

No. 2003-64

AN ACT

SB 924

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.

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

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CHAPTER 1
PRELIMINARY PROVISIONS

Section 101. Short title.

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

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:

“Adjusted for inflation.” Increased in accordance with the formula for inflation adjustment set forth in Exhibit C of the Master Settlement Agreement.

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

“Allocable share.” As that term is defined in the Master Settlement Agreement.

“Brand family.” 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 “100s.” The term includes any 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.” Any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use and consists of or contains any of the following:

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

(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.

(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 paragraph (1).

(4) Any “roll-your-own,” which means 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, 0.09 ounces of “roll-your-own” tobacco shall constitute one individual cigarette.

“Cigarette stamping agent.” Any person licensed as such under Article XII of the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971.

“Department.” The Department of Revenue of the Commonwealth.

“Directory.” The listing of cigarette brands and manufacturers developed by the Attorney General under section 301.

“Master Settlement Agreement.” The settlement agreement and related documents entered into on November 23, 1998, by the Commonwealth and leading United States tobacco product manufacturers and approved by the

court in *Commonwealth v. Philip Morris*, April Term, 1997, No.2443 (C.P. Philadelphia County), on January 13, 1999.

“Nonparticipating manufacturer.” Any tobacco product manufacturer that is not a participating manufacturer.

“Participating manufacturer.” A tobacco product manufacturer that is a party to the Master Settlement Agreement.

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

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

(1) requires that the financial institution hold the principal of the escrowed funds for the benefit of releasing parties as that term is defined in the Master Settlement Agreement; and

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

“Released claims.” As that term is defined in the Master Settlement Agreement.

“Sell” or “sold.” The term includes sales made directly or through a distributor, retailer or similar intermediary.

“Tobacco product manufacturer.”

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

(i) 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 the 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 the 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 the cigarettes does not market or advertise the cigarettes in the United States;

(ii) 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

(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 compliance with section 303.

(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.

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

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

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

(3) The Attorney General shall provide notice to the registered agent of the affected tobacco product manufacturer when the Attorney General determines to add a manufacturer or its brand families or to remove the

manufacturer or its brand families from the directory. A determination of the Attorney General to remove a tobacco product manufacturer or brand families from the directory shall take effect 21 days after notice of that determination appears in the directory.

(4) The Attorney General shall publish the directory under this section within 90 days after the effective date of this section. Upon initial publication of the directory, the 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 and continuously maintains a qualified escrow fund and has executed a qualified escrow agreement approved by the Attorney General.

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

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

Section 304. Required information.

(a) **Participating manufacturers.**—A participating manufacturer shall include in its certification a list of its brand families. A supplemental certification shall be filed if brand families change during the year.

(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 established its qualified escrow fund.

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

(iii) The amount the nonparticipating manufacturer placed in the fund 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 made from the qualified escrow fund at any time or from any other qualified escrow fund into which the nonparticipating manufacturer 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.

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

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

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

(d) **Escrow fund.**—A nonparticipating manufacturer whose products have not previously been sold in this Commonwealth shall deposit funds into a qualified escrow fund on a quarterly basis during the first 12 months it has sales in this Commonwealth and shall file supplemental certifications with the Attorney General. The deposit and certification for sales in the first

calendar quarter shall be due May 15, the deposit and certification for the second calendar quarter shall be due August 15, the deposit and certification for the third calendar quarter shall be due November 15, and the deposit and certification for the fourth calendar quarter shall be due February 15 of the following year.

(e) Construction.—Nothing in this section shall be construed as limiting or otherwise affecting the Commonwealth'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 and the Tobacco Settlement Agreement Act.

Section 305. Agent for service of process.

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

(b) Notice.—A nonparticipating manufacturer shall provide notice to the Attorney General 30 calendar days prior to termination of the agent appointed under subsection (a). A nonparticipating manufacturer shall provide proof, as required by the Attorney General, of the appointment of a new agent no less than five calendar days prior to the termination of an existing agent. In the event an agent terminates the appointment, the nonparticipating manufacturer shall notify the Attorney General of the termination within five calendar days and include proof, as required by the Attorney General, of the appointment of a new agent.

(c) Secretary of Commonwealth.—A nonparticipating manufacturer whose products are sold in this Commonwealth without the appointment of an agent under this section shall be deemed to have appointed the Secretary of the Commonwealth as its agent and may be proceeded against in the courts of this Commonwealth by service of process upon the Secretary of the Commonwealth. The appointment of the Secretary of the Commonwealth under this subsection shall not serve as a condition precedent for including or retaining the brand families of the nonparticipating manufacturer in the directory.

Section 306. Records and reporting.

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

(b) Reporting.—Not later than 20 days following the end of each month, a cigarette stamping agent shall submit to the department information required by the department or the Attorney General to facilitate compliance with this act, including 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 cigarette stamping agent affixed stamps during the previous calendar month or otherwise paid the tax due. The cigarette stamping agent shall maintain and make available to the department and the Attorney General all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon to make reports under this subsection for a period of five years. The first report of cigarette stamping agents for the year 2003 required by this subsection shall be due 30 days after the effective date of this section.

(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.

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

(e) Additional information.—The department or the Attorney General may require a cigarette stamping agent or tobacco product manufacturer to submit additional information, including samples of the packaging or labeling of each brand family, as necessary to enable the Attorney General to determine whether a tobacco product manufacturer is in compliance with this act.

Section 307. Penalties.

(a) License sanctions.—In addition to or in lieu of any other civil or criminal penalty, if the department determines that a cigarette stamping agent has violated section 302, the department may revoke or suspend the license of the agent. The department may also assess a civil penalty in an amount not to exceed 500% of the retail value of the cigarettes sold. An appeal from a determination by the department shall be conducted in accordance with section 207-A of the act of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code.

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

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

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

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

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

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

Section 309. Disgorgement of profits for violations.

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 Commonwealth.

Section 310. Notice and review of determination.

A determination by the Attorney General to exclude or remove a brand family or tobacco product manufacturer from the directory may be appealed by a manufacturer by filing a petition for review with the Commonwealth Court within 21 days of the determination. No party other than the manufacturer may challenge a determination by the Attorney General.

Section 311. Regulations.

(a) Attorney General.—The Attorney General may promulgate regulations necessary to enforce this act.

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

CHAPTER 21 MISCELLANEOUS PROVISIONS

Section 2101. Severability.

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

Section 2102. Effective date.

This act shall take effect as follows:

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

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

APPROVED—The 30th day of December, A.D. 2003.

EDWARD G. RENDELL