

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas
2 84th General Assembly
3 Regular Session, 2003
4

As Engrossed: S3/25/03

A Bill

Act 1073 of 2003
HOUSE BILL 2194

5 By: Representative Bradford
6 By: Senator Bryles
7

For An Act To Be Entitled

10 AN ACT TO ENHANCE ENFORCEMENT OF ARKANSAS CODE §§
11 26-57-260 AND 26-57-261; AND FOR OTHER PURPOSES.
12

Subtitle

14 AN ACT TO ENHANCE ENFORCEMENT OF
15 ARKANSAS CODE §§ 26-57-260 AND 26-57-
16 261.
17

18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
19

SECTION 1. Findings and Purpose.

21 The General Assembly finds that:

22 (1) Violations of Arkansas Code §§ 26-57-260 and 26-57-261
23 threaten the integrity of the tobacco Master Settlement Agreement, the fiscal
24 soundness of the state, and the public health; and

25 (2) Enacting procedural enhancements will help prevent
26 violations and aid the enforcement of Arkansas Code §§ 26-57-260 and 26-57-
27 261 and thereby safeguard the Master Settlement Agreement, the fiscal
28 soundness of the state, and the public health.
29

SECTION 2. Definitions.

31 (a) "Brand family" means all styles of cigarettes sold under the same
32 trade mark and differentiated from one another by means of additional
33 modifiers or descriptors, including, but not limited to, "menthol", "lights",
34 "kings", and "100s", and includes any brand name (alone or in conjunction
35 with any other word) trademark, logo, symbol, motto, selling message,
36 recognizable pattern of colors, or any other indicia of product



1 identification identical or similar to, or identifiable with, a previously
2 known brand of cigarettes;

3 (b) "Cigarette" has the same meaning as in Arkansas Code § 26-57-
4 260(a)(4);

5 (c) "Director" means the Director of the Arkansas Tobacco Control
6 Board;

7 (d) "Licensee" means any person or entity who has been granted and
8 holds a permit or license under Arkansas Code § 26-57-215, including a
9 wholesale cigarette license or permit, a wholesale tobacco license or permit,
10 a salesman's license or permit, a retail cigarette license or permit, a
11 retail tobacco license or permit, or a dealer's license or permit;

12 (e) "Master Settlement Agreement" has the same meaning as in Arkansas
13 Code § 26-57-260(a)(5);

14 (f) "Nonparticipating manufacturer" means any tobacco product
15 manufacturer that is not a participating manufacturer;

16 (g) "Participating manufacturer" has the meaning given that term in
17 Section II(jj) of the Master Settlement Agreement and all amendments thereto;

18 (h) "Qualified escrow fund" has the same meaning as that term is
19 defined in Arkansas Code § 26-57-260(a)(6);

20 (i) "Wholesaler" means:

21 (1) Any person or entity who has been granted and holds a
22 wholesale cigarette license or permit, or a wholesale tobacco license or
23 permit, pursuant to Arkansas Code § 26-57-215; and

24 (2) Any person or entity who, as a retailer, purchases tobacco
25 products directly from a manufacturer or an unlicensed wholesaler or
26 distributor and is therefore liable for reporting and paying taxes under
27 Arkansas Code § 26-57-211(a)(1)(B);

28 (j) "Tobacco product manufacturer" has the same meaning as that term
29 is defined in Arkansas Code § 26-57-260(a)(9); and

30 (k) "Units sold" has the same meaning as that term is defined in
31 Arkansas Code § 26-57-260(a)(10)(A).

32
33 SECTION 3. Certifications – Directory – Tax stamps.

34 (a) Certification.

35 (1) Every tobacco product manufacturer whose cigarettes are
36 sold in Arkansas, whether directly or through a wholesaler, retailer, or

1 similar intermediary or intermediaries, shall execute and deliver on a form
2 prescribed by the Attorney General a certification to the Attorney General,
3 no later than the thirtieth day of April each year, certifying under penalty
4 of perjury that, as of the date of the certification, the tobacco product
5 manufacturer either:

6 (A) Is a participating manufacturer; or

7 (B) Is in full compliance with Arkansas Code §§ 26-57-260
8 and 26-57-261, including all quarterly installment payments that may be
9 required under section 5(e).

10 (2) A participating manufacturer shall include in its
11 certification a list of its brand families. The participating manufacturer
12 shall update the list thirty (30) calendar days prior to any addition to or
13 modification of its brand families by executing and delivering a supplemental
14 certification to the Attorney General.

15 (3) A Nonparticipating manufacturer shall include in its
16 certification:

17 (A) An electronic mail address and facsimile number to
18 which notices from the Attorney General may be sent, and a list of all of its
19 brand families and the number of units sold for each brand family that were
20 sold in the state during the preceding calendar year;

21 (B) A list of all of its brand families that have been
22 sold in the state at any time during the current calendar year;

23 (C) Indicating, by an asterisk, any brand family sold in
24 the state during the preceding calendar year that is no longer being sold in
25 the state as of the date of the certification; and

26 (D) Identifying by name and address any other manufacturer
27 of the brand families in the preceding or current calendar year.

28 (4) The Nonparticipating manufacturer shall update the list
29 thirty (30) calendar days prior to any addition to or modification of its
30 brand families by executing and delivering a supplemental certification to
31 the Attorney General.

32 (5) In the case of a Nonparticipating manufacturer, the
33 certification shall further certify:

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

1 (B) That the Nonparticipating manufacturer:

2 (i) Has established and continues to maintain a
3 qualified escrow fund; and

4 (ii) Has executed a qualified escrow agreement that
5 has been reviewed and approved by the Attorney General and that governs the
6 qualified escrow fund;

7 (C) That the Nonparticipating manufacturer is in full
8 compliance with Arkansas Code §§ 26-57-260 and 26-57-261 and this act, and
9 any regulations promulgated pursuant thereto; and

10 (D)(i) The name, address, and telephone number of the
11 financial institution where the Nonparticipating manufacturer has established
12 the qualified escrow fund required under Arkansas Code §§ 26-57-260 and 26-
13 57-261 and all regulations promulgated thereto;

14 (ii) The account number of the qualified escrow fund
15 and any sub-account number for the state;

16 (iii) The amount the Nonparticipating manufacturer
17 placed in the fund for cigarettes sold in the state during the preceding
18 calendar year, the date and amount of each the deposit, and such evidence or
19 verification as may be deemed necessary by the Attorney General to confirm
20 the requirements of the foregoing; and

21 (iv) The amount and date of any withdrawal or
22 transfer of funds the Nonparticipating manufacturer made at any time from the
23 fund or from any other qualified escrow fund into which it ever made escrow
24 payments under Arkansas Code §§ 26-57-260 and 26-57-261 and all regulations
25 promulgated thereto.

26 (6) A tobacco product manufacturer may not include a brand
27 family in its certification unless:

28 (A) In the case of a participating manufacturer, the
29 participating manufacturer affirms that the brand family is to be deemed to
30 be its cigarettes for purposes of calculating its payments under the Master
31 Settlement Agreement for the relevant year, in the volume and shares
32 determined under the Master Settlement Agreement; and

33 (B) In the case of a Nonparticipating manufacturer, the
34 Nonparticipating manufacturer affirms that the brand family is to be deemed
35 to be its cigarettes for purposes of Arkansas Code §§ 26-57-260 and 26-57-
36 261.

1 (7) Nothing in section 3(a)(6) shall be construed as limiting or
2 otherwise affecting the state's right to maintain that a brand family
3 constitutes cigarettes of a different tobacco product manufacturer for
4 purposes of calculating payments under the Master Settlement Agreement or for
5 purposes of Arkansas Code §§ 26-57-260 and 26-57-261.

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

10 (b) Directory of cigarettes approved for stamping and sale.

11 (1)(A) Not later than the last business day of May of each year,
12 the Attorney General shall develop and make available for public inspection,
13 and shall publish on its website, a directory listing all tobacco product
14 manufacturers that have provided current and accurate certifications
15 conforming to the requirements of section 3(a) and all brand families that
16 are listed in the certifications, except as provided in this section.

17 (B) The Attorney General shall not include or retain in
18 the directory the name or brand families of any Nonparticipating manufacturer
19 that has failed to provide the required certification or whose certification
20 the Attorney General determines is not in compliance with section 3(a),
21 unless the Attorney General has determined that the violation has been cured
22 to the satisfaction of the Attorney General.

23 (C) Neither a tobacco product manufacturer nor brand
24 family shall be included or retained in the directory if the Attorney General
25 concludes, in the case of a Nonparticipating manufacturer, that:

26 (i) Any escrow payment required under Arkansas Code
27 §§ 26-57-260 and 26-57-261 for any period for any brand family, whether or
28 not listed by the Nonparticipating manufacturer, has not been fully paid into
29 a qualified escrow fund governed by a qualified escrow agreement that has
30 been approved by the Attorney General; or

31 (ii) Any outstanding final judgment, including
32 interest on the judgment, for a violation of Arkansas Code §§ 26-57-260 and
33 26-57-261 has not been fully satisfied for the brand family or the
34 manufacturer.

35 (D) The Attorney General shall update the directory as
36 necessary in order to correct mistakes and to add or remove a tobacco product

1 manufacturer or brand family to keep the directory in conformity with the
2 requirements of this act.

3 (E) Every wholesaler shall provide and update as necessary
4 an electronic mail address to the Attorney General for the purpose of
5 receiving any notifications as may be required by this act.

6 (F) Notwithstanding the provisions of this section, in the case of any
7 Nonparticipating manufacturer who has established a qualified escrow account
8 pursuant to Arkansas Code §§ 26-57-260 and 26-57-261 that has been approved
9 by the Attorney General, the Attorney General may not remove the
10 Nonparticipating manufacturer or its brand families from the directory until
11 at least fifteen (15) days after the Nonparticipating manufacturer has been
12 given notice of such intended action. Notice shall be sufficient and be
13 deemed immediately received by a Nonparticipating manufacturer if the notice
14 is sent either electronically or by facsimile to an electronic mail address
15 or facsimile number, as the case may be, provided by the Nonparticipating
16 manufacturer in its most recent certification filed pursuant to section 3(a).

17 (c) Prohibition against stamping, sale, or import of cigarettes not in
18 directory.

19 (1) It is unlawful for any person or entity to:

20 (A) Affix a tax stamp to a package or other container of
21 cigarettes of a tobacco product manufacturer or brand family that the person
22 or entity knows is not included in the directory maintained by the Attorney
23 General pursuant to section 3(b); or

24 (B) Sell, offer, or possess for sale in this state, or
25 import for personal consumption in this state, cigarettes of a tobacco
26 product manufacturer or brand family that the person or entity knows is not
27 included in the directory maintained by the Attorney General pursuant to
28 section 3(b).

29 (2) Persons and entities are deemed to have received notice that
30 cigarettes of a tobacco product manufacturer or a brand family are not
31 included in the directory maintained by the Attorney General pursuant to
32 section 3(b) at the time the Attorney General's website fails to list any
33 such cigarettes in the directory or at the time the Attorney General removes
34 the cigarettes from the directory.

35 (3) A person or entity purchasing cigarettes for resale shall
36 not be in violation of this act if:

1 (A) At the time of purchase the manufacturer and brand
2 families of the cigarettes are included in the directory maintained by the
3 Attorney General pursuant to section 3(b) and the cigarettes are lawfully
4 stamped and sold within fourteen (14) days of the date such manufacturer and
5 brand families were removed from the directory; or

6 (B) In the case of a retailer, the cigarettes are sold or
7 delivered to retail customers within fourteen (14) days after receipt of
8 delivery of such cigarettes from a wholesaler, so long as the cigarettes in
9 question were lawfully purchased from the same wholesaler.

10 (4) Any manufacturer, wholesaler or retailer selling cigarettes
11 for resale of a manufacturer or brand family that has been removed from the
12 directory maintained by the Attorney General pursuant to section 3(b) shall
13 notify the purchaser of such cigarettes of that fact at the time of delivery
14 of the cigarettes.

15 (5) Unless otherwise provided by contract or purchase agreement,
16 a purchaser shall be entitled to a refund of the purchase price, from the
17 manufacturer, wholesaler, or retailer from whom the cigarettes were
18 purchased, of any cigarettes that are the product of a manufacturer or a
19 brand family that have been removed from the directory maintained by the
20 Attorney General pursuant to section 3(b). The Department of Finance and
21 Administration may, by regulation, provide for a refund of the price of tax
22 stamps that have been lawfully affixed to cigarettes that may not be sold
23 under section 3(c).

24
25 SECTION 4. Requirement for agent for service of process.

26 (a)(1) Any nonresident or foreign Nonparticipating manufacturer that
27 has not registered to do business in the state as a foreign corporation or
28 business entity shall, as a condition precedent to having its brand families
29 included or retained in the directory maintained by the Attorney General
30 pursuant to section 3(b), appoint and continually engage without interruption
31 the services of an agent in this state to act as agent for the service of
32 process on whom all process, and any action or proceeding against it
33 concerning or arising out of the enforcement of this act and Arkansas Code §§
34 26-57-260 and 26-57-261, may be served in any manner authorized by law.

35 (2) Such service shall constitute legal and valid service of
36 process on the Nonparticipating manufacturer.

1 (3) The Nonparticipating manufacturer shall provide the name,
2 address, phone number, and proof of the appointment and availability of the
3 agent to, and to the satisfaction of, the Attorney General.

4 (b)(1) The Nonparticipating manufacturer shall provide notice to the
5 Attorney General thirty (30) calendar days prior to termination of the
6 authority of an agent and shall provide proof to the satisfaction of the
7 Attorney General of the appointment of a new agent no less than five (5)
8 calendar days prior to the termination of an existing agent appointment.

9 (2) If an agent terminates an agency appointment, the
10 Nonparticipating manufacturer shall notify the Attorney General of the
11 termination within five (5) calendar days and shall include proof to the
12 satisfaction of the Attorney General of the appointment of a new agent.

13 (c) Any Nonparticipating manufacturer whose cigarettes are sold in
14 this state, who has not appointed and engaged an agent as required by this
15 act, shall be deemed to have appointed the Secretary of State as the agent
16 and may be proceeded against in courts of this state by service of process
17 upon the Secretary of State; provided, however, that the appointment of the
18 Secretary of State as the agent shall not satisfy the condition precedent for
19 having the brand families of the Nonparticipating manufacturer included or
20 retained in the directory maintained by the Attorney General pursuant to
21 section 3(b).

22
23 SECTION 5. Reporting of information - Escrow installments.

24 (a) Reporting by wholesalers.

25 (1) Not later than twenty (20) calendar days after the end of
26 each calendar quarter, each wholesaler shall submit such information as the
27 Attorney General requires to facilitate compliance with this act, including,
28 but not limited to, a list by brand family of the total number of cigarettes,
29 or, in the case of roll your own, the equivalent stick count for which the
30 wholesaler affixed tax stamps during the previous calendar quarter or
31 otherwise paid the tax due for the cigarettes.

32 (2) The wholesaler shall maintain, and make available to the
33 Attorney General, all invoices and documentation of sales of all
34 Nonparticipating manufacturer cigarettes and any other information relied
35 upon in reporting to the Attorney General for a period of five (5) years.

36 (b) Disclosure of information.

1 (1) The Arkansas Tobacco Control Board and the Arkansas
2 Department of Finance and Administration may disclose to the Attorney General
3 any information in their possession as requested by the Attorney General for
4 purposes of determining compliance with and enforcing the provisions of this
5 act.

6 (2) The Arkansas Tobacco Control Board, Department of Finance
7 and Administration, and the Attorney General may share with each other any
8 information received under this act, and may share the information with other
9 federal, state, or local agencies only for purposes of enforcement of this
10 act, Arkansas Code §§ 26-57-260 and 26-57-261, or corresponding laws of other
11 states.

12 (c) Verification of qualified escrow fund.

13 The Attorney General may require at any time from the Nonparticipating
14 manufacturer proof, from the financial institution in which the manufacturer
15 has established a qualified escrow fund for the purpose of compliance with
16 Arkansas Code §§ 26-57-260 and 26-57-261, of:

17 (1) The amount of money in the fund, exclusive of interest;

18 (2) The amount and date of each deposit to the fund; and

19 (3) The amount and date of each withdrawal from the fund.

20 (d) Requests for additional information.

21 In addition to the information required to be submitted under this act,
22 the Attorney General may require a licensee or tobacco product manufacturer
23 to submit any additional information including, but not limited to, samples
24 of the packaging or labeling of each brand family, as is necessary to enable
25 the Attorney General to determine whether a tobacco product manufacturer is
26 in compliance with this act.

27 (e) Quarterly escrow installments for new tobacco product
28 manufacturers.

29 (1) To promote compliance with this act, the Attorney General
30 may require any manufacturer added to the directory after the first
31 publication of the directory on the Attorney General's website to make escrow
32 deposits required by Arkansas Code §§ 26-57-260 and 26-57-261 in quarterly
33 installment deposits through the first two years in which the sales covered
34 by the deposits are made.

35 (2) The Attorney General may require production of information
36 sufficient to enable the Attorney General to determine the adequacy of the

1 amount of each installment deposit.

2
3 SECTION 6. Penalties and Other Remedies.

4 (a) License revocation and civil penalty.

5 (1) In addition to or in lieu of any other civil or criminal
6 remedy provided by law, upon a determination that a licensee has violated
7 section 3(c) or any regulation adopted under this act, the director may
8 revoke or suspend the licensee's licenses or permits pursuant to law and
9 Arkansas Tobacco Control Board rules and regulations governing the procedure
10 for revocation or suspension of the licenses or permits.

11 (2) Each tax stamp affixed to and each sale or offer to sell
12 cigarettes in violation of section 3(c) shall constitute a separate
13 violation.

14 (3) For each violation, the Tobacco Control Board may also
15 impose a civil penalty in an amount not to exceed the greater of five hundred
16 percent (500%) of the retail value of the cigarettes or five thousand dollars
17 (\$5,000) upon a determination of violation of section 3(b) or any regulations
18 adopted under this act.

19 (b) Contraband and seizure.

20 Any cigarettes that have been sold, offered for sale, or possessed for
21 sale, in this state, or imported for personal consumption in this state, in
22 violation of section 3(c) shall be deemed contraband and the cigarettes shall
23 be subject to seizure and forfeiture as provided in Arkansas Code § 5-64-505,
24 and all of the cigarettes so seized and forfeited shall be destroyed and not
25 resold.

26 (c) Injunction.

27 (1) The Attorney General may seek an injunction to restrain a
28 threatened or actual violation of section 3(c), section 5(a), or section 5(d)
29 by a licensee and to compel the licensee to comply with those provisions.

30 (2) In any action brought under this section, the state shall be
31 entitled to recover the costs of investigation, costs of the action, and
32 reasonable attorney fees.

33 (d) Unlawful sale and distribution.

34 (1) It is unlawful for a person to sell or distribute cigarettes
35 or acquire, hold, own, possess, transport, import, or cause to be imported,
36 cigarettes that the person knows or should know are intended for distribution

1 or sale in the state in violation of subsection 3(c).

2 (2) A violation of this section is a Class A misdemeanor.

3 (e) Deceptive and unconscionable trade practice.

4 A violation of section 3(c) is a deceptive or unconscionable trade
5 practice under Arkansas Code § 4-88-101 et seq.

6
7 SECTION 7. Miscellaneous Provisions.

8 (a) Notice and review of determination.

9 (1) A determination by the Attorney General to not include or to
10 remove from the directory a brand family or tobacco product manufacturer
11 shall be subject to review by the filing of a civil action for prospective
12 declaratory or injunctive relief.

13 (2) The Circuit Court of Pulaski County, Arkansas shall have
14 sole and exclusive jurisdiction over the civil action.

15 (3) In authorizing the civil action, the state does not waive
16 its sovereign immunity from claims for monetary relief, costs, or attorneys'
17 fees, and no such relief shall be recoverable in any such civil action.

18 (b) Applicants for licenses.

19 No person or entity shall be issued a license or permit or granted a
20 renewal of a license or permit by the Director of the Arkansas Tobacco
21 Control Board unless the person or entity has certified in writing, under
22 penalty of perjury, that the person or entity will comply fully with this
23 act.

24 (c) Dates.

25 For the year 2003, if the effective date of this act is later than
26 March 16, 2003:

27 (1) The first report of wholesalers required by section 5(a)
28 shall be due thirty (30) calendar days after the effective date of this act;

29 (2) The certifications by a tobacco product manufacturer
30 described in section 3(a) of this act shall be due forty-five (45) calendar
31 days after the effective date of this act; and

32 (3) The directory described in section 3(b) shall be published
33 or made available within ninety (90) calendar days after the effective date
34 of this act.

35 (d) Promulgation of regulations.

36 The Attorney General, the Arkansas Tobacco Control Board, and the

1 Arkansas Department of Finance and Administration may promulgate regulations
2 necessary to effect the purposes of this act.

3 (e) Recovery of costs and fees by Attorney General.

4 In any action brought by the Attorney General to enforce this act, the
5 Attorney General shall be entitled to recover the costs of investigation,
6 expert witness fees, costs of the action and reasonable attorneys' fees.

7 (f) Disgorgement of profits for violations of act.

8 (1) If a court determines that a person or entity has violated
9 this act, the court shall order any profits, gain, gross receipts, or other
10 benefit from the violation to be disgorged and paid to the Treasurer of State
11 for deposit in the State Central Services Fund.

12 (2) Unless otherwise expressly provided the remedies or
13 penalties provided by this act are cumulative to each other and to the
14 remedies or penalties available under all other laws of this state.

15 (g) Construction and severability.

16 (1) If a court of competent jurisdiction finds that the
17 provisions of this act and of Arkansas Code §§ 26-57-260 and 26-57-261
18 conflict and cannot be harmonized, then such provisions of Arkansas Code §§
19 26-57-260 and 26-57-261 shall control.

20 (2) If any section, subsection, subdivision, paragraph,
21 sentence, clause, or phrase of this act causes Arkansas Code §§ 26-57-260 and
22 26-57-261 to no longer constitute a qualifying or model statute, as those
23 terms are defined in the Master Settlement Agreement, then that portion of
24 this act shall not be valid.

25 (3) If any section, subsection, subdivision, paragraph,
26 sentence, clause or phrase of this Act is for any reason held to be invalid,
27 unlawful or unconstitutional, such decision shall not affect the validity of
28 the remaining portions of this Act or any part thereof.

29
30 SECTION 8. EMERGENCY CLAUSE. It is found and determined by the
31 General Assembly that that violations of Arkansas Code §§ 26-57-260 and 26-
32 57-261 threaten the integrity of the tobacco Master Settlement Agreement, the
33 fiscal soundness of the state, and the public health and that procedural
34 enhancements will prevent violations and are immediately needed to aid the
35 enforcement of Arkansas Code §§ 26-57-260 and 26-57-261 and thereby safeguard
36 the Master Settlement Agreement, the fiscal soundness of the state, and the

1 public health. Therefore, an emergency is declared to exist and this act
2 being immediately necessary for the preservation of the public peace, health,
3 and safety shall become effective on:

4 (1) The date of its approval by the Governor;

5 (2) If the bill is neither approved nor vetoed by the Governor,
6 the expiration of the period of time during which the Governor may veto the
7 bill;

8 (3) If the bill is vetoed by the Governor and the veto is
9 overridden, the date the last house overrides the veto.

10
11 */s/ Bradford*

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14 **APPROVED: 4/3/2003**
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