

HOUSE BUSINESS AND INDUSTRY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 287

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

AN ACT

RELATING TO TOBACCO; AMENDING THE CIGARETTE ENFORCEMENT ACT;
AMENDING THE TOBACCO ESCROW FUND ACT; AMENDING THE CIGARETTE
TAX ACT; REQUIRING ADDITIONAL DOCUMENTATION PRIOR TO DELIVERY
SALES OF CIGARETTES; REQUIRING CERTAIN TOBACCO PRODUCTS
MANUFACTURERS AND IMPORTERS TO POST BONDS; GRANTING ADDITIONAL
POWERS TO THE ATTORNEY GENERAL; IMPOSING JOINT AND SEVERAL
LIABILITY ON CERTAIN TOBACCO PRODUCTS MANUFACTURERS AND
IMPORTERS; IMPOSING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 6-4-12 NMSA 1978 (being Laws 1999,
Chapter 208, Section 1) is amended to read:

"6-4-12. DEFINITIONS.--As used in ~~[this act]~~ Sections
6-4-12 and 6-4-13 NMSA 1978:

A. "adjusted for inflation" means increased in

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1 accordance with the formula for inflation adjustment set forth
2 in Exhibit C to the master settlement agreement;

3 B. "affiliate" means a person who directly or
4 indirectly owns or controls, is owned or controlled by, or is
5 under common ownership or control with, another person. Solely
6 for purposes of this definition, the terms "owns", "is owned"
7 and "ownership" mean ownership of an equity interest, or the
8 equivalent thereof, of ten percent or more, and the term
9 "person" means an individual, partnership, committee,
10 association, corporation or any other organization or group of
11 persons;

12 C. "allocable share" means Allocable Share as that
13 term is defined in the master settlement agreement;

14 D. "cigarette" means any product that contains
15 nicotine, is intended to be burned or heated under ordinary
16 conditions of use, and consists of or contains:

17 (1) any roll of tobacco wrapped in paper or in
18 any substance not containing tobacco; or

19 (2) tobacco, in any form, that is functional
20 in the product, which, because of its appearance, the type of
21 tobacco used in the filler, or its packaging and labeling, is
22 likely to be offered to, or purchased by, consumers as a
23 cigarette; or

24 (3) any roll of tobacco wrapped in any
25 substance containing tobacco which, because of its appearance,

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1 the type of tobacco used in the filler, or its packaging and
2 labeling, is likely to be offered to, or purchased by,
3 consumers as a cigarette described in [~~clause (1) of this~~
4 ~~definition~~] Paragraph (1) of this subsection. The term
5 "cigarette" includes "roll-your-own" (i.e., any tobacco which,
6 because of its appearance, type, packaging, or labeling is
7 suitable for use and likely to be offered to, or purchased by,
8 consumers as tobacco for making cigarettes). For purposes of
9 this definition of "cigarette", 0.09 ounces of "roll-your-own"
10 tobacco shall constitute one individual "cigarette";

11 E. "master settlement agreement" means the
12 settlement agreement (and related documents) entered into on
13 November 23, 1998 by the state and leading United States
14 tobacco product manufacturers;

15 F. "qualified escrow fund" means an escrow
16 arrangement with a federally or state chartered financial
17 institution having no affiliation with any tobacco product
18 manufacturer and having assets of at least one billion dollars
19 (\$1,000,000,000) where such arrangement requires that such
20 financial institution hold the escrowed funds' principal for
21 the benefit of releasing parties and prohibits the tobacco
22 product manufacturer placing the funds into escrow from using,
23 accessing or directing the use of the funds' principal except
24 as consistent with Subsection B of Section [~~2 of this act~~]
25 6-4-13 NMSA 1978;

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1 G. "released claims" means Released Claims as that
2 term is defined in the master settlement agreement;

3 H. "releasing parties" means Releasing Parties as
4 that term is defined in the master settlement agreement;

5 I. "tobacco product manufacturer" means an entity
6 that after the date of enactment of this act directly (and not
7 exclusively through any affiliate):

8 (1) manufactures cigarettes anywhere that such
9 manufacturer intends to be sold in the United States, including
10 cigarettes intended to be sold in the United States through an
11 importer (except where such importer is an original
12 participating manufacturer (as that term is defined in the
13 master settlement agreement) that will be responsible for the
14 payments under the master settlement agreement with respect to
15 such cigarettes as a result of the provisions of subsection
16 II(mm) of the master settlement agreement and that pays the
17 taxes specified in subsection II(z) of the master settlement
18 agreement, and provided that the manufacturer of such
19 cigarettes does not market or advertise such cigarettes in the
20 United States);

21 (2) is the first purchaser anywhere for resale
22 in the United States of cigarettes manufactured anywhere that
23 the manufacturer does not intend to be sold in the United
24 States; or

25 (3) becomes a successor of an entity described

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1 in Paragraph (1) or (2) of this subsection.

2 The term "tobacco product manufacturer" shall not include
3 an affiliate of a tobacco product manufacturer unless such
4 affiliate itself falls within Paragraph (1), (2) or (3) of this
5 subsection; and

6 J. "units sold" means the number of individual
7 cigarettes sold in the state by the applicable tobacco product
8 manufacturer (whether directly or through a distributor,
9 retailer or similar intermediary or intermediaries) during the
10 year in question, as measured by excise taxes collected [~~by the~~
11 ~~state on packs (or "roll-your-own" tobacco containers) bearing~~
12 ~~the excise tax stamp of the state~~], ounces of "roll-your-own"
13 tobacco sold and sales of products bearing tax-exempt stamps on
14 packs or "roll-your-own" tobacco containers. The secretary of
15 taxation and revenue shall promulgate such [~~regulations~~] rules
16 as are necessary to ascertain the amount of state excise tax
17 paid on the cigarettes of such tobacco product manufacturer for
18 each year."

19 Section 2. Section 6-4-14 NMSA 1978 (being Laws 2003,
20 Chapter 114, Section 1) is amended to read:

21 "6-4-14. SHORT TITLE.--~~[This act]~~ Sections 6-4-14 through
22 6-4-24 NMSA 1978 may be cited as the "Tobacco Escrow Fund
23 Act"."

24 Section 3. Section 6-4-17 NMSA 1978 (being Laws 2003,
25 Chapter 114, Section 4) is amended to read:

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1 "6-4-17. CERTIFICATION BY TOBACCO PRODUCT MANUFACTURER.--

2 A. No later than April 30 of each year, a tobacco
3 product manufacturer whose cigarettes are sold in this state,
4 whether directly or through a distributor, retailer or similar
5 intermediary, shall execute and deliver to the attorney
6 general, in the manner and on the form prescribed by the
7 attorney general requesting such information as the attorney
8 general deems reasonably necessary to make the determination
9 required by Section 6-4-18 NMSA 1978, a certification pursuant
10 to this section. The certification shall:

11 (1) be made under penalty of perjury;

12 (2) state that as of the date of the
13 certification, the tobacco product manufacturer is either a
14 participating or a nonparticipating manufacturer; and

15 (3) include the information required pursuant
16 to [~~Subsections~~] Subsection B or C of this section.

17 B. In its certification, a participating
18 manufacturer shall include a complete list of its brand
19 families.

20 C. In its certification, a nonparticipating
21 manufacturer shall:

22 (1) certify that it is registered to do
23 business in the state or has appointed an agent for service of
24 process and has provided written notice to the attorney general
25 in accordance with Section [~~7 of the Tobacco Escrow Fund Act~~]

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1 6-4-20 NMSA 1978;

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

6 (3) certify that it has established and
7 maintains a qualified escrow fund governed by a qualified
8 escrow agreement that has been reviewed and approved by the
9 attorney general and provide:

10 (a) the name, address and telephone
11 number of the financial institution where the fund is
12 established;

13 (b) the account number of the fund and
14 the subaccount number for the state;

15 (c) the amounts placed in the fund for
16 cigarettes sold in the state during the preceding calendar
17 year, including the date and amount of each deposit and any
18 other evidence or verification of the amounts as the attorney
19 general deems necessary; and

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

25 (4) include a complete list of its brand

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1 families and:

2 (a) separately list the number of units
3 sold in the state for each brand family during the preceding
4 calendar year, indicating any brand family sold in the state
5 during the preceding calendar year that is no longer being sold
6 as of the date of certification; and

7 (b) indicate all of its brand families
8 that have been sold in the state at any time during the current
9 calendar year, identifying by name and address any other
10 manufacturer of [~~such~~] the brand families in the preceding or
11 current calendar year.

12 D. In its certification, a nonparticipating
13 manufacturer located outside of the United States shall also:

14 (1) certify that it has provided a
15 declaration, on a form prescribed by the attorney general, from
16 each of its importers into the United States of any of its
17 brand families to be sold in New Mexico that the importer
18 accepts joint and several liability with the nonparticipating
19 manufacturer for all escrow deposits due in accordance with
20 Section 6-4-13 NMSA 1978, for all penalties assessed in
21 accordance with Section 6-4-13 NMSA 1978 and for payment of all
22 costs and attorney fees imposed in accordance with the Tobacco
23 Escrow Fund Act or Section 6-4-13 NMSA 1978; and

24 (2) certify that it has appointed a resident
25 agent for service of process in New Mexico in accordance with

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1 Section 6-4-20 NMSA 1978.

2 ~~[D.]~~ E. A tobacco product manufacturer may not
3 include a 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 in the volume and shares determined
9 pursuant to the master settlement agreement; or

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

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

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

24 ~~[G.]~~ H. Nothing in this section shall limit or
25 otherwise affect the state's right to maintain that a brand

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1 family constitutes cigarettes of a different tobacco product
2 manufacturer for purposes of calculating payments under the
3 master settlement agreement or for purposes of Section 6-4-13
4 NMSA 1978."

5 Section 4. Section 6-4-18 NMSA 1978 (being Laws 2003,
6 Chapter 114, Section 5) is amended to read:

7 "6-4-18. DIRECTORY OF TOBACCO PRODUCT MANUFACTURERS AND
8 CIGARETTE BRANDS.--

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

14 The attorney general shall not include or retain in the
15 directory a [~~nonparticipating manufacturer~~] name or brand
16 family if:

17 (1) the participating manufacturer fails to
18 provide the required certification or to make a payment
19 calculated by an independent auditor to be due from it under
20 the master settlement agreement except to the extent that it is
21 disputing such payment;

22 [~~(1)~~] (2) the nonparticipating manufacturer
23 fails to provide the required certification or the attorney
24 general determines that its certification is not in compliance
25 with Section [~~4 of the Tobacco Escrow Fund Act~~] 6-4-17 NMSA

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1 1978; or

2 [~~2~~] (3) the attorney general concludes that:

3 (a) all escrow payments required by
4 Section 6-4-13 NMSA 1978 for any period for any brand family,
5 whether or not listed by the nonparticipating manufacturer,
6 have not been fully paid into a qualified escrow fund governed
7 by a qualified escrow agreement that has been approved by the
8 attorney general; [~~or~~]

9 (b) [~~all~~] any outstanding final
10 judgments, including interest thereon, for violations of
11 Section 6-4-13 NMSA 1978 have not been fully satisfied for the
12 brand family or the nonparticipating manufacturer;

13 (c) for a nonparticipating manufacturer
14 or a tobacco product manufacturer that became a participating
15 manufacturer after the master settlement agreement in New
16 Mexico or in any other state, or any of its principals, the
17 nonparticipating manufacturer or tobacco product manufacturer
18 fails to provide reasonable assurance that it will comply with
19 the requirements of the Tobacco Escrow Fund Act; or

20 (d) the manufacturer has knowingly
21 failed to disclose any material information required or
22 knowingly made any material false statement in the
23 certification of any supporting information or documentation
24 provided.

25 B. As used in this section, "reasonable assurances"

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1 means information and documentation establishing to the
2 satisfaction of the attorney general that a failure to pay in
3 New Mexico or elsewhere was the result of a good faith dispute
4 over the payment obligation.

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

10 [C.] D. A distributor shall provide a current
11 electronic mail address to the attorney general for the purpose
12 of receiving notifications as may be required pursuant to the
13 Tobacco Escrow Fund Act."

14 Section 5. A new section of the Tobacco Escrow Fund Act,
15 Section 6-4-18.1 NMSA 1978, is enacted to read:

16 "6-4-18.1. [NEW MATERIAL] BOND REQUIREMENTS FOR NEWLY
17 QUALIFIED AND ELEVATED RISK NONPARTICIPATING MANUFACTURERS.--

18 A. The attorney general may require a
19 nonparticipating manufacturer to post a bond for the first
20 three years of the manufacturer's listing in the directory or
21 for a longer period if the manufacturer has been determined to
22 pose an elevated risk for noncompliance with the Tobacco Escrow
23 Fund Act. The attorney general may consult with other states
24 to determine the viability of a potential nonparticipating
25 manufacturer and may impose additional requirements to protect

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1 state interests.

2 B. Notwithstanding any other provision of law, if a
3 nonparticipating manufacturer is to be listed in the directory,
4 and if the attorney general reasonably determines that a
5 nonparticipating manufacturer that has filed a certification
6 pursuant to Section 6-4-17 NMSA 1978 poses an elevated risk for
7 noncompliance with the Tobacco Escrow Fund Act, the
8 nonparticipating manufacturer and any of its brand families
9 shall not be included in the directory until the
10 nonparticipating manufacturer, or its United States importer
11 that undertakes joint and several liability for the
12 manufacturer's performance in accordance with Section 6-4-20
13 NMSA 1978, has posted bond in accordance with this section.

14 C. The bond shall be posted by a corporate surety
15 located within the United States in an amount equal to the
16 greater of fifty thousand dollars (\$50,000) or the amount of
17 escrow the manufacturer, in either its current or predecessor
18 form, was required to deposit as a result of its previous
19 calendar year sales in New Mexico. The bond shall be written
20 in favor of the state of New Mexico and shall be conditioned on
21 the performance by the nonparticipating manufacturer or its
22 United States importer that undertakes joint and several
23 liability for the manufacturer's performance in accordance with
24 all of its obligations under the Tobacco Escrow Fund Act or
25 Section 6-4-13 NMSA 1978 during the year in which the

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1 certification is filed and the next succeeding calendar year.

2 D. A nonparticipating manufacturer may be deemed to
3 pose an elevated risk for noncompliance with this section or
4 Section 6-4-13 NMSA 1978 if:

5 (1) the nonparticipating manufacturer or any
6 of its affiliates has underpaid an escrow obligation within the
7 past three calendar years, unless:

8 (a) the manufacturer did not make
9 underpayment knowingly or recklessly and the manufacturer
10 promptly cured the underpayment within one hundred eighty days
11 of notice; or

12 (b) the underpayment or lack of payment
13 is the subject of a good faith dispute as documented to the
14 satisfaction of the attorney general and the underpayment is
15 cured within one hundred eighty days of entry of a final order
16 establishing the amount of the required escrow payment;

17 (2) any state has removed the manufacturer or
18 its brands or brand families or an affiliate or any of the
19 affiliate's brands or brand families from the state's tobacco
20 directory for noncompliance with the state law at any time
21 within the past three calendar years; or

22 (3) any state has litigation pending against,
23 or an unsatisfied judgment against, the manufacturer or any of
24 its affiliates for escrow or for penalties, costs or attorney
25 fees related to noncompliance with the state escrow laws.

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1 E. As used in this section, "newly qualified
2 nonparticipating manufacturer" means a nonparticipating
3 manufacturer that has not previously been listed in the
4 directory."

5 Section 6. Section 6-4-20 NMSA 1978 (being Laws 2003,
6 Chapter 114, Section 7) is amended to read:

7 "6-4-20. AGENT FOR SERVICE OF PROCESS.--

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

21 B. A nonparticipating manufacturer located outside
22 of the United States shall, as an additional condition
23 precedent to having its brand families listed or retained in
24 the directory, cause each of its importers of any of its brand
25 families to be sold in New Mexico to appoint, and continually

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1 engage without interruption, the services of an agent in the
2 state in accordance with the provisions of this section. All
3 obligations of a nonparticipating manufacturer imposed by this
4 section with respect to appointment of its agent shall also
5 apply to the importers with respect to appointment of their
6 agents.

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

23 ~~[C.]~~ D. A nonparticipating manufacturer whose
24 products are sold in this state without appointing or
25 designating an agent as required by this section shall be

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[bracketed material] = delete

1 deemed to have appointed the secretary of state as agent and
 2 may be proceeded against in the courts of this state by service
 3 of process upon the secretary of state; provided that the
 4 appointment of the secretary of state as agent shall not
 5 satisfy any other requirement of the Tobacco Escrow Fund Act."

6 Section 7. A new section of the Tobacco Escrow Fund Act,
 7 Section 6-4-20.1 NMSA 1978, is enacted to read:

8 "6-4-20.1. [NEW MATERIAL] JOINT AND SEVERAL LIABILITY.--
 9 For each nonparticipating manufacturer located outside the
 10 United States, each importer into the United States of the
 11 nonparticipating manufacturer's brand families that are sold in
 12 New Mexico shall bear joint and several liability with the
 13 nonparticipating manufacturer for deposit of all escrow amounts
 14 due under Section 6-4-13 NMSA 1978, payment of all penalties
 15 imposed in accordance with Section 6-4-13 NMSA 1978 and payment
 16 of all costs and attorney fees imposed in accordance with the
 17 Tobacco Escrow Fund Act."

18 Section 8. Section 6-4-22 NMSA 1978 (being Laws 2003,
 19 Chapter 114, Section 9) is amended to read:

20 "6-4-22. PENALTIES AND OTHER REMEDIES.--

21 A. It is unlawful for a person to:

22 (1) affix a tax stamp or otherwise pay the tax
 23 due on a package or other container of cigarettes of a tobacco
 24 product manufacturer or a brand family that is not included in
 25 the directory; or

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1 (2) sell, offer for sale or possess for [~~sale~~]
2 any purpose other than personal use cigarettes of a tobacco
3 product manufacturer or a brand family that is not included in
4 the directory.

5 B. The secretary may revoke or suspend the
6 registration or license of a person licensed or registered
7 pursuant to Section [~~7-12-9~~] 7-12-9.1 or 7-12A-7 NMSA 1978 that
8 violates Subsection A of this section.

9 C. Each stamp affixed, payment of tobacco tax,
10 offer to sell, possession for [~~sale~~] any purpose other than
11 personal use or sale of cigarettes in violation of Subsection A
12 of this section constitutes a separate violation. For each
13 violation, the secretary may impose a civil penalty in an
14 amount not to exceed the greater of five thousand dollars
15 (\$5,000) or five hundred percent of the retail value of the
16 cigarettes sold, offered for sale or possessed for [~~sale~~] any
17 purpose other than personal use.

18 D. Cigarettes that have been sold, offered for sale
19 or possessed for [~~sale~~] any purpose other than personal use in
20 this state in violation of Subsection A of this section are
21 contraband, are subject to seizure and forfeiture and shall be
22 destroyed.

23 E. It is unlawful for a person to sell, distribute,
24 acquire, hold, own, possess, transport, import or cause to be
25 imported cigarettes that the person knows or should know are

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[bracketed material] = delete

1 intended for distribution or sale in violation of Subsection A
2 of this section. A person who violates this subsection is
3 guilty of a misdemeanor and shall be sentenced in accordance
4 with Section 31-19-1 NMSA 1978.

5 F. A tobacco product manufacturer, stamping agent
6 or importer of cigarettes, or any officer, employee or agent of
7 any such entity, who knowingly makes any materially false
8 statement in any record required by the Tobacco Escrow Fund Act
9 or Section 6-4-13 NMSA 1978 to be filed with the attorney
10 general is guilty of a fourth degree felony and upon conviction
11 shall be sentenced pursuant to the provisions of Section
12 31-18-15 NMSA 1978. Each document filed containing one or more
13 false statements constitutes a separate offense.

14 G. A violation of this section constitutes an
15 unfair and deceptive trade practice pursuant to the Unfair
16 Practices Act.

17 [~~F.~~] H. The attorney general or the department may
18 seek an injunction to compel compliance with or to restrain a
19 threatened or actual violation of Subsection A of this section.
20 In any action brought pursuant to this subsection, the state
21 shall be entitled to recover the costs of investigation, costs
22 of the action and reasonable attorney fees, if the state
23 prevails.

24 I. The attorney general may issue a civil
25 investigative demand based on reasonable belief that any person

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1 may be in possession, custody or control of an original or copy
2 of any book, record, report, memorandum, paper, communication,
3 tabulation, map, chart, photograph, mechanical transcription or
4 other document or recording relevant to the subject matter of
5 an investigation of a probable violation of the Tobacco Escrow
6 Fund Act. The attorney general may, prior to the institution
7 of a civil proceeding, execute in writing and cause to be
8 served upon the person a civil investigative demand requiring
9 the person to produce documentary material and permit the
10 inspection and copying of the material. The demand of the
11 attorney general shall not be a matter of public record and
12 shall not be published except by order of the court.

13 J. For the purposes of this section, fewer than one
14 thousand cigarettes shall be presumed to be for personal use."

15 Section 9. A new Section 6-4-24.1 NMSA 1978 is enacted to
16 read:

17 "6-4-24.1. [NEW MATERIAL] ATTORNEY GENERAL AUTHORITY--
18 AUDIT AND INVESTIGATION.--The attorney general or the attorney
19 general's authorized representative may:

20 A. conduct audits and investigations of:

21 (1) a nonparticipating tobacco product
22 manufacturer and its importers;

23 (2) a tobacco product manufacturer as defined
24 in Section 6-4-12 NMSA 1978 that became a participating
25 manufacturer after the master settlement agreement execution

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1 date, as defined at section II(aa) of the master settlement
2 agreement, and its importers;

3 (3) exclusive distributors, retail dealers,
4 stamping agents and wholesale dealers; and

5 (4) persons or entities engaged in delivery
6 sales; and

7 B. upon reasonable belief that a violation of the
8 Tobacco Escrow Fund Act or Section 6-4-13 NMSA 1978 has
9 occurred or is reasonably likely to occur, issue subpoenas,
10 compel the attendance of witnesses, administer oaths, certify
11 to official acts, take depositions within and without the state
12 as now provided by law and compel the production of pertinent
13 books, payrolls, accounts, papers, records, documents and
14 testimony relevant to an investigation. If a person refuses,
15 without good cause, to be examined or to answer a legal and
16 pertinent question or to produce a document or other evidence
17 when ordered to do so by the attorney general or the attorney
18 general's authorized representative, the attorney general or
19 the attorney general's authorized representative may apply to
20 the judge of the district court of the jurisdiction where the
21 person is in attendance or located, upon affidavit, for an
22 order returnable in no less than two nor more than five days
23 directing the person to show cause why the person should not be
24 examined, answer a legal or pertinent question or produce a
25 document, record or other evidence. Upon a hearing for an

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1 order to show cause, if the court determines that the person,
2 without good cause, has refused to be examined or to answer
3 legal or pertinent questions or to produce a document, record
4 or other evidence, the court may order compliance with the
5 subpoena and assess all costs and reasonable attorney fees
6 against the person. If the motion for an order is granted and
7 the person thereafter fails to comply with the order, the court
8 may make such orders as are provided for in the rules of the
9 supreme court of New Mexico. Subpoenas shall be served and
10 witness fees and mileage paid as allowed in civil cases in the
11 circuit courts of the state."

12 Section 10. A new Section 6-4-24.2 NMSA 1978 is enacted
13 to read:

14 "6-4-24.2. [NEW MATERIAL] PRESUMPTION.--In any action
15 under Section 6-4-13 NMSA 1978, reports of numbers of
16 cigarettes stamped submitted pursuant to Subsection A of
17 Section 6-4-21 NMSA 1978 shall be admissible evidence and shall
18 be presumed to state accurately the number of cigarettes
19 stamped during the time period by the stamping agent that
20 submitted the report, absent a contrary showing by the
21 nonparticipating manufacturer or importer. Nothing in this
22 section shall be construed as limiting or otherwise affecting
23 the state's right to maintain that such reports are incorrect
24 or do not accurately reflect a nonparticipating manufacturer's
25 sales in the state during the time period in question, and the

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1 presumption shall not apply in the event that the state does so
2 maintain."

3 Section 11. Section 7-12-2 NMSA 1978 (being Laws 1971,
4 Chapter 77, Section 2, as amended) is amended to read:

5 "7-12-2. DEFINITIONS.--As used in the Cigarette Tax Act:

6 A. "cigarette" means:

7 (1) any roll of tobacco or any substitute for
8 tobacco wrapped in paper or in any substance not containing
9 tobacco; [~~or~~]

10 (2) any roll of tobacco that is wrapped in any
11 substance containing tobacco, other than one hundred percent
12 natural leaf non-reconstituted tobacco, which, because of its
13 appearance, the type of tobacco used in the filler, its
14 packaging and labeling, or its marketing and advertising, is
15 likely to be offered to, or purchased by, consumers as a
16 cigarette, as described in Paragraph (1) of this subsection
17 [~~and "cigarette" includes~~];

18 (3) bidis, [~~and~~] kreteks and little cigars; or

19 (4) any other roll of tobacco that is defined
20 as a "cigarette" in Subsection D of Section 6-4-12 NMSA 1978;

21 B. "contraband cigarettes" means cigarette packages
22 with counterfeit stamps, counterfeit cigarettes, cigarettes
23 that have false or fraudulent manufacturing labels, cigarettes
24 not sold in packages of five, ten, twenty or twenty-five, [~~and~~]
25 cigarette packages without the tax or tax-exempt stamps

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1 required by the Cigarette Tax Act and cigarettes produced by a
2 manufacturer or in a brand family not included in the
3 directory;

4 C. "department" means the taxation and revenue
5 department, the secretary of taxation and revenue or any
6 employee of the department exercising authority lawfully
7 delegated to that employee;

8 D. "directory" means a listing of tobacco product
9 manufacturers and brand families that is developed, maintained
10 and published by the attorney general under the Tobacco Escrow
11 Fund Act;

12 [~~D.~~] E. "distributor" means a person licensed
13 pursuant to the Cigarette Tax Act to sell or distribute
14 cigarettes in New Mexico. "Distributor" does not include:

15 (1) a retailer;

16 (2) a cigarette manufacturer, export warehouse
17 proprietor or importer with a valid permit pursuant to 26
18 U.S.C. 5713, if that person sells cigarettes in New Mexico only
19 to distributors that hold valid licenses under the laws of a
20 state or sells to an export warehouse proprietor or to another
21 manufacturer; or

22 (3) a common or contract carrier transporting
23 cigarettes pursuant to a bill of lading or freight bill, or a
24 person who ships cigarettes through the state by a common or
25 contract carrier pursuant to a bill of lading or freight bill;

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1 ~~[F.]~~ F. "license" means a license granted pursuant
2 to the Cigarette Tax Act that authorizes the holder to conduct
3 business as a manufacturer or distributor of cigarettes;

4 ~~[F.]~~ G. "manufacturer" means a person that
5 manufactures, fabricates, assembles, processes or labels a
6 cigarette or that imports from outside the United States,
7 directly or indirectly, a finished cigarette for sale or
8 distribution in the United States;

9 ~~[G.]~~ H. "master settlement agreement" means the
10 settlement agreement and related documents entered into on
11 November 23, 1998 by the state and leading United States
12 tobacco product manufacturers;

13 ~~[H.]~~ I. "package" means an individual pack, box or
14 other container; "package" does not include a container that
15 itself contains other containers, such as a carton of
16 cigarettes;

17 ~~[I.]~~ J. "retailer" means a person, whether located
18 within or outside of New Mexico, that sells cigarettes at
19 retail to a consumer in New Mexico and the sale is not for
20 resale;

21 ~~[J.]~~ K. "stamp" means an adhesive label issued and
22 authorized by the department to be affixed to cigarette
23 packages for excise tax purposes and upon which is printed a
24 serial number and the words "State of New Mexico" and "tobacco
25 tax";

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1 ~~[K-]~~ L. "tax stamp" means a stamp that has a
2 specific cigarette tax value pursuant to the Cigarette Tax Act;
3 and

4 ~~[L-]~~ M. "tax-exempt stamp" means a stamp that
5 indicates a tax-exempt status pursuant to the Cigarette Tax
6 Act."

7 Section 12. Section 7-12-17 NMSA 1978 (being Laws 1971,
8 Chapter 77, Section 14, as amended) is amended to read:

9 "7-12-17. REPORTING REQUIREMENTS--PENALTY.--

10 A. Each person who sells in New Mexico cigarettes
11 manufactured by that person or who receives on consignment or
12 buys cigarettes either directly from the manufacturer or from
13 any out-of-state person for resale in New Mexico shall report
14 to the department by the twenty-fifth day of each month that
15 person's sales of cigarettes during the preceding month in each
16 municipality and within that portion of each county outside of
17 the municipalities located in that county. The department
18 shall then advise the state treasurer of the proportion of the
19 total sales of cigarettes for the month within each
20 municipality and within that portion of each county outside of
21 municipalities. The reports of such persons shall, upon
22 receipt by the department, become public records.

23 B. Any person who sells in New Mexico cigarettes
24 manufactured by that person or who receives on consignment or
25 buys cigarettes for resale in New Mexico who willfully fails to

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1 render accurately the reports required by this section and any
 2 municipal or county officer who approves any expenditure or
 3 expends funds distributed from the county and municipality
 4 recreational fund for any purposes other than permitted by
 5 Section 7-12-15 NMSA 1978 is guilty of a petty misdemeanor.

6 C. Any tobacco product manufacturer, stamping agent
 7 or importer of cigarettes, or any officer, employee or agent of
 8 any such entity, who knowingly makes a materially false
 9 statement in any record required to be kept by the Cigarette
 10 Tax Act, or in any report or return required to be filed with
 11 the department by the Cigarette Tax Act is guilty of a fourth
 12 degree felony. Each record kept and each report or return
 13 filed containing one or more false statements shall constitute
 14 a separate offense."

15 Section 13. Section 57-2A-4 NMSA 1978 (being Laws 2000,
 16 Chapter 77, Section 4) is amended to read:

17 "57-2A-4. DOCUMENTATION.--

18 A. On the first business day of each month, each
 19 person licensed or registered to affix a state tax stamp to
 20 cigarettes pursuant to Section [~~7-12-9~~] 7-12-9.1 NMSA 1978
 21 shall file with the department for all cigarettes imported into
 22 the United States to which the person has affixed a tax stamp
 23 in the preceding month:

24 [~~A.~~] (1) copies of:

25 [~~(1)~~] (a) the permit issued pursuant to

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1 26 USCA 5713 to the person importing the cigarettes into the
2 United States allowing the person to import the cigarettes; and

3 ~~[(2)]~~ (b) the customs form containing,
4 with respect to the cigarettes, the internal revenue tax
5 information required by the federal bureau of alcohol, tobacco,
6 firearms and explosives;

7 ~~[B-]~~ (2) a statement signed under penalty of
8 perjury by the person affixing the state tax stamp identifying
9 the brand and brand styles of all the cigarettes, the quantity
10 of each brand style, the supplier of the cigarettes and the
11 person to whom the cigarettes were conveyed for resale and a
12 separate statement by that person under penalty of perjury,
13 which is not confidential or exempt from public disclosure,
14 identifying only the brands and the brand styles of the
15 cigarettes; and

16 ~~[G-]~~ (3) a statement signed under penalty of
17 perjury by an officer of the manufacturer or importer of the
18 cigarettes certifying that the manufacturer or importer has
19 complied with the package health warning and ingredient
20 reporting requirements of 15 USCA Sections 1333 and 1335a with
21 respect to the cigarettes, including a statement indicating
22 whether the manufacturer is or is not a participating
23 manufacturer within the meaning of that federal law.

24 B. Prior to making a delivery sale or mailing,
25 shipping or otherwise delivering cigarettes in connection with

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1 a delivery sale, each person shall file with the department and
2 with the attorney general a statement setting forth the
3 person's name and trade name and the address of the person's
4 principal place of business and any other place of business.

5 C. Not later than the tenth day of each month, each
6 person who has made a delivery sale or mailed, shipped or
7 otherwise delivered cigarettes in connection with a delivery
8 sale during the previous calendar month shall file with the
9 department and with the attorney general a report in the format
10 prescribed by the attorney general, which may include an
11 electronic format, that provides for each delivery sale:

12 (1) the name and address of the customer to
13 whom the delivery sale was made;

14 (2) the brand or brands of cigarettes that
15 were sold in the delivery sale; and

16 (3) the quantity of cigarettes that were sold
17 in the delivery sale.

18 D. Any person who satisfies the requirements of
19 Section 376 of Title 15 of the United States Code shall be
20 deemed to satisfy the requirements of this section.

21 E. For purposes of any penalty that may be imposed
22 for a violation of Subsection B or C of this section, a failure
23 to file a particular statement or report with both the
24 department and the attorney general shall constitute a single
25 violation."

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1 Section 14. Section 57-2A-10 NMSA 1978 (being Laws 2000,
2 Chapter 77, Section 10) is amended to read:

3 "57-2A-10. GENERAL PROVISIONS.--

4 A. The Cigarette Enforcement Act shall be enforced
5 by the department and the attorney general; provided that, at
6 the request of the department, the state police and all local
7 police authorities shall enforce the provisions of the
8 Cigarette Enforcement Act.

9 B. For the purpose of enforcing the Cigarette
10 Enforcement Act, the department or the attorney general may
11 request information from any state or local agency, and may
12 share information with, and request information from, any
13 federal agency and any agency of any other state or any local
14 agency thereof.

15 C. In addition to any other remedy provided by law,
16 including enforcement as provided in Subsection A of this
17 section, any person may bring an action for appropriate
18 injunctive or other equitable relief for a violation of the
19 Cigarette Enforcement Act; actual damages, if any, sustained by
20 reason of the violation; and, as determined by the court,
21 interest on the damages from the date of the complaint, taxable
22 costs and reasonable ~~[attorney's]~~ attorney fees. If the trier
23 of fact finds that the violation is flagrant, it may increase
24 recovery to an amount not in excess of three times the actual
25 damages sustained by reason of the violation."

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