Senate Engrossed House Bill

FILED
MICHELE REAGAN
SECRETARY OF STATE

State of Arizona
House of Representatives
Fifty-second Legislature
Second Regular Session
2016

CHAPTER 301

HOUSE BILL 2594

AN ACT

AMENDING SECTION 44-7111, ARIZONA REVISED STATUTES; RELATING TO TOBACCO PRODUCT MANUFACTURERS ESCROW ACCOUNTS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 44-7111, Arizona Revised Statutes, is amended to read:

44-7111. Tobacco; nonparticipating manufacturers; civil penalty; violation; classification

This state enacts the model nonparticipating manufacturers legislation as follows:

Section 1. Findings and Purpose.

The legislature finds that violations of section 44-7101 threaten the integrity of the tobacco master settlement agreement, the fiscal soundness of the state and the public health. The legislature finds that enacting procedural enhancements will aid the enforcement of section 44-7101 and thereby safeguard the master settlement agreement, the fiscal soundness of the state and the public health.

Section 2. Definitions.

(a) "Brand family" means all styles of cigarettes sold under the same trade mark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, "menthol", "lights", "kings" and "100s", and includes any 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.

(b) "Cigarette" has the same meaning prescribed in section 44-7101.

(c) "Department" means the department of revenue.

(d) "Director" means the director of the department.

(e) "Distributor" has the same meaning prescribed in section 42-3001.

(f) "Master settlement agreement" has the same meaning prescribed in section 44-7101.

(g) "Nonparticipating manufacturer" means any tobacco product manufacturer that is not a participating manufacturer.

(h) "Participating manufacturer" has the meaning given that term in section II(jj) of the master settlement agreement and all amendments thereto.

(i) "Qualified escrow fund" has the same meaning prescribed in section 44-7101.

(j) "Tobacco product manufacturer" has the same meaning prescribed in section 44-7101.

(k) "Units sold" has the same meaning prescribed in section 44-7101.

Section 3. Certifications; Directory; Tax Stamps.

(a) Certification. Every tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer or similar intermediary or intermediaries, shall execute and deliver on a form prescribed by the attorney general a certification to the attorney general not later than the thirtieth day of April each year, certifying that, as of the date of the certification, the tobacco product manufacturer either

is a participating manufacturer or is in full compliance with section 44-7101, section 3(b), including all quarterly installment payments required by regulations as may be promulgated by the attorney general pursuant to section 5(f) of this article. As to all certifications required by this article, if the certification is rejected due to incompleteness or incorrectness, the tobacco product manufacturer may not submit supplemental documentation to try to cure the rejection and must execute and deliver an entirely new certification to the attorney general.

(1) A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update the list thirty days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the attorney general.

(2) A nonparticipating manufacturer shall include in its certification (i) a list of all of its brand families and the number of units sold for each brand family that were sold in the state during the preceding calendar year, (ii) a list of all of its brand families that have been sold in the state at any time during the current calendar year, (iii) indicating by an asterisk, any brand family sold in the state during the preceding calendar year that is no longer being sold in the state as of the date of the certification and (iv) identifying by name and address any other manufacturer of the brand families in the preceding or current calendar year and (v) for each of the current calendar year and the preceding calendar year, a list of all of this state's resident and nonresident distributors that the manufacturer sold cigarettes to or that the manufacturer believes or has reason to believe purchased or received any of the manufacturer's cigarettes from another source. The nonparticipating manufacturer must execute and deliver a supplemental certification to the attorney general to request any addition to or modification of its brand families. The supplemental certification requesting the addition or modification does not relieve the brand families from the prohibitions set forth in sections 3(c) and 6(d) until the request is approved by the attorney general and the addition or modification to the brand families is listed or made in the directory.

(3) In the case of a nonparticipating manufacturer, the certification shall further certify:

(a) That the nonparticipating manufacturer is registered to do business in the state or has appointed a resident agent for service of process and provided notice thereof as required by section 4.

(b) That the nonparticipating manufacturer (i) has established and continues to maintain a qualified escrow fund and (ii) has executed a qualified escrow agreement that has been reviewed and approved by the attorney general and that governs the qualified escrow fund.

(c) That the nonparticipating manufacturer is in full compliance with section 44-7101, section (3)(b) and this article, and any regulations promulgated pursuant thereto;

(d) (i) The name, address and telephone number of the financial institution where the nonparticipating manufacturer has established the qualified escrow fund required pursuant to section 44-7101, section 3(b) and all regulations promulgated pursuant thereto, (ii) the account number of the qualified escrow fund and any subaccount number for the state, (iii) the amount the nonparticipating manufacturer placed in the fund for cigarettes sold in the state during the preceding calendar year, the date and amount of each deposit and such evidence or verification as may be deemed necessary by the attorney general to confirm the foregoing and (iv) the amount of and date of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from the fund or from any other qualified escrow fund into which it ever made escrow payments pursuant to section 44-7101, section 3(b) and all regulations promulgated pursuant thereto.

(e) Unless the nonparticipating manufacturer or its affiliate is licensed as a tobacco distributor in this state, that all sales or shipments made by the nonparticipating manufacturer or its affiliate within or into this state are made to a tobacco distributor that is licensed in this state.

(f) All other information and materials specifically requested by this section or the attorney general in the course of enforcing this section.

(4) A tobacco product manufacturer may not include a brand family in its certification unless (i) in the case of a participating manufacturer, the participating manufacturer affirms that the brand family is to be 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 pursuant to the master settlement agreement, and (ii) in the case of a nonparticipating manufacturer, the nonparticipating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of section 44-7101, section 3(b). Nothing in this section shall be construed as limiting or otherwise affecting the state'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 or for purposes of section 44-7101.

(5) Tobacco product manufacturers shall maintain all invoices and documentation of sales and other information relied upon for the certification for a period of five years, unless otherwise required by law to maintain them for a greater period of time.

(6) A tobacco product manufacturer that is not currently listed in the directory must submit an initial certification subject to the same requirements and review process set forth in this article for annual certifications. The tobacco product manufacturers brand families remain subject to the prohibitions set forth in sections 3(c) and 6(d) until listed in the directory.

(b) Directory of cigarettes approved for stamping and sale. Not later than ninety days after the effective date of this article, the attorney general shall develop and publish on the attorney general's web site a

directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of section 3(a) and all brand families that are listed in those certifications (the "directory"), except as noted below.

(1) The attorney general shall not include or retain in the directory the name or brand families of any nonparticipating manufacturer that fails to provide the required certification or whose certification the attorney general determines is not in compliance with any term of this article, unless the attorney general has determined that the violation has been cured to the satisfaction of the attorney general.

(2) Neither a tobacco product manufacturer nor brand family shall be included or retained in the directory if the attorney general concludes, in the case of a nonparticipating manufacturer, that (i) any escrow payment required pursuant to section 44-7101, section 3(b) for any period for any brand family, whether or not listed by the nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the attorney general, or (ii) any outstanding final judgment, including interest thereon, for a violation of section 44-7101 has not been fully satisfied for the brand family or the manufacturer.

(3) The attorney general shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements of this article.

(4) A distributor that has lawfully affixed stamps to cigarettes and subsequently is unable to sell those cigarettes lawfully because the cigarettes have been removed from the directory pursuant to section 3(b)(2) of this article, may apply to the department for a refund of the cost of such stamps.

(5) Every distributor shall provide and update as necessary an electronic mail address to the director and attorney general for the purpose of receiving any notifications as may be required by this article.

(6) A tobacco product manufacturer included in the directory may request that a new brand family be added to the directory by executing and delivering a supplemental certification with the necessary information to the attorney general and the director. Not later than forty-five business days after receiving such a request, and at such earlier time as is reasonable to do so, the attorney general shall either (i) certify the new brand family or (ii) deny the request. However, in cases where the attorney general reasonably determines that it needs additional information to ascertain whether the requestor is the tobacco product manufacturer of the new brand family, the attorney general may take whatever additional time is reasonably needed to process the request, to locate and assemble information or documents needed to process the request, and to notify persons or agencies affected by the request.

(c) Prohibition against stamping or sale of cigarettes not in the directory. It shall be unlawful for any person (1) to affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory or (2) to sell, offer or possess for sale, in this state, including for sale within or outside of this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory.

(d) Every nonparticipating manufacturer shall post a bond for the exclusive benefit of this state.

(e) The bond shall be posted at least ten days in advance of each calendar quarter as a condition to the nonparticipating manufacturer and its brand families being included in the state directory for that quarter. The amount of the bond shall be the greater of (i) the greatest required escrow amount due from the nonparticipating manufacturer or its predecessor for any of the twelve preceding calendar quarters or (ii) fifty thousand dollars. The bond certifications and materials must be submitted as part of the initial, annual and supplemental certifications required by this article.

(f) If a nonparticipating manufacturer that posted a bond has failed to make or have made on its behalf deposits equal to the full amount owed for a quarter within fifteen days following the due date of the quarter under section 5, subparagraph (g), the state may execute on the bond in the amount equal to any remaining amount of the escrow due. Amounts that the state collects on a bond shall be deposited into the state treasury and shall reduce the amount of escrow due from that nonparticipating manufacturer in the dollar amount collected. Escrow obligations above the amount collected on the bond remain due from that nonparticipating manufacturer and, as provided in any joint and several provision in this section, from the importers that sold its cigarettes during that calendar quarter.

(g) The office of the attorney general shall adopt rules necessary to implement subparagraphs (d), (e) and (f) of this section.

(h) Nonparticipating manufacturers located outside the United States must provide a declaration in a form prescribed by the attorney general from each of its importers into the United States of any of its brand families, that the importer accepts joint and several liability with the nonparticipating manufacturer for all escrow deposits due pursuant to section 44-7101 as well as all penalties and other relief available to the state pursuant to section 44-7101 and this section. The declaration shall appoint a resident agent for service of process in this state pursuant to section 4. The declarations shall be submitted as part of the certifications required pursuant to this section and updated at least thirty days before any other importer begins the importation of the manufacturer's cigarettes. Failure to comply with this subparagraph is grounds for removal from the directory. For the purposes of this subparagraph, "importer" has the same meaning as in 27 Code of Federal Regulations section 41.11 (2012). The importer declaration

must be submitted as part of the initial, annual and supplemental certifications required by this article.

(i) The attorney general shall have the authority to not retain or refuse to include in the directory any nonparticipating manufacturer or the manufacturer's brand families, that (i) does not certify that it is subject to the enforcement of section 44-7101, this section and section 36-798.06 without any immunity, (ii) provides incorrect, false or misleading statements in any certification submitted to this state pursuant to section 44-7101 or this section with regard to any year or (iii) was previously or is currently not in compliance with any other federal or state laws, including another state's qualifying statute as defined in the master settlement agreement or if the attorney general has reason to believe that the tobacco product manufacturer will not comply with the laws.

(j) The attorney general has the authority to require any nonparticipating manufacturer to submit all information, certifications, affidavits and other materials that the attorney general deems appropriate to determine compliance with this section and other related laws, including the grounds for not retaining or not including in the directory any nonparticipating manufacturer or the manufacturer's brand families.

Section 4. Agent for Service of Process.

(a) Requirement for agent for service of process. Any nonresident or foreign nonparticipating manufacturer that has not registered to do business in the state as a foreign corporation or business entity shall, as a condition precedent to having its brand families included or retained in the directory, appoint and continually engage without interruption the services of an agent in this state to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of this article and section 44-7101, may be served in any manner authorized by law. Such service on the agent constitutes legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, phone number and proof of the appointment and availability of the agent to and to the satisfaction of the attorney general.

(b) The nonparticipating manufacturer shall provide notice to the attorney general thirty calendar days prior to termination of the authority of an agent and shall further provide proof to the satisfaction of the attorney general of the appointment of a new agent not less than five calendar days prior to the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the attorney general of the termination within five calendar days and shall include proof to the satisfaction of the attorney general of the appointment of a new agent.

(c) Any nonparticipating manufacturer whose cigarettes are sold in this state and who has not appointed and engaged an agent as herein required shall be deemed to have appointed the secretary of state as the agent and may

be proceeded against in courts of this state by service of process upon the secretary of state; provided, however, that the appointment of the secretary of state as the agent shall not satisfy the condition precedent to having the brand families of the nonparticipating manufacturer included or retained in the directory.

Section 5. Reporting of Information; Escrow Installments.

(a) Reporting by distributors. Not later than twenty calendar days after the end of each calendar month, and more frequently if so directed by the director, each distributor shall submit to the department on a form prescribed by the department such information as the director requires to facilitate compliance with this article, including, but not limited to, 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 distributor affixed stamps during the previous calendar quarter or otherwise paid the tax due for the cigarettes. The department shall review all information reported by the distributor for accuracy and completeness. The distributor shall maintain, and make available to the director and the attorney general, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the director for a period of five years.

(b) Disclosure of information. The department is authorized to disclose to the attorney general any information received under this article and requested by the attorney general for purposes of determining compliance with and enforcing the provisions of this article. The department and attorney general shall share with each other the information received under this article, and may share the information with other federal, state or local agencies only for purposes of enforcement of this article, section 44-7101 or corresponding laws of other states.

(c) If a tobacco product manufacturer required to establish a qualified escrow fund under section 44-7101, section 3(b) disputes the attorney general's determination of the amount that the manufacturer is required to deposit into escrow and the attorney general determines that the dispute can likely be resolved by information contained in reports submitted by distributors to the department indicating sales or purchases of the manufacturer's cigarettes, then the attorney general shall produce the relevant portions of the reports to the manufacturer. However, before disclosing the foregoing information, the attorney general may require the manufacturer to provide all records related to its sales of the cigarettes in dispute. The disclosure provided by the attorney general to a tobacco product manufacturer pursuant to this subsection shall be limited to information concerning the cigarettes alleged by the state to be subject to the requirements of section 44-7101, section 3(b), may be used by the manufacturer only for the limited purpose of determining the appropriate escrow deposit, and may not be disclosed by the manufacturer to any third parties.

(d) Verification of qualified escrow fund. The attorney general may require at any time from the nonparticipating manufacturer, proof from the financial institution in which the manufacturer has established a qualified escrow fund for the purpose of compliance with section 44-7101, section 3(b) of the amount of money in the fund, exclusive of interest, the amount and the date of each deposit to the fund, and the amount and date of each withdrawal from the fund.

(e) Requests for additional information. In addition to the information required to be submitted pursuant to this article, the director and attorney general may require a distributor or tobacco product manufacturer to submit any additional information including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to enable the attorney general to determine whether a tobacco product manufacturer is in compliance with this article.

(f) Quarterly escrow installments. To promote compliance with the provisions of this article, the attorney general may promulgate regulations requiring tobacco product manufacturers subject to the requirements of section 3(a)(2) to make the escrow deposits required in quarterly installments during the year in which the sales covered by the deposits are made:

(1) In circumstances where the attorney general reasonably concludes that a manufacturer may not fully and timely comply with section 44-7101, section 3(b).

(2) Where manufacturers have not made escrow deposits pursuant to section 44-7101, section 3(b) during the preceding calendar year.

The attorney general may require production of information sufficient to enable the attorney general to determine the adequacy of the amount of the installment deposit.

(g) A tobacco product manufacturer that is subject to the requirements of section 3(a)(2) shall make the required escrow deposits in quarterly installments following each sales quarter. The attorney general may require the production of information that is sufficient to enable the attorney general to determine the adequacy of the amount of the installment deposit. Quarterly escrow installment deposits must be made pursuant to the following schedule:

(1) For the first quarter, January through March, on or before May 31 of the calendar year.

(2) For the second quarter, April through June, on or before August 31 of the calendar year.

(3) For the third quarter, July through September, on or before November 30 of the calendar year.

(4) For the fourth quarter, October through December, on or before February 28 of the following calendar year.

Section 6. Penalties and Other Remedies.

(a) License revocation and civil penalty. In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a distributor has violated section 3(c) or any regulation adopted pursuant to this article, the director may revoke or suspend the license of the distributor in the manner provided by title 41, chapter 6, article 10 for contested cases. Each stamp affixed and each sale or offer to sell cigarettes in violation of section 3(c) shall constitute a separate violation. The director may also impose a civil penalty in an amount not to exceed the greater of five hundred ~~per cent~~ PERCENT of the retail value of the cigarettes or five thousand dollars upon a determination of violation of section 3(c) or any regulations promulgated pursuant thereto. The penalty shall be imposed in the manner provided by title 41, chapter 6, article 10 for contested cases.

(b) Contraband and seizure. Any cigarettes that have been sold, offered for sale or possessed for sale in this state in violation of section 3(c) shall be deemed contraband and the cigarettes shall be subject to seizure by the department and forfeiture, and all the cigarettes so seized and forfeited shall be destroyed and not resold.

(c) Injunction. The attorney general, on behalf of the director, may seek an injunction to restrain a threatened or actual violation of section 3(c), 5(a) or 5(d) by a distributor and to compel the distributor to comply with those sections. In any action brought pursuant to this section, the state shall be entitled to recover the costs of investigation, costs of the action and reasonable attorney fees.

(d) Unlawful sale and distribution. It shall be unlawful for a person to (i) sell or distribute cigarettes, or (ii) 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 the state in violation of section 3(c). A violation of this section is a class 1 misdemeanor.

(e) Deceptive trade practice. A person who violates section 3(c) engages in an unlawful practice in violation of section 44-1522. Standing to bring an action to enforce title 44, chapter 10, article 7 for violation of section 3(c) shall lie solely with the attorney general.

Section 7. Miscellaneous Provisions.

(a) Notice and review of determination. A determination of the attorney general to not include or to remove from the directory a brand family or tobacco product manufacturer shall be subject to review as an appealable agency action in the manner prescribed by title 41, chapter 6, article 10.

(b) Dates. For the year 2003, the first report of distributors required by section 5(a) shall be due thirty calendar days after the effective date of this article. The certifications by a tobacco product manufacturer described in section 3(a) shall be due forty-five calendar days

after the effective date and the directory described in section 3(b) shall be published or made available within ninety calendar days after the effective date.

(c) Promulgation of regulations. The department and the attorney general may promulgate regulations necessary to effect the purposes of this article.

(d) Recovery of costs and fees by attorney general. In any action brought by the state to enforce this article, the state shall be entitled to recover the costs of investigation, expert witness fees, costs of the action and reasonable attorney fees.

(e) Disgorgement of profits for violations of article. If a court determines that a person has violated this article, the court shall order any profits, gain, gross receipts or other benefit from the violation to be disgorged and paid to the state general fund. Unless otherwise expressly provided, the remedies or penalties provided by this article are cumulative to each other and to the remedies or penalties available under all other laws of this state.

(f) Construction and severability. If a court of competent jurisdiction finds that the provisions of this article and section 44-7101 conflict and cannot be harmonized, then the provisions of section 44-7101 shall control. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this article causes section 44-7101 to no longer constitute a qualifying or model statute, as those terms are defined in the master settlement agreement, then that portion of this article shall not be valid. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this article is for any reason held to be invalid, unlawful or unconstitutional, the decision shall not affect the validity of the remaining portions of this article or any part thereof.

(g) TOBACCO SALES DATA CONFIDENTIALITY. ALL TOBACCO SALES DATA PROVIDED TO THE ATTORNEY GENERAL OR THE DEPARTMENT OF REVENUE PURSUANT TO THE MASTER SETTLEMENT OR AGREEMENTS REGARDING DISPUTES UNDER THE MASTER SETTLEMENT AGREEMENT SHALL BE CONFIDENTIAL AND SHALL NOT BE MADE PUBLIC. THIS SUBDIVISION DOES NOT APPLY TO ANY DATA FROM TAX REPORTS OR RETURNS, OR ANY OTHER TAX REPORT, RETURN OR FORM FILED WITH THE DEPARTMENT PURSUANT TO TITLE 42, CHAPTER 3.

APPROVED BY THE GOVERNOR MAY 17, 2016.

FILED IN THE OFFICE OF THE SECRETARY OF STATE MAY 17, 2016.

Passed the House February 24, 20 16

by the following vote: 44 Ayes,

15 Nays, 1 Not Voting

Speaker of the House

☐ Pro Tempore

Chief Clerk of the House

Passed the Senate April 19, 2016

by the following vote: 28 Ayes,

0 Nays, 2 Not Voting

President of the Senate

Secretary of the Senate

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF GOVERNOR

This Bill received by the Governor this

_____ day of _____, 20_____

at _____ o'clock _____M.

Secretary to the Governor

Approved this _____day of

_____

at _____o'clock _____M.

Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF SECRETARY OF STATE

This Bill received by the Secretary of State

this _____ day of _____, 20_____

at _____ o'clock _____M.

Secretary of State

H.B. 2594

HOUSE CONCURS IN SENATE
AMENDMENTS AND FINAL PASSAGE

May 6, 2016,

by the following vote: 36 Ayes,

18 Nays, 6 Not Voting

Speaker of the House

Jim Drake
Chief Clerk of the House

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF GOVERNOR

This Bill was received by the Governor this

6 day of May, 2016,

at 8:18 o'clock P. M.

Valerie Hanna
Secretary to the Governor

Approved this 17th day of

May, 2016,

at 1:39 o'clock P. M.

Doug A. Ducey
Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF SECRETARY OF STATE

This Bill was received by the Secretary of State

this 17th day of May, 2016,

at 4:35 o'clock P M.

Michele Reagan
Secretary of State

H.B. 2594