

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
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,

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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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

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.

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

20 H. The attorney general may issue a civil
21 investigative demand based on reasonable belief that any person
22 may be in possession, custody or control of an original or copy
23 of any book, record, report, memorandum, paper, communication,
24 tabulation, map, chart, photograph, mechanical transcription or
25 other document or recording relevant to the subject matter of

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1 an investigation of a probable violation of the Tobacco Escrow
2 Fund Act. The attorney general may, prior to the institution
3 of a civil proceeding, execute in writing and cause to be
4 served upon the person a civil investigative demand requiring
5 the person to produce documentary material and permit the
6 inspection and copying of the material.

7 I. For the purposes of this section, fewer than one
8 thousand cigarettes shall be presumed to be for personal use."

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

11 "6-4-24.1. [NEW MATERIAL] ATTORNEY GENERAL AUTHORITY--
12 AUDIT AND INVESTIGATION.--The attorney general or the attorney
13 general's authorized representative may conduct audits and
14 investigations of:

15 A. a nonparticipating tobacco product manufacturer
16 and its importers;

17 B. a tobacco product manufacturer as defined in
18 Section 6-4-12 NMSA 1978 that became a participating
19 manufacturer after the master settlement agreement execution
20 date, as defined at section II(aa) of the master settlement
21 agreement, and its importers;

22 C. exclusive distributors, retail dealers, stamping
23 agents and wholesale dealers; and

24 D. persons or entities engaged in delivery sales."

25 Section 10. A new Section 6-4-24.2 NMSA 1978 is enacted

1 to read:

2 "6-4-24.2. [NEW MATERIAL] PRESUMPTION.--In any action
3 under Section 6-4-13 NMSA 1978, reports of numbers of
4 cigarettes stamped submitted pursuant to Subsection A of
5 Section 6-4-21 NMSA 1978 shall be admissible evidence and shall
6 be presumed to state accurately the number of cigarettes
7 stamped during the time period by the stamping agent that
8 submitted the report, absent a contrary showing by the
9 nonparticipating manufacturer or importer. Nothing in this
10 section shall be construed as limiting or otherwise affecting
11 the state's right to maintain that such reports are incorrect
12 or do not accurately reflect a nonparticipating manufacturer's
13 sales in the state during the time period in question, and the
14 presumption shall not apply in the event that the state does so
15 maintain."

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

18 "7-12-2. DEFINITIONS.--As used in the Cigarette Tax Act:

19 A. "cigarette" means:

20 (1) any roll of tobacco or any substitute for
21 tobacco wrapped in paper or in any substance not containing
22 tobacco; [~~or~~]

23 (2) any roll of tobacco that is wrapped in any
24 substance containing tobacco, other than one hundred percent
25 natural leaf non-reconstituted tobacco, which, because of its

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1 appearance, the type of tobacco used in the filler, its
2 packaging and labeling, or its marketing and advertising, is
3 likely to be offered to, or purchased by, consumers as a
4 cigarette, as described in Paragraph (1) of this subsection
5 [~~and "cigarette" includes~~];

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

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

9 B. "contraband cigarettes" means cigarette packages
10 with counterfeit stamps, counterfeit cigarettes, cigarettes
11 that have false or fraudulent manufacturing labels, cigarettes
12 not sold in packages of five, ten, twenty or twenty-five, [~~and~~]
13 cigarette packages without the tax or tax-exempt stamps
14 required by the Cigarette Tax Act and cigarettes produced by a
15 manufacturer or in a brand family not included in the
16 directory;

17 C. "department" means the taxation and revenue
18 department, the secretary of taxation and revenue or any
19 employee of the department exercising authority lawfully
20 delegated to that employee;

21 D. "directory" means a listing of tobacco product
22 manufacturers and brand families that is developed, maintained
23 and published by the attorney general under the Tobacco Escrow
24 Fund Act;

25 [~~D.~~] E. "distributor" means a person licensed

1 pursuant to the Cigarette Tax Act to sell or distribute
2 cigarettes in New Mexico. "Distributor" does not include:

3 (1) a retailer;

4 (2) a cigarette manufacturer, export warehouse
5 proprietor or importer with a valid permit pursuant to 26
6 U.S.C. 5713, if that person sells cigarettes in New Mexico only
7 to distributors that hold valid licenses under the laws of a
8 state or sells to an export warehouse proprietor or to another
9 manufacturer; or

10 (3) a common or contract carrier transporting
11 cigarettes pursuant to a bill of lading or freight bill, or a
12 person who ships cigarettes through the state by a common or
13 contract carrier pursuant to a bill of lading or freight bill;

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

17 [~~F.~~] G. "manufacturer" means a person that
18 manufactures, fabricates, assembles, processes or labels a
19 cigarette or that imports from outside the United States,
20 directly or indirectly, a finished cigarette for sale or
21 distribution in the United States;

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

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1 ~~[H.]~~ I. "package" means an individual pack, box or
2 other container; "package" does not include a container that
3 itself contains other containers, such as a carton of
4 cigarettes;

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

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

14 ~~[K.]~~ L. "tax stamp" means a stamp that has a
15 specific cigarette tax value pursuant to the Cigarette Tax Act;
16 and

17 ~~[L.]~~ M. "tax-exempt stamp" means a stamp that
18 indicates a tax-exempt status pursuant to the Cigarette Tax
19 Act."

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

22 "7-12-17. REPORTING REQUIREMENTS--PENALTY.--

23 A. Each person who sells in New Mexico cigarettes
24 manufactured by that person or who receives on consignment or
25 buys cigarettes either directly from the manufacturer or from

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1 any out-of-state person for resale in New Mexico shall report
 2 to the department by the twenty-fifth day of each month that
 3 person's sales of cigarettes during the preceding month in each
 4 municipality and within that portion of each county outside of
 5 the municipalities located in that county. The department
 6 shall then advise the state treasurer of the proportion of the
 7 total sales of cigarettes for the month within each
 8 municipality and within that portion of each county outside of
 9 municipalities. The reports of such persons shall, upon
 10 receipt by the department, become public records.

11 B. Any person who sells in New Mexico cigarettes
 12 manufactured by that person or who receives on consignment or
 13 buys cigarettes for resale in New Mexico who willfully fails to
 14 render accurately the reports required by this section and any
 15 municipal or county officer who approves any expenditure or
 16 expends funds distributed from the county and municipality
 17 recreational fund for any purposes other than permitted by
 18 Section 7-12-15 NMSA 1978 is guilty of a petty misdemeanor.

19 C. Any tobacco product manufacturer, stamping agent
 20 or importer of cigarettes, or any officer, employee or agent of
 21 any such entity, who knowingly makes a materially false
 22 statement in any record required to be kept by the Cigarette
 23 Tax Act, or in any report or return required to be filed with
 24 the department by the Cigarette Tax Act is guilty of a fourth
 25 degree felony."

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

3 "57-2A-4. DOCUMENTATION.--

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

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

11 [~~(1)~~] (a) the permit issued pursuant to
12 26 USCA 5713 to the person importing the cigarettes into the
13 United States allowing the person to import the cigarettes; and

14 [~~(2)~~] (b) the customs form containing,
15 with respect to the cigarettes, the internal revenue tax
16 information required by the federal bureau of alcohol, tobacco,
17 firearms and explosives;

18 [~~B.~~] (2) a statement signed under penalty of
19 perjury by the person affixing the state tax stamp identifying
20 the brand and brand styles of all the cigarettes, the quantity
21 of each brand style, the supplier of the cigarettes and the
22 person to whom the cigarettes were conveyed for resale and a
23 separate statement by that person under penalty of perjury,
24 which is not confidential or exempt from public disclosure,
25 identifying only the brands and the brand styles of the

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1 cigarettes; and

2 ~~[C.]~~ (3) a statement signed under penalty of
3 perjury by an officer of the manufacturer or importer of the
4 cigarettes certifying that the manufacturer or importer has
5 complied with the package health warning and ingredient
6 reporting requirements of 15 USCA Sections 1333 and 1335a with
7 respect to the cigarettes, including a statement indicating
8 whether the manufacturer is or is not a participating
9 manufacturer within the meaning of that federal law.

10 B. Prior to making a delivery sale or mailing,
11 shipping or otherwise delivering cigarettes in connection with
12 a delivery sale, each person shall file with the department and
13 with the attorney general a statement setting forth the
14 person's name and trade name and the address of the person's
15 principal place of business and any other place of business.

16 C. Not later than the tenth day of each month, each
17 person who has made a delivery sale or mailed, shipped or
18 otherwise delivered cigarettes in connection with a delivery
19 sale during the previous calendar month shall file with the
20 department and with the attorney general a report in the format
21 prescribed by the attorney general, which may include an
22 electronic format, that provides for each delivery sale:

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

25 (2) the brand or brands of cigarettes that

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1 were sold in the delivery sale; and

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

4 D. Any person who satisfies the requirements of
5 Section 376 of Title 15 of the United States Code shall be
6 deemed to satisfy the requirements of this section.

7 E. For purposes of any penalty that may be imposed
8 for a violation of Subsection B or C of this section, a failure
9 to file a particular statement or report with both the
10 department and the attorney general shall constitute a single
11 violation."

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

14 "57-2A-10. GENERAL PROVISIONS.--

15 A. The Cigarette Enforcement Act shall be enforced
16 by the department and the attorney general; provided that, at
17 the request of the department, the state police and all local
18 police authorities shall enforce the provisions of the
19 Cigarette Enforcement Act.

20 B. For the purpose of enforcing the Cigarette
21 Enforcement Act, the department or the attorney general may
22 request information from any state or local agency, and may
23 share information with, and request information from, any
24 federal agency and any agency of any other state or any local
25 agency thereof.

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1 C. In addition to any other remedy provided by law,
 2 including enforcement as provided in Subsection A of this
 3 section, any person may bring an action for appropriate
 4 injunctive or other equitable relief for a violation of the
 5 Cigarette Enforcement Act; actual damages, if any, sustained by
 6 reason of the violation; and, as determined by the court,
 7 interest on the damages from the date of the complaint, taxable
 8 costs and reasonable ~~[attorney's]~~ attorney fees. If the trier
 9 of fact finds that the violation is flagrant, it may increase
 10 recovery to an amount not in excess of three times the actual
 11 damages sustained by reason of the violation."

12 Section 15. Section 57-12-2 NMSA 1978 (being Laws 1967,
 13 Chapter 268, Section 2, as amended) is amended to read:

14 "57-12-2. DEFINITIONS.--As used in the Unfair Practices
 15 Act:

16 A. "person" means, where applicable, natural
 17 persons, corporations, trusts, partnerships, associations,
 18 cooperative associations, clubs, companies, firms, joint
 19 ventures or syndicates;

20 B. "seller-initiated telephone sale" means a sale,
 21 lease or rental of goods or services in which the seller or
 22 ~~[his]~~ the seller's representative solicits the sale by
 23 telephoning the prospective purchaser and in which the sale is
 24 consummated entirely by telephone or mail, but does not include
 25 a transaction:

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1 (1) in which a person solicits a sale from a
2 prospective purchaser who has previously made an authorized
3 purchase from the seller's business; or

4 (2) in which the purchaser is accorded the
5 right of rescission by the provisions of the federal Consumer
6 Credit Protection Act, 15 U.S.C. 1635 or regulations issued
7 pursuant thereto;

8 C. "trade" or "commerce" includes the advertising,
9 offering for sale or distribution of any services and any
10 property and any other article, commodity or thing of value,
11 including any trade or commerce directly or indirectly
12 affecting the people of this state;

13 D. "unfair or deceptive trade practice" means an
14 act specifically declared unlawful pursuant to the Unfair
15 Practices Act, a false or misleading oral or written statement,
16 visual description or other representation of any kind
17 knowingly made in connection with the sale, lease, rental or
18 loan of goods or services or in the extension of credit or in
19 the collection of debts by a person in the regular course of
20 [his] the person's trade or commerce, [which] that may, tends
21 to or does deceive or mislead any person and includes:

22 (1) representing goods or services as those of
23 another when the goods or services are not the goods or
24 services of another;

25 (2) causing confusion or misunderstanding as

1 to the source, sponsorship, approval or certification of goods
2 or services;

3 (3) causing confusion or misunderstanding as
4 to affiliation, connection or association with or certification
5 by another;

6 (4) using deceptive representations or
7 designations of geographic origin in connection with goods or
8 services;

9 (5) representing that goods or services have
10 sponsorship, approval, characteristics, ingredients, uses,
11 benefits or quantities that they do not have or that a person
12 has a sponsorship, approval, status, affiliation or connection
13 that [~~he~~] the person does not have;

14 (6) representing that goods are original or
15 new if they are deteriorated, altered, reconditioned,
16 reclaimed, used or secondhand;

17 (7) representing that goods or services are of
18 a particular standard, quality or grade or that goods are of a
19 particular style or model if they are of another;

20 (8) disparaging the goods, services or
21 business of another by false or misleading representations;

22 (9) offering goods or services with intent not
23 to supply them in the quantity requested by the prospective
24 buyer to the extent of the stock available, unless the
25 purchaser is purchasing for resale;

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1 (10) offering goods or services with intent
2 not to supply reasonable expectable public demand;

3 (11) making false or misleading statements of
4 fact concerning the price of goods or services, the prices of
5 competitors or one's own price at a past or future time or the
6 reasons for, existence of or amounts of price reduction;

7 (12) making false or misleading statements of
8 fact for the purpose of obtaining appointments for the
9 demonstration, exhibition or other sales presentation of goods
10 or services;

11 (13) packaging goods for sale in a container
12 that bears a trademark or trade name identified with goods
13 formerly packaged in the container, without authorization,
14 unless the container is labeled or marked to disclaim a
15 connection between the contents and the trademark or trade
16 name;

17 (14) using exaggeration, innuendo or ambiguity
18 as to a material fact or failing to state a material fact if
19 doing so deceives or tends to deceive;

20 (15) stating that a transaction involves
21 rights, remedies or obligations that it does not involve;

22 (16) stating that services, replacements or
23 repairs are needed if they are not needed; [~~or~~]

24 (17) [~~failure~~] failing to deliver the quality
25 or quantity of goods or services contracted for; [~~and~~] or

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underscored material = new
[bracketed material] = delete

