

HB 1209

AN ACT

Amending the act of December 30, 2003 (P.L.441, No.64), entitled "An act requiring certifications by tobacco product manufacturers; providing for a directory of cigarettes approved for stamping and sale; conferring powers and imposing duties on the Attorney General and the Department of Revenue; and imposing penalties," in preliminary provisions, further providing for definitions; in tobacco product manufacturers directory, further providing for directory, for certification, for required information, for agent for service of process and for records and reporting and providing for nonparticipating manufacturer and importer joint and several liability and for surety bond requirements; and imposing duties on the Office of Attorney General.

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

Section 1. The definition of "units sold" in section 102 of the act of December 30, 2003 (P.L.441, No.64), known as the Tobacco Product Manufacturer Directory Act, is amended and the section is amended by adding definitions to read:
Section 102. Definitions.

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

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"Importer." A person in any state or territory of the United States to whom cigarettes that are manufactured outside the United States are shipped, delivered or consigned for resale.

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"Nonparticipating Manufacturer Adjustment Settlement Agreement." The settlement agreement and related documents entered into on June 20, 2018, by the Commonwealth and the participating manufacturers settling certain disputes regarding application of adjustments to payments made pursuant to the Master Settlement Agreement.

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"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 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; by taxes collected by the Commonwealth on "roll-your-own" tobacco containers which are not required to have a tax stamp under section 1215 of the Tax Reform Code of 1971; and by taxes collected by the Commonwealth on cigarettes sold without a tax stamp, when authorized by the Department of Revenue, under section 1215(h) of the Tax Reform Code of 1971.] on which the Commonwealth has authority under Federal law to collect State excise tax, notwithstanding whether the State excise taxes were imposed or collected by the Commonwealth. Cigarettes that are

exempt from State excise taxes under Federal law are specifically excluded from this definition.

Section 2. Section 301 introductory paragraph, (1)(ii) and (iv) of the act are amended and the paragraph is amended by adding a subparagraph to read:

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] **publicly accessible Internet website**. 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:

* * *

(ii) The manufacturer has failed to make any payment required under the Tobacco Settlement Agreement Act, including applicable penalties, for any period for any brand family, whether or not listed by the tobacco product manufacturer, including all payments or penalties required from prior manufacturers of those brands, into a qualified escrow fund approved by the Attorney General. **For purposes of retention on the directory, the Commonwealth's recovery of any amount from execution of a bond under section 313 shall not excuse a manufacturer's failure to timely deposit escrow as required by the Tobacco Settlement Agreement Act, notwithstanding if the bond fully covers the escrow owed and any other costs, fees or penalties that may be applicable.**

* * *

(iv) The requirements of section 303(a), 304(b), 312 or 313 have not been satisfied.

(v) **The Commonwealth has executed upon a bond under section 313 due to the manufacturer's failure to timely deposit escrow as required. This ground for exclusion or removal from the directory shall remain notwithstanding whether the manufacturer's escrow obligations and other costs were fully covered by the amount recovered by the Commonwealth under the bond.**

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Section 3. Section 303(a) of the act is amended by adding a paragraph to read:

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:

* * *

(3) The nonparticipating manufacturer has posted the bond required under section 313.

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Section 4. Section 304(b) of the act is amended to read:
Section 304. Required information.

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

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

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

(3) The following:

(i) The name, address and telephone number of the financial institution where the nonparticipating manufacturer [has] **and its importers have** established [its] **a** qualified escrow fund.

(ii) The account number of [the] **each** qualified escrow fund and [any] **each** subaccount number for the escrow account established for the benefit of the Commonwealth.

(iii) The amount the nonparticipating manufacturer **and its importers** placed in [the fund] **qualified escrow funds** for cigarettes sold in this Commonwealth during the preceding calendar year, the date and amount of each deposit and any other evidence of the deposit required by the Attorney General.

(iv) The amount and date of any withdrawal or transfer of funds the nonparticipating manufacturer **or its importers** made from [the] qualified escrow [fund] **funds** at any time or from any other qualified escrow fund into which the nonparticipating manufacturer **or its importers** made escrow payments under the Tobacco Settlement Agreement Act.

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

(4) **If the nonparticipating manufacturer's cigarettes are manufactured outside of the United States, a complete list of its importers into the United States who sell cigarettes into this Commonwealth and the brand families sold by the importers, including the importer's name, address, contact name, phone number and email address at which the importer can be reached, and a declaration signed by each importer on a form prescribed by the Attorney General. The declaration shall state the following:**

(i) **The importer accepts joint and several liability with the nonparticipating manufacturer for each obligation to place money into a qualified escrow fund and for payment of civil penalties, costs, expenses and attorney's fees related to the nonparticipating manufacturer's failure to deposit escrow as required.**

(ii) **The importer consents to personal jurisdiction in this Commonwealth for the purposes of claims by the Commonwealth for any obligations to place money into a qualified escrow fund and for payment of civil penalties, costs, expenses and attorney's fees related to the escrow obligations.**

(iii) **The importer has appointed an agent for service of process in this Commonwealth according to the same requirements under section 305.**

(iv) **The importer holds a valid permit under 26 U.S.C. § 5713 (relating to permit).**

(v) The importer agrees to provide any information required under this act.

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Section 5. Section 305 of the act is amended by adding a subsection to read:

Section 305. Agent for service of process.

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(d) Importers.--Each importer of cigarettes into the United States of any nonparticipating manufacturer's brand families that are sold in this Commonwealth shall appoint an agent for service of process located in this Commonwealth pursuant to the same requirements provided by this section. The importers shall be subject to personal jurisdiction within this Commonwealth. The nonparticipating manufacturer shall bear responsibility for ensuring its importers' compliance with this act. Failure to ensure compliance shall constitute grounds for removal of the nonparticipating manufacturer's brand families from the directory.

Section 6. Section 306(c) of the act is amended to read: Section 306. Records and reporting.

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(c) Disclosure.--The department may disclose to the Attorney General any information received under this section. The department and the Attorney General shall share information received under this [section with other Federal, State and local agencies as necessary to enforce this act or related laws of other states.] chapter, the act of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code, or the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, with:

(1) other Federal, State and local agencies as necessary to determine compliance with and enforcement of this act or related laws of other states; or

(2) the data clearinghouse and the participating manufacturer's counsel as provided by the Nonparticipating Manufacturer Adjustment Settlement Agreement to determine the proper amount of any payment, offset, adjustment or refund pursuant to the Master Settlement Agreement or the Nonparticipating Manufacturer Adjustment Settlement Agreement.

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Section 7. The act is amended by adding sections to read: Section 312. Nonparticipating manufacturer and importer joint and several liability.

In the case of nonparticipating manufacturers located outside of the United States, each importer into the United States of any nonparticipating manufacturer's brand families that are sold in this Commonwealth shall bear joint and several liability with the nonparticipating manufacturer for deposit of all escrow due under section 4(a) of the Tobacco Settlement Agreement Act and payment of all civil penalties, fees, costs and attorney fees due under section 4(c) and (d) of the Tobacco Settlement Agreement Act.

Section 313. Surety bond requirements.

(a) Requirements.--All nonparticipating manufacturers shall post a bond for the benefit of the Commonwealth, which shall be:

(1) Subject to execution under subsection (c).

(2) Conditioned on the nonparticipating manufacturer's compliance with the requirements of this act and the Tobacco Settlement Agreement Act.

(3) Posted by a surety bond company located within this Commonwealth.

(4) Posted or adjusted at least 21 days prior to every calendar quarter.

(5) Provided to the Attorney General at least 21 days in advance of each calendar quarter as a precondition for the nonparticipating manufacturer and its brand families being included on the directory for that quarter. If the amount required to be posted under subsection (b) is equal to or lower than the amount already posted, the nonparticipating manufacturer shall not be required to post a new bond and may comply with this section by providing evidence that the bond already posted will remain in effect for the next calendar year or quarter, whichever is applicable.

(b) Amount.--The amount of the bond required by subsection (a) shall be the greater of:

(1) \$25,000;

(2) for a nonparticipating manufacturer that deposits escrow annually, the highest collective amount of escrow owed in this Commonwealth by the nonparticipating manufacturer or its predecessor for any four consecutive calendar quarters out of the past 12 calendar quarters;

(3) for a nonparticipating manufacturer that deposits escrow quarterly, the highest amount of escrow owed in this Commonwealth by the nonparticipating manufacturer or its predecessor for any of the past 12 calendar quarters; or

(4) for a nonparticipating manufacturer that, at the time of its application, is not included on the directory and is applying for initial inclusion or reinclusion on the directory, an amount determined by the Attorney General to adequately protect the Commonwealth's interest in enforcing the Tobacco Settlement Agreement Act and this act, considering:

(i) the nonparticipating manufacturer's prior sales history selling within this Commonwealth or in other states, territories or countries;

(ii) the nonparticipating manufacturer's history of compliance with Federal or State tobacco regulations;

(iii) the financial state of the nonparticipating manufacturer; and

(iv) any other factors that the Attorney General deems pertinent to the determination.

(c) Execution upon bond.--If a nonparticipating manufacturer that posted a bond has failed to make, or have made on its behalf by its importer with joint and several liability, escrow deposits equal to the full amount due for the certification within 15 days following the due date for the certification under section 4 of the Tobacco Settlement Agreement Act, the Attorney General may execute upon the bond, first to recover delinquent escrow, then to recover civil penalties and costs authorized by section 4 of the Tobacco Settlement Agreement Act, all of which, including escrow, shall be deposited into the General Fund. Escrow obligations, civil penalties, costs, fees and disgorgement of profits determined to be due under this act or the Tobacco Settlement Agreement Act that are above the amount collected on the bond shall remain from the nonparticipating manufacturer and from any importer that sold cigarettes during the period of default. Any delinquent escrow recovered under this subsection shall reduce the amount of escrow due from the nonparticipating manufacturer by the dollar amount collected.

Section 8. The following shall apply:

(1) The Office of Attorney General shall attempt to obtain the consent of the participating manufacturers under the Master Settlement Agreement, as defined in section 102 of the act, to the amendment or addition of the following provisions of the act:

(i) The definitions of "importer," "Nonparticipating Manufacturer Adjustment Settlement Agreement" and "units sold" in section 102.

(ii) Section 301(1)(ii), (iv) and (v).

(iii) Section 303(a)(3).

(iv) Section 304(b).

(v) Section 305(d).

(vi) Section 306(c).

(vii) Section 312.

(viii) Section 313.

(2) If consent is obtained under paragraph (1), the Office of Attorney General shall:

(i) provide notice to the Secretary of Revenue; and

(ii) transmit notice of the consent to the Legislative Reference Bureau for publication in the next available issue of the Pennsylvania Bulletin.

(3) If consent is not obtained under paragraph (1), the Office of Attorney General shall:

(i) notify the Secretary of Revenue; and

(ii) transmit notice of the refusal to the Legislative Reference Bureau for publication in the next available issue of the Pennsylvania Bulletin.

Section 9. This act shall take effect as follows:

(1) This section and section 8 of this act shall take effect immediately.

(2) The remainder of this act shall take effect 60 days after publication of the notice of consent under section 8(2)(ii) of this act.

APPROVED--The 11th day of October, A.D. 2023.

JOSH SHAPIRO