XII of the act of March 4, 1971 (P.L.6, No.2),

1 known as the Tax Reform Code of 1971.

2 "Department." The Department of Revenue of the Commonwealth.

3 "Directory." The listing of cigarette brands and
4 manufacturers developed by the Attorney General under section
5 301.

6 "Master Settlement Agreement." The settlement agreement and
7 related documents entered into on November 23, 1998, by the
8 Commonwealth and leading United States tobacco product
9 manufacturers and approved by the court in Commonwealth v.
10 Philip Morris, April Term, 1997, No.2443 (C.P. Philadelphia
11 County), on January 13, 1999.

12 "Nonparticipating manufacturer." Any tobacco product
13 manufacturer that is not a participating manufacturer.

14 "Participating manufacturer." A tobacco product manufacturer
15 that is a party to the Master Settlement Agreement.

16 "Person." Any individual, unincorporated association,
17 corporation, limited liability corporation, joint stock company,
18 group, committee, agency, syndicate, trust or trustee, receiver,
19 fiduciary, partnership or conservator. Whenever used in any
20 section of this act to establish or impose penalties, the term
21 "person" when applied to a partnership, unincorporated
22 association or other joint venture means the partners or members
23 thereof and when applied to a corporation means all officers and
24 directors thereof.

25 "Qualified escrow fund." An escrow arrangement with a
26 federally chartered or State-chartered financial institution
27 that has no affiliation with any tobacco product manufacturer
28 and has assets of at least \$1,000,000,000 in which the escrow
29 arrangement:

30 (1) requires that the financial institution hold the

1 principal of the escrowed funds for the benefit of releasing
2 parties as that term is defined in the Master Settlement
3 Agreement; and

4 (2) prohibits the tobacco product manufacturer placing
5 the funds into escrow from using, accessing or directing the
6 use of the principal of the funds except as consistent with
7 section 4 of the act of June 22, 2000 (P.L.394, No.54), known
8 as the Tobacco Settlement Agreement Act.

9 "Released claims." As that term is defined in the Master
10 Settlement Agreement.

11 "Sell" or "sold." The term includes sales made directly or
12 through a distributor, retailer or similar intermediary.

13 "Tobacco product manufacturer."

14 (1) A person that directly and not exclusively through
15 any affiliate:

16 (i) manufactures cigarettes anywhere that such
17 manufacturer intends to be sold in the United States,
18 including cigarettes intended to be sold in the United
19 States through an importer, except where the importer is
20 an original participating manufacturer, as that term is
21 defined in the Master Settlement Agreement, that will be
22 responsible for the payments under the Master Settlement
23 Agreement with respect to the cigarettes as a result of
24 the provisions of subsection II(mm) of the Master
25 Settlement Agreement and that pays the taxes specified in
26 subsection II(z) of the Master Settlement Agreement and
27 provided that the manufacturer of the cigarettes does not
28 market or advertise the cigarettes in the United States;

29 (ii) is the first purchaser anywhere for resale in
30 the United States of cigarettes manufactured anywhere

that the manufacturer does not intend to be sold in the United States; or

(iii) becomes a successor of a person described in subparagraph (i) or (ii).

(2) The term shall not include an affiliate of a tobacco product manufacturer unless the affiliate itself falls under paragraph (1)(i), (ii) or (iii).

"Tobacco Settlement Agreement Act." The act of June 22, 2000 (P.L.394, No.54), known as the Tobacco Settlement Agreement Act.

"Units sold." The number of individual cigarettes sold in this Commonwealth by the applicable tobacco product manufacturer during the year in question, as measured by taxes collected by the Commonwealth on packs, or "roll-your-own" tobacco containers, bearing the tax stamp of the Commonwealth required under section 1215 of the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971.

CHAPTER 3

TOBACCO PRODUCT MANUFACTURERS DIRECTORY

Section 301. Directory.

The Attorney General shall develop and publish a directory of all tobacco product manufacturers and their brand families that have provided current and accurate certification under section 303. The directory shall be available on the Office of Attorney General's World Wide Web site. The following shall apply:

(1) In the case of a nonparticipating manufacturer, neither the manufacturer nor its brand family shall be included or retained in the directory if the Attorney General determines that any of the following apply:

(i) The manufacturer has failed to provide the required certification or the certification is not in

1 compliance with section 303.

2 (ii) The manufacturer has failed to make any payment
3 required under the Tobacco Settlement Agreement Act,
4 including applicable penalties, for any period for any
5 brand family, whether or not listed by the tobacco
6 product manufacturer, including all payments or penalties
7 required from prior manufacturers of those brands, into a
8 qualified escrow fund approved by the Attorney General.

9 (iii) Any outstanding final judgment for a violation
10 of the Tobacco Settlement Agreement Act, including
11 interest, has not been fully satisfied for the brand
12 family and the manufacturer.

13 (iv) The requirements of section 303(a) have not
14 been satisfied.

15 (2) The Attorney General shall take steps to update the
16 directory, correct mistakes, add or remove a tobacco product
17 manufacturer or brand family or to make other changes
18 necessary to ensure compliance with this act.

19 (3) The Attorney General shall provide notice to the
20 registered agent of the affected tobacco product manufacturer
21 when the Attorney General determines to add a manufacturer or
22 its brand families or to remove the manufacturer or its brand
23 families from the directory. A determination of the Attorney
24 General to remove a tobacco product manufacturer or brand
25 families from the directory shall take effect 21 days after
26 notice of that determination appears in the directory.

27 (4) The Attorney General shall publish the directory
28 under this section within 90 days after the effective date of
29 this section. Upon initial publication of the directory the
30 Attorney General shall cause notice of the same to be

published in the Pennsylvania Bulletin.

Section 302. Prohibition.

It shall be unlawful for any person to:

(1) Affix a tax stamp to a package or other container of cigarettes belonging to a tobacco product manufacturer or brand family that is not included in the directory.

(2) Sell, offer, distribute or possess for sale in this Commonwealth cigarettes belonging to a tobacco product manufacturer or brand family that is not included in the directory.

(3) 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 this Commonwealth in violation of paragraph (1).

Section 303. Certification.

(a) Required information.--A tobacco product manufacturer whose cigarettes are sold in this Commonwealth, whether directly or through a distributor, retailer or similar intermediary or intermediaries, shall execute and deliver to the Attorney General a certification under penalty of perjury that, as of the date of the certification, the tobacco product manufacturer is either a participating manufacturer or is in full compliance with this act and the Tobacco Settlement Agreement Act. In the case of a nonparticipating manufacturer, the certification shall include a statement that:

(1) The nonparticipating manufacturer is registered to do business in this Commonwealth or has appointed a resident agent for service of process and provided notice of the registration or appointment under section 305.

(2) The nonparticipating manufacturer has established

1 and continuously maintains a qualified escrow fund and has
2 executed a qualified escrow agreement approved by the
3 Attorney General.

4 (b) Form.--The certification submitted under this section
5 shall be on a form prescribed by the Attorney General.

6 (c) Time.--Initial certifications shall be due 45 days after
7 the effective date of this section. Thereafter, certifications
8 shall be executed no earlier than April 15 of each year and
9 shall be delivered to the Attorney General no later than April
10 30 each year.

11 Section 304. Required information.

12 (a) Participating manufacturers.--A participating
13 manufacturer shall include in its certification a list of its
14 brand families. A supplemental certification shall be filed if
15 brand families change during the year.

16 (b) Nonparticipating manufacturers.--A nonparticipating
17 manufacturer shall include in its certification the following:

18 (1) A list of all of its brand families that were sold
19 in this Commonwealth during the preceding calendar year,
20 including the number of units sold for each brand family.

21 (2) A list of all of its brand families that have been
22 sold in this Commonwealth during the current calendar year.

23 (3) The following:

24 (i) The name, address and telephone number of the
25 financial institution where the nonparticipating
26 manufacturer has established its qualified escrow fund.

27 (ii) The account number of the qualified escrow fund
28 and any subaccount number for the escrow account
29 established for the benefit of the Commonwealth.

30 (iii) The amount the nonparticipating manufacturer

1 placed in the fund for cigarettes sold in this
2 Commonwealth during the preceding calendar year, the date
3 and amount of each deposit and any other evidence of the
4 deposit required by the Attorney General.

5 (iv) The amount and date of any withdrawal or
6 transfer of funds the nonparticipating manufacturer made
7 from the qualified escrow fund at any time or from any
8 other qualified escrow fund into which the
9 nonparticipating manufacturer made escrow payments under
10 the Tobacco Settlement Agreement Act.

11 (v) The name and address of any other manufacturer
12 of its brand families in the current or preceding
13 calendar year. A supplemental certification shall be
14 filed if brand families change during the course of the
15 year.

16 (c) Brand requirements.--In order to include a brand family
17 in its certification, a tobacco product manufacturer must:

18 (1) in the case of a participating manufacturer, affirm
19 that the brand family is deemed to be its cigarettes for
20 purposes of calculating its payments under the Master
21 Settlement Agreement for the relevant year in the volume and
22 shares determined under the Master Settlement Agreement; or

23 (2) in the case of a nonparticipating manufacturer,
24 affirm that the brand family is deemed to be its cigarettes
25 for purposes of the Tobacco Settlement Agreement Act.

26 (d) Escrow fund.--A nonparticipating manufacturer whose
27 products have not previously been sold in this Commonwealth
28 shall deposit funds into a qualified escrow fund on a quarterly
29 basis during the FIRST 12 months it has sales in this
30 Commonwealth and shall file supplemental certifications with the

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1 Attorney General. The deposit and certification for sales in the
2 first calendar quarter shall be due May 15, the deposit and
3 certification for the second calendar quarter shall be due
4 August 15, the deposit and certification for the third calendar
5 quarter shall be due November 15, and the deposit and
6 certification for the fourth calendar quarter shall be due
7 February 15 of the following year.

8 (e) Construction.--Nothing in this section shall be
9 construed as limiting or otherwise affecting the Commonwealth's
10 right to maintain that a brand family constitutes cigarettes of
11 a different tobacco product manufacturer for purposes of
12 calculating payments under the Master Settlement Agreement and
13 the Tobacco Settlement Agreement Act.

14 Section 305. Agent for service of process.

15 (a) Appointment of agent.--A nonresident or foreign
16 nonparticipating manufacturer shall, as a condition precedent to
17 having its brand families listed or retained in the directory,
18 appoint and continually engage the services of an agent located
19 in this Commonwealth to act as agent for the service of process
20 for any action or proceeding against it relating to the
21 enforcement of this act and the Tobacco Settlement Agreement
22 Act. Service by certified mail on the agent shall constitute
23 legal and valid service of process on the nonparticipating
24 manufacturer. The nonparticipating manufacturer shall provide
25 the name, address, telephone number, proof of the appointment
26 and availability of the agent to the Attorney General in a
27 manner prescribed by the Attorney General.

28 (b) Notice.--A nonparticipating manufacturer shall provide
29 notice to the Attorney General 30 calendar days prior to
30 termination of the agent appointed under subsection (a). A

1 nonparticipating manufacturer shall provide proof as required by
2 the Attorney General of the appointment of a new agent no less
3 than five calendar days prior to the termination of an existing
4 agent. In the event an agent terminates the appointment, the
5 nonparticipating manufacturer shall notify the Attorney General
6 of the termination within five calendar days and include proof
7 as required by the Attorney General of the appointment of a new
8 agent.

9 (c) Secretary of Commonwealth.--A nonparticipating
10 manufacturer whose products are sold in this Commonwealth
11 without the appointment of an agent under this section shall be
12 deemed to have appointed the Secretary of the Commonwealth as
13 its agent and may be proceeded against in the courts of this
14 Commonwealth by service of process upon the Secretary of the
15 Commonwealth. The appointment of the Secretary of the
16 Commonwealth under this subsection shall not serve as a
17 condition precedent for including or retaining the brand
18 families of the nonparticipating manufacturer in the directory.
19 Section 306. Records and reporting.

20 (a) Maintenance of records.--Tobacco product manufacturers
21 shall maintain all invoices and documentation of sales and other
22 information relied upon in a certification for a period of five
23 years.

24 (b) Reporting.--Not later than 20 days following the end of
25 each month, a cigarette stamping agent shall submit to the
26 department information required by the department or the
27 Attorney General to facilitate compliance with this act,
28 including a list by brand family of the total number of
29 cigarettes or, in the case of "roll-your-own," the equivalent
30 stick count for which the cigarette stamping agent affixed

1 stamps during the previous calendar month or otherwise paid the
2 tax due. The cigarette stamping agent shall maintain and make
3 available to the department and the Attorney General all
4 invoices and documentation of sales of all nonparticipating
5 manufacturer cigarettes and any other information relied upon to
6 make reports under this subsection for a period of five years.
7 The first report of cigarette stamping agents for the year 2003
8 required by this subsection shall be due 30 days after the
9 effective date of this section.

10 (c) Disclosure.--The department may disclose to the Attorney
11 General any information received under this section. The
12 department and the Attorney General shall share information
13 received under this section with other Federal, State and local
14 agencies as necessary to enforce this act or related laws of
15 other states.

16 (d) Required proof.--The Attorney General may at any time
17 require that a nonparticipating manufacturer submit proof from a
18 qualified financial institution of the amount of money in a
19 qualified escrow fund, dates of deposits and a history of all
20 account transactions.

21 (e) Additional information.--The department or the Attorney
22 General may require a cigarette stamping agent or tobacco
23 product manufacturer to submit additional information, including
24 samples of the packaging or labeling of each brand family, as
25 necessary to enable the Attorney General to determine whether a
26 tobacco product manufacturer is in compliance with this act.
27 Section 307. Penalties.

28 (a) License sanctions.--In addition to or in lieu of any
29 other civil or criminal penalty, if the department determines
30 that a cigarette stamping agent has violated section 302, the

1 department may revoke or suspend the license of the agent. The
2 department may also assess a civil penalty in an amount not to
3 exceed 500% of the retail value of the cigarettes sold. An
4 appeal from a determination by the department shall be conducted
5 in accordance with section 207-A of the act of April 9, 1929
6 (P.L.343, No.176), known as The Fiscal Code.

7 (b) Contraband.--Any cigarettes that have been sold, offered
8 for sale or possessed for sale in this Commonwealth in violation
9 of section 302 shall be deemed to be contraband and shall be
10 subject to seizure and forfeiture.

11 (c) Equitable relief.--The Attorney General may seek
12 injunctive relief or other order to prevent a threatened or
13 actual violation of or to ensure compliance by a cigarette
14 stamping agent with section 302 or 306.

15 (d) Grading.--A violation of section 302 is a misdemeanor of
16 the third degree.

17 (e) Separate offenses.--Each stamp affixed and each offer to
18 sell cigarettes in violation of section 302 shall constitute a
19 separate offense.

20 Section 308. Recovery of costs and fees by Attorney General.

21 In an action to enforce this act, the Commonwealth shall be
22 entitled to recover costs, including the cost of investigation,
23 expert witness fees and reasonable attorney fees.

24 Section 309. Disgorgement of profits for violations.

25 If a court determines that a person has violated this act,
26 the court shall order any profits, gain, gross receipts or other
27 benefit from the violation to be disgorged and paid to the
28 Commonwealth.

29 Section 310. Notice and review of determination.

30 A determination by the Attorney General to exclude or remove

1 a brand family or tobacco product manufacturer from the
2 directory may be appealed by a manufacturer by filing a petition
3 for review with the Commonwealth Court within 21 days of the
4 determination. No party other than the manufacturer may
5 challenge a determination by the Attorney General.

6 Section 311. Regulations.

7 (a) Attorney General.--The Attorney General may promulgate
8 regulations necessary to enforce this act.

9 (b) Department of Revenue.--The Department of Revenue shall
10 promulgate regulations as are necessary to ascertain the amount
11 of State tax paid on the cigarettes of a tobacco product
12 manufacturer for each year.

13 CHAPTER 21

14 MISCELLANEOUS PROVISIONS

15 Section 2101. Severability.

16 The provisions of this act are severable. If any provision of
17 this act or its application to any person or circumstance is
18 held invalid, the invalidity shall not affect other provisions
19 or applications of this act which can be given effect without
20 the invalid provision or application.

21 Section 2102. Effective date.

22 This act shall take effect as follows:

23 (1) Sections 302, 307, 308 and 309 shall take effect 15
24 days following the date of publication in the Pennsylvania
25 Bulletin of the notice required under section 301(4).

26 (2) The remainder of this act shall take effect
27 immediately.