

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

A Bill

HOUSE BILL 2194

4
5 By: Representative Bradford
6 By: Senator Bryles

For An Act To Be Entitled

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8
9
10 AN ACT TO ENHANCE ENFORCEMENT OF ARKANSAS CODE §§
11 26-57-260 AND 26-57-261; AND FOR OTHER PURPOSES.

Subtitle

12
13
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:

SECTION 1. Findings and Purpose.

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20
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.

SECTION 2. Definitions.

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30
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) A list of all of its brand families and the number of
 18 units sold for each brand family that were sold in the state during the
 19 preceding calendar year;

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

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

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

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

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

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

36 (B) That the Nonparticipating manufacturer:

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

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

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

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

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

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

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

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

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

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

36 (7) Nothing in section 3(a)(6) shall be construed as limiting or

1 otherwise affecting the state's right to maintain that a brand family
2 constitutes cigarettes of a different tobacco product manufacturer for
3 purposes of calculating payments under the Master Settlement Agreement or for
4 purposes of Arkansas Code §§ 26-57-260 and 26-57-261.

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

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

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

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

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

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

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

34 (D) The Attorney General shall update the directory as
35 necessary in order to correct mistakes and to add or remove a tobacco product
36 manufacturer or brand family to keep the directory in conformity with the

1 requirements of this act.

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

5 (c) Prohibition against stamping, sale, or import of cigarettes not in
6 the directory.

7 It is unlawful for any person or entity to:

8 (1) Affix a tax stamp to a package or other container of
9 cigarettes of a tobacco product manufacturer or brand family not included in
10 the directory maintained by the Attorney General pursuant to section 3(b); or

11 (2) Sell, offer, or possess for sale, in this state, or import
12 for personal consumption in this state, cigarettes of a tobacco product
13 manufacturer or brand family not included in the directory maintained by the
14 Attorney General pursuant to section 3(b).

15

16 SECTION 4. Requirement for agent for service of process.

17 (a)(1) Any nonresident or foreign Nonparticipating manufacturer that
18 has not registered to do business in the state as a foreign corporation or
19 business entity shall, as a condition precedent to having its brand families
20 included or retained in the directory maintained by the Attorney General
21 pursuant to section 3(b), appoint and continually engage without interruption
22 the services of an agent in this state to act as agent for the service of
23 process on whom all process, and any action or proceeding against it
24 concerning or arising out of the enforcement of this act and Arkansas Code §§
25 26-57-260 and 26-57-261, may be served in any manner authorized by law.

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

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

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

36 (2) If an agent terminates an agency appointment, the

1 Nonparticipating manufacturer shall notify the Attorney General of the
2 termination within five (5) calendar days and shall include proof to the
3 satisfaction of the Attorney General of the appointment of a new agent.

4 (c) Any Nonparticipating manufacturer whose cigarettes are sold in
5 this state, who has not appointed and engaged an agent as required by this
6 act, shall be deemed to have appointed the Secretary of State as the agent
7 and may be proceeded against in courts of this state by service of process
8 upon the Secretary of State; provided, however, that the appointment of the
9 Secretary of State as the agent shall not satisfy the condition precedent for
10 having the brand families of the Nonparticipating manufacturer included or
11 retained in the directory maintained by the Attorney General pursuant to
12 section 3(b).

13
14 SECTION 5. Reporting of information - Escrow installments.

15 (a) Reporting by wholesalers.

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

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

27 (b) Disclosure of information.

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

33 (2) The Arkansas Tobacco Control Board, Department of Finance
34 and Administration, and the Attorney General may share with each other any
35 information received under this act, and may share the information with other
36 federal, state, or local agencies only for purposes of enforcement of this

1 act, Arkansas Code §§ 26-57-260 and 26-57-261, or corresponding laws of other
 2 states.

3 (c) Verification of qualified escrow fund.

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

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

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

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

11 (d) Requests for additional information.

12 In addition to the information required to be submitted under this act,
 13 the Attorney General may require a licensee or tobacco product manufacturer
 14 to submit any additional information including, but not limited to, samples
 15 of the packaging or labeling of each brand family, as is necessary to enable
 16 the Attorney General to determine whether a tobacco product manufacturer is
 17 in compliance with this act.

18 (e) Quarterly escrow installments.

19 (1) To promote compliance with this act, the Attorney General
 20 may require every tobacco product manufacturer subject to the requirements of
 21 sections 3(a)(4) and 3(a)(5) to make the escrow deposits required in
 22 quarterly installments during the year in which the sales covered by the
 23 deposits are made.

24 (2) The Attorney General may require production of information
 25 sufficient to enable the Attorney General to determine the adequacy of the
 26 amount of each installment deposit.

27
 28 SECTION 6. Penalties and Other Remedies.

29 (a) License revocation and civil penalty.

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

36 (2) Each tax stamp affixed to and each sale or offer to sell

1 cigarettes in violation of section 3(c) shall constitute a separate
 2 violation.

3 (3) For each violation, the Tobacco Control Board may also
 4 impose a civil penalty in an amount not to exceed the greater of five hundred
 5 percent (500%) of the retail value of the cigarettes or five thousand dollars
 6 (\$5,000) upon a determination of violation of section 3(b) or any regulations
 7 adopted under this act.

8 (b) Contraband and seizure.

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

15 (c) Injunction.

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

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

22 (d) Unlawful sale and distribution.

23 (1) It is unlawful for a person to sell or distribute cigarettes
 24 or acquire, hold, own, possess, transport, import, or cause to be imported,
 25 cigarettes that the person knows or should know are intended for distribution
 26 or sale in the state in violation of subsection 3(c).

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

28 (e) Deceptive and unconscionable trade practice.

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

31
 32 SECTION 7. Miscellaneous Provisions.

33 (a) Notice and review of determination.

34 (1) A determination by the Attorney General to not include or to
 35 remove from the directory a brand family or tobacco product manufacturer
 36 shall be subject to review by the filing of a civil action for prospective

1 declaratory or injunctive relief.

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

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

7 (b) Applicants for licenses.

8 No person or entity shall be issued a license or permit or granted a
 9 renewal of a license or permit by the Director of the Arkansas Tobacco
 10 Control Board unless the person or entity has certified in writing, under
 11 penalty of perjury, that the person or entity will comply fully with this
 12 act.

13 (c) Dates.

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

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

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

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

24 (d) Promulgation of regulations.

25 The Attorney General, the Arkansas Tobacco Control Board, and the
 26 Arkansas Department of Finance and Administration may promulgate regulations
 27 necessary to effect the purposes of this act.

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

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

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

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

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

4 (g) Construction and severability.

5 (1) If a court of competent jurisdiction finds that the
 6 provisions of this act and of Arkansas Code §§ 26-57-260 and 26-57-261
 7 conflict and cannot be harmonized, then such provisions of Arkansas Code §§
 8 26-57-260 and 26-57-261 shall control.

9 (2) If any section, subsection, subdivision, paragraph,
 10 sentence, clause, or phrase of this act causes Arkansas Code §§ 26-57-260 and
 11 26-57-261 to no longer constitute a qualifying or model statute, as those
 12 terms are defined in the Master Settlement Agreement, then that portion of
 13 this act shall not be valid.

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

18
 19 SECTION 8. EMERGENCY CLAUSE. It is found and determined by the
 20 General Assembly that that violations of Arkansas Code §§ 26-57-260 and 26-
 21 57-261 threaten the integrity of the tobacco Master Settlement Agreement, the
 22 fiscal soundness of the state, and the public health and that procedural
 23 enhancements will prevent violations and are immediately needed to aid the
 24 enforcement of Arkansas Code §§ 26-57-260 and 26-57-261 and thereby safeguard
 25 the Master Settlement Agreement, the fiscal soundness of the state, and the
 26 public health. Therefore, an emergency is declared to exist and this act
 27 being immediately necessary for the preservation of the public peace, health,
 28 and safety shall become effective on:

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

30 (2) If the bill is neither approved nor vetoed by the Governor,
 31 the expiration of the period of time during which the Governor may veto the
 32 bill;

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