

Sixtieth  
Legislative Assembly  
of North Dakota

## HOUSE BILL NO. 1251

Introduced by

Representatives Belter, Carlson

Senator J. Lee

1 A BILL for an Act relating to the sale of noncompliant tobacco products; to repeal section  
2 57-36-05.2 of the North Dakota Century Code, relating to the sale of noncompliant tobacco  
3 products; to provide a penalty; and to provide for application.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. Definitions.**

- 6 1. "Brand family" means all styles of cigarettes sold under the same trademark and  
7 differentiated from one another by means of additional modifiers or descriptors,  
8 including "menthol", "lights", "kings", and "100s", and includes any brand name,  
9 trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or  
10 any other indicia of product identification identical or similar to, or identifiable with,  
11 a previously known brand of cigarettes.
- 12 2. "Cigarette" has the same meaning as in section 51-25-01.
- 13 3. "Commissioner" means the tax commissioner.
- 14 4. "Dealer" has the same meaning as in section 57-36-01.
- 15 5. "Distributor" has the same meaning as in section 57-36-01.
- 16 6. "Master settlement agreement" has the same meaning as in section 51-25-01.
- 17 7. "Nonparticipating manufacturer" means any tobacco product manufacturer that is  
18 not a participating manufacturer.
- 19 8. "Participating manufacturer" has the meaning given that term in the master  
20 settlement agreement.
- 21 9. "Qualified escrow fund" has the same meaning as in section 51-25-01.
- 22 10. "Tobacco product manufacturer" has the same meaning as in section 51-25-01.
- 23 11. "Units sold" has the same meaning as in section 51-25-01.

24 **SECTION 2. Certification - Directory.**

- 1           1. Every tobacco product manufacturer for which cigarettes are sold in this state,  
2           whether directly or through a distributor, retailer, or similar intermediary, shall  
3           execute and deliver on a form prescribed by the attorney general a certification to  
4           the attorney general, no later than the thirtieth day of April of each year, certifying  
5           that, as of the date of the certification, the tobacco product manufacturer either is a  
6           participating manufacturer or is in full compliance with chapter 51-25.  
7           a. A participating manufacturer shall include in its certification a list of its brand  
8           families. The participating manufacturer shall update the list thirty calendar  
9           days before any addition to or modification of its brand families by executing  
10           and delivering a supplemental certification to the attorney general.  
11          b. (1) A nonparticipating manufacturer shall include in its certification:  
12               (a) A list of its brand families and the number of units sold for each  
13               brand family that was sold in the state during the preceding  
14               calendar year;  
15               (b) A list of its brand families that have been sold in the state during  
16               the current calendar year;  
17               (c) An indication, by an asterisk, of any brand family sold in the state  
18               during the preceding calendar year which is no longer being sold  
19               in the state as of the date of the certification; and  
20               (d) The name and address of any other manufacturer of the brand  
21               families in the preceding or current calendar year.  
22          (2) A nonparticipating manufacturer shall update the list thirty calendar  
23               days before any addition to or modification of its brand families by  
24               executing and delivering a supplemental certification to the attorney  
25               general.  
26          c. A nonparticipating manufacturer shall include in the certification:  
27               (1) A statement that the nonparticipating manufacturer is registered to do  
28               business in the state or has appointed a resident agent for service of  
29               process and provided notice of the appointment as required by this Act.  
30               (2) A statement that the nonparticipating manufacturer has established and  
31               continues to maintain a qualified escrow fund and has executed a

1 qualified escrow agreement that governs the qualified escrow fund that  
2 has been reviewed and approved by the attorney general.

3 (3) A statement that the nonparticipating manufacturer is in full compliance  
4 with chapter 51-25, this Act, and any applicable rules,

5 (4) The name, address, and telephone number of the financial institution  
6 where the nonparticipating manufacturer has established the qualified  
7 escrow fund; the account number of the qualified escrow fund and any  
8 subaccount number for the state; the amount the nonparticipating  
9 manufacturer placed in the fund for cigarettes sold in the state during  
10 the preceding calendar year, the date and amount of each deposit, and  
11 any evidence or verification deemed necessary by the attorney general  
12 to confirm that information; and the amount and date of any withdrawal  
13 or transfer of funds the nonparticipating manufacturer made from the  
14 fund or from any other qualified escrow fund into which it made escrow  
15 payments.

16 d. (1) A tobacco product manufacturer may not include a brand family in its  
17 certification unless:

18 (a) In the case of a participating manufacturer, the participating  
19 manufacturer affirms that the brand family is to be deemed to be  
20 its cigarettes for purposes of calculating its payments under the  
21 master settlement agreement for the relevant year, in the volume  
22 and shares determined under the master settlement agreement;  
23 and

24 (b) In the case of a nonparticipating manufacturer, the  
25 nonparticipating manufacturer affirms that the brand family is to  
26 be deemed to be its cigarettes for purposes of chapter 51-25.

27 (2) This section does not limit or otherwise affect the state's right to  
28 maintain that a brand family constitutes cigarettes of a different tobacco  
29 product manufacturer for purposes of calculating payments under the  
30 master settlement agreement or for purposes of chapter 51-25.

1           e. A tobacco product manufacturer shall maintain all invoices and documentation  
2           of sales and other such information relied upon for the certification for a period  
3           of five years, unless otherwise required by law to maintain the records for a  
4           greater period of time.

5           2. The attorney general shall develop and publish on the internet a directory listing  
6           each tobacco product manufacturer that has provided current and accurate  
7           certifications conforming to the requirements of this Act and all brand families that  
8           are listed in the certifications, except:

9           a. The attorney general may not include or retain in the directory the name or  
10           brand families of any nonparticipating manufacturer that has failed to provide  
11           the required certification or for which the certification the attorney general  
12           determines is not in compliance with this Act, unless the attorney general has  
13           determined that the violation has been cured.

14           b. A tobacco product manufacturer or brand family may not be included or  
15           retained in the directory if the attorney general concludes that the  
16           nonparticipating manufacturer has not fully paid any escrow payment required  
17           under section 51-25-02 for any period for any brand family into a qualified  
18           escrow fund governed by a qualified escrow agreement approved by the  
19           attorney general, or if the nonparticipating manufacturer has not fully satisfied  
20           any outstanding final judgment, including interest for a violation of chapter  
21           51-25 for the brand family or the manufacturer.

22           c. The attorney general shall update the directory as necessary to correct  
23           mistakes and to add or remove a tobacco product manufacturer or brand  
24           family.

25           d. Each dealer or distributor shall provide and update as necessary an electronic  
26           mail address to the attorney general for the purpose of receiving any  
27           notification required by this Act.

28           3. A person may not sell, offer, or possess for sale in this state, or import for personal  
29           consumption in this state, cigarettes of a tobacco product manufacturer or brand  
30           family not included in the directory.

- 1           4.   A determination of the attorney general to not include or to remove from the  
2                   directory a brand family or tobacco product manufacturer is subject to review in  
3                   accordance with chapter 28-32.

4           **SECTION 3. Agent for service of process.**

- 5           1.   Any nonresident or foreign nonparticipating manufacturer that has not registered to  
6                   do business in this state as a foreign corporation or business entity, as a condition  
7                   to having its brand families included or retained in the directory, shall appoint and  
8                   continually engage without interruption the services of an agent in this state to act  
9                   as agent for the service of process on whom all process and any action or  
10                  proceeding against the manufacturer concerning or arising out of the enforcement  
11                  of this Act and chapter 51-25 may be served. The service constitutes legal and  
12                  valid service of process on the nonparticipating manufacturer. The  
13                  nonparticipating manufacturer shall provide the name, address, telephone number,  
14                  and proof of the appointment and availability of the agent to the attorney general.
- 15          2.   The nonparticipating manufacturer shall provide notice to the attorney general thirty  
16                  calendar days before termination of the authority of an agent and shall provide  
17                  proof to the satisfaction of the attorney general of the appointment of a new agent  
18                  no less than five calendar days before the termination of an existing agent  
19                  appointment. If an agent terminates an agency appointment, the nonparticipating  
20                  manufacturer shall notify the attorney general of the termination within five  
21                  calendar days and shall include proof to the satisfaction of the attorney general of  
22                  the appointment of a new agent.
- 23          3.   A nonparticipating manufacturer for which cigarettes are sold in this state and that  
24                  has not appointed and engaged an agent is deemed to have appointed the  
25                  secretary of state as an agent and may be proceeded against in courts of this state  
26                  by service of process upon the secretary of state. The appointment of the  
27                  secretary of state as the agent does not satisfy the condition precedent for having  
28                  the brand families of the nonparticipating manufacturer included or retained in the  
29                  directory.

30          **SECTION 4. Reporting of information - Escrow installments.**

- 1       1. Not later than twenty calendar days after the end of each calendar quarter, and  
2       more frequently if directed by the attorney general, each dealer and distributor shall  
3       submit any information the attorney general requires to facilitate compliance with  
4       this Act, including a list by brand family of the total number of cigarettes, or, in the  
5       case of roll your own, the equivalent stick count, for which the dealer or distributor  
6       paid the tax due for the cigarettes. The dealer and distributor shall maintain and  
7       make available to the attorney general all invoices and documentation of sales of  
8       all nonparticipating manufacturer cigarettes and any other information relied upon  
9       in reporting to the attorney general for a period of five years.
- 10      2. The commissioner may disclose to the attorney general any information received  
11      under this Act and requested by the attorney general for purposes of determining  
12      compliance with and enforcing this Act. The commissioner and the attorney  
13      general shall share with each other the information received under this chapter,  
14      and may share the information with other governmental agencies for purposes of  
15      enforcement of this Act, chapter 51-25, or corresponding laws of other states.
- 16      3. The attorney general may require at any time from the nonparticipating  
17      manufacturer proof, from the financial institution in which the manufacturer has  
18      established a qualified escrow fund, of the amount of money in the fund, exclusive  
19      of interest, the amount and date of each deposit to the fund, and the amount and  
20      date of each withdrawal from the fund.
- 21      4. In addition to the information required to be submitted under chapter 51-25 and this  
22      chapter, the attorney general may require a dealer, distributor, or tobacco product  
23      manufacturer to submit any additional information, including samples of the  
24      packaging or labeling of each brand family, to enable the attorney general to  
25      determine whether a tobacco product manufacturer is in compliance with this Act.
- 26      5. To promote compliance with this chapter, the attorney general may adopt rules  
27      requiring a tobacco product manufacturer subject to this Act to make the escrow  
28      deposits required in quarterly installments during the year in which the sales  
29      covered by the deposits are made. The attorney general may require production of  
30      information sufficient to enable the attorney general to determine the adequacy of  
31      the amount of the installment deposit.

**SECTION 5. Penalties and other remedies.**

1. In addition to any other civil remedy or criminal penalty provided by law, upon a determination that a dealer or distributor has violated subsection 3 of section 2 of this Act or any rule adopted to implement this Act, the attorney general may revoke or suspend the license of the dealer or distributor in the manner provided under section 57-36-04. Each sale or offer to sell cigarettes in violation of subsection 3 of section 2 of this Act constitutes a separate violation. For each violation, the attorney general also may impose a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars upon a determination of a violation.
2. Any cigarettes that have been sold, offered for sale, or possessed for sale in this state or imported for personal consumption in this state in violation of subsection 3 of section 2 of this Act are deemed contraband under section 57-36-14 and the cigarettes are subject to seizure and forfeiture as provided in that section. Any cigarettes seized and forfeited must be destroyed and may not be resold.
3. The attorney general may seek an injunction to restrain a threatened or actual violation of subsection 3 of section 2 or subsection 1 or 4 of section 4 of this Act by a dealer or distributor and to compel the dealer or distributor to comply. In any action brought under this section, the state is entitled to recover the costs of investigation, costs of the action, and reasonable attorney's fees.
4. It is unlawful for a person to sell or distribute cigarettes or 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 subsection 3 of section 2 of this Act. A violation of this subsection is a class A misdemeanor.
5. A person who violates subsection 3 of section 2 of this Act engages in an unfair trade practice in violation of chapter 51-10.
6. If a court determines that a person has violated this Act, the court shall order any profits, gain, gross receipts, or other benefit from the violation to be paid to the state treasurer for deposit in the attorney general refund fund.

1           **SECTION 6. Applicant for licenses.** A person may not be issued a license or granted  
2 a renewal of a license to act as a dealer or distributor unless the person has certified in writing,  
3 under penalty of perjury, that the person will comply fully with this Act.

4           **SECTION 7. REPEAL.** Section 57-36-05.2 of the North Dakota Century Code is  
5 repealed.

6           **SECTION 8. APPLICATION.** The first report of dealers and distributors required by  
7 this Act is due thirty calendar days after the effective date of this Act and the certifications by a  
8 tobacco product manufacturer under this Act are due forty-five calendar days after the effective  
9 date of this Act.