

HOUSE BILL NO. 1432

Introduced by

Representatives Grande, Grosz, Haas

Senators Freborg, Robinson, Tollefson

1 A BILL for an Act to impose limitations on the sales of tobacco products of tobacco product
2 manufacturers not participating in the tobacco settlement agreement; and to provide a penalty.

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

4 **SECTION 1. Limitation of scope.** This Act does not amend chapter 51-25.

5 **SECTION 2. Definitions.** As used in this Act, unless the context requires otherwise:

- 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"; includes any use of a brand
9 name, alone or in conjunction with any other word, trademark, logo, symbol, motto,
10 selling message, recognizable pattern of colors; or any other indicia of product
11 identification identical or similar to, or identifiable with, a previously known brand of
12 cigarettes.
- 13 2. "Cigarette" has the same meaning as under section 51-25-01.
- 14 3. "Distributor" has the same meaning as under section 57-36-01.
- 15 4. "Nonparticipating manufacturer" means any tobacco product manufacturer that is
16 not a participating manufacturer.
- 17 5. "Participating manufacturer" has the meaning given that term in section II(jj) of the
18 master settlement agreement as defined under section 51-25-01.
- 19 6. "Qualified escrow fund" has the same meaning as under section 51-25-01.
- 20 7. "Tobacco product manufacturer" has the same meaning as under section
21 51-25-01.
- 22 8. "Units sold" has the same meaning as under section 51-25-01.

23 **SECTION 3. Certifications - Directory - Tax stamps.**

- 1 1. Every tobacco product manufacturer with cigarettes sold in this state whether
2 directly or through a distributor, retailer, or similar intermediary shall execute and
3 deliver on a form or in the manner prescribed by the state tax commissioner a
4 certification to the state tax commissioner and attorney general no later than the
5 thirtieth day of April each year, certifying that, as of the date of the certification, the
6 tobacco product manufacturer either is a participating manufacturer or is in full
7 compliance with chapter 51-25.
- 8 a. A participating manufacturer shall include in its certification a list of its brand
9 families. The participating manufacturer shall update the list thirty days before
10 any addition to or modification of its brand families by executing and delivering
11 a supplemental certification to the state tax commissioner.
- 12 b. A nonparticipating manufacturer shall:
- 13 (1) Include in its certification, a complete list of all of its brand families:
- 14 (a) Separately listing brand families of cigarettes and the number of
15 units sold for each brand family that were sold in the state during
16 the preceding calendar year;
- 17 (b) All of its brand families that have been sold in the state at any
18 time during the current calendar year;
- 19 (c) Indicating by an asterisk, any brand family sold in the state during
20 the preceding calendar year which is no longer being sold in the
21 state as of the date of such certification; and
- 22 (d) Identifying by name and address any other manufacturer of such
23 brand families in the preceding calendar year.
- 24 2. Update such list thirty days before any addition to or modification of its brand
25 families by executing and delivering a supplemental certification to the state tax
26 commissioner.
- 27 c. In the case of a nonparticipating manufacturer, the certification must further
28 certify:
- 29 (1) That the nonparticipating manufacturer is registered to do business in
30 the state or has appointed a resident agent for service of process and
31 provided notice thereof as required by subdivision d.

- 1 (2) That the nonparticipating manufacturer has established and continues
2 to maintain a qualified escrow fund as that term is defined under section
3 51-25-01, and executed a qualified escrow agreement that has been
4 reviewed and approved by the state tax commissioner and that governs
5 the qualified escrow fund.
- 6 (3) That the nonparticipating manufacturer is in full compliance with escrow
7 provisions of chapter 51-25 and this section, and any rules adopted
8 pursuant thereto.
- 9 (4) (a) The name, address, and telephone number of the financial
10 institution with which the nonparticipating manufacturer has
11 established such qualified escrow fund required pursuant to
12 chapter 51-25 and all rules adopted thereto;
- 13 (b) The account number of such qualified escrow fund and
14 subaccount number for the state;
- 15 (c) The amount such nonparticipating manufacturer placed in such
16 fund for cigarettes sold in the state during the preceding calendar
17 year, the date and amount of each deposit, and evidence or
18 verification as may be deemed necessary by the state tax
19 commissioner to confirm the foregoing; and
- 20 (d) The amounts of and dates of any withdrawal or transfer of funds
21 the nonparticipating manufacturer made at any time from the fund
22 or from any other qualified escrow fund into which it made escrow
23 payments pursuant to chapter 51-25 and all rules adopted under
24 that chapter.
- 25 d. A tobacco product manufacturer may not include a brand family in its
26 certification unless, in the case of a participating manufacturer, said
27 participating manufacturer affirms that the brand family is to be deemed to be
28 its cigarettes for purposes of calculating its payments under the master
29 settlement agreement for the relevant year, in the volume and shares
30 determined pursuant to the master settlement agreement and, in the case of a
31 nonparticipating manufacturer, said nonparticipating manufacturer affirms that

1 the brand family is to be deemed to be its cigarettes for purposes of chapter
2 51-25. This section does not limit or otherwise affect the state's right to
3 maintain that a brand family constitutes cigarettes of a different tobacco
4 product manufacturer for purposes of calculating payments under the master
5 settlement agreement or for purposes of chapter 51-25.

6 e. The tobacco product manufacturers shall maintain all invoices and
7 documentation of sales and other such information relied upon for such
8 certification for a period of five years, unless otherwise required by law to
9 maintain them for a greater period of time.

10 2. Not later than the effective date of this Act, the state tax commissioner shall
11 develop and make available for public inspection a directory listing all tobacco
12 product manufacturers that have provided current and accurate certifications
13 conforming to the requirements of subsection 1 and all brand families that are
14 listed in the certifications, except as herein provided.

15 a. The state tax commissioner may not include or retain in the directory the
16 name or brand families of any nonparticipating manufacturer that fails to
17 provide the required certification or whose certification the state tax
18 commissioner determines is not in compliance with subsection 1, unless the
19 state tax commissioner has determined that the violation has been cured to
20 the satisfaction of the state tax commissioner.

21 b. Neither a tobacco product manufacturer nor brand family may be included or
22 retained in the directory if the state tax commissioner concludes that in the
23 case of a nonparticipating manufacturer all escrow payments required
24 pursuant to chapter 51-25 for any period for any brand family, whether or not
25 listed by such nonparticipating manufacturer, have not been fully paid into a
26 qualified escrow fund governed by a qualified escrow agreement that has
27 been approved by the attorney general, or concludes that all outstanding final
28 judgments, including interest thereon, for violations of chapter 51-25 have not
29 been fully satisfied for the brand family and the manufacturer.

30 c. The state tax commissioner shall update the directory as necessary in order
31 to correct mistakes and to add or remove a tobacco product manufacturer or

1 brand families to keep the directory in conformity with the requirements of this
2 Act.

3 d. Every distributor shall provide and update as necessary an electronic mail
4 address to the state tax commissioner for the purpose of receiving any
5 notifications as may be required by this Act.

6 3. It is unlawful for any person to affix a stamp to a package or other container of
7 cigarettes of a tobacco product manufacturer or brand family not included in the
8 directory, or to sell, offer, or possess for sale in this state, cigarettes of a tobacco
9 product manufacturer or brand family not included in the directory.

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

11 1. Any nonresident or foreign nonparticipating manufacturer that has not registered to
12 do business in the state as a foreign corporation or business entity, as a condition
13 precedent to having its brand families listed or retained in the directory, shall
14 appoint and continually engage without interruption the services of an agent in this
15 state to act as agent for the service of process on whom all process, and any
16 action or proceeding against it concerning or arising out of the enforcement of the
17 Act and chapter 51-25, may be served in any manner authorized by law. The
18 service constitutes legal and valid service of process on the nonparticipating
19 manufacturer. The nonparticipating manufacturer shall provide the name, address,
20 telephone number, and proof of the appointment and availability of the agent to
21 and to the satisfaction of the state tax commissioner and attorney general.

22 2. The nonparticipating manufacturer shall provide notice to the state tax
23 commissioner thirty calendar days before termination of the authority of an agent
24 and shall further provide proof to the satisfaction of the attorney general of the
25 appointment of a new agent no less than five calendar days before the termination
26 of an existing agent appointment. In the event an agent terminates an agency
27 appointment, the nonparticipating manufacturer shall notify the state tax
28 commissioner and attorney general of said termination within five calendar days
29 and shall include proof to the satisfaction of the attorney general of the
30 appointment of a new agent.

- 1 3. Any nonparticipating manufacturer with products sold in this state, without
2 appointing or designating an agent as herein required is deemed to have appointed
3 the secretary of state as the agent and may be proceeded against in courts of this
4 state by service of process upon the secretary of state; however, the appointment
5 of the secretary of state as such agent does not satisfy the condition precedent to
6 having its brand families listed or retained in the directory.

7 **SECTION 5. Reporting - Escrow installments.**

- 8 1. Not later than twenty days after the end of each calendar quarter, and more
9 frequently if so directed by the state tax commissioner, each distributor shall submit
10 such information as the state tax commissioner requires to facilitate compliance
11 with this section, including a list by brand family of the total number of cigarettes or
12 in the case of roll your own, the equivalent stick count for which the distributor
13 affixed stamps during the previous calendar or otherwise paid the tax due for the
14 cigarettes. The distributor shall maintain and make available to the state tax
15 commissioner all invoices and documentation of sales of all nonparticipating
16 manufacturer cigarettes and any other information relied upon in reporting to the
17 state tax commissioner for a period of five years.
- 18 2. The state tax commissioner may disclose to the attorney general any information
19 received under this Act and requested by the attorney general for purposes of
20 determining compliance with and enforcing the provisions of this Act. The state tax
21 commissioner and attorney general shall share with each other the information
22 received under this Act, and may share the information with other federal, state, or
23 local agencies only for purposes of enforcement of this Act, chapter 51-25, or
24 corresponding laws of other states.
- 25 3. The attorney general may require at any time from the nonparticipating
26 manufacturer proof from the financial institution in which the manufacturer has
27 established a qualified escrow fund for the purpose of compliance with chapter
28 51-25 of the amount of money in the fund being held on behalf of the state and the
29 dates of deposits, and listing the amounts of all withdrawals from the fund and the
30 dates thereof.

- 1 4. The state tax commissioner may require a distributor or tobacco product
2 manufacturer to submit any additional information, including samples of the
3 packaging or labeling of each brand family, as is necessary to enable the attorney
4 general to determine whether a tobacco product manufacturer is in compliance
5 with this Act.
- 6 5. To promote compliance with the provisions of this Act, the state tax commissioner
7 may adopt rules requiring a tobacco product manufacturer subject to the
8 requirements of subdivision b of subsection 1 of section 3 of this Act to make the
9 escrow deposits required in installments during the year in which the sales covered
10 by the deposits are made. The state tax commissioner may require production of
11 information sufficient to enable the state tax commissioner to determine the
12 adequacy of the amount of the installment deposit.

13 **SECTION 6. Penalties - Remedies.**

- 14 1. In addition to or in lieu of any other remedy provided by law, upon a determination
15 that any person has violated subsection 3 of section 3 of this Act or any rule
16 adopted implementing that subsection, the state tax commissioner may revoke or
17 suspend the license of any distributor in the manner provided by section 57-36-02.
18 Each stamp affixed and each offer to sell cigarettes in violation of subsection 3 of
19 section 3 of this Act constitutes a separate violation. For each violation, the state
20 tax commissioner may also impose a civil penalty in an amount not to exceed the
21 greater of five hundred percent of the retail value of the cigarettes sold or five
22 thousand dollars upon a determination of violation of subsection 3 of section 3 of
23 this Act or any rules adopted to implement that subsection. The penalty must be
24 imposed in the manner provided under chapter 57-36.
- 25 2. Any cigarettes that have been sold, offered for sale, or possessed for sale in this
26 state, in violation of subsection 3 of section 3 of this Act are deemed contraband
27 and such cigarettes are subject to seizure and forfeiture as may be provided, and
28 all such cigarettes so seized and forfeited must be destroyed and not resold.
- 29 3. The attorney general, on behalf of the state tax commissioner, may seek an
30 injunction to restrain a threatened or actual violation of subsection 3 of section 3 of
31 this Act, subsection 1 of section 5 of this Act, or subsection 4 of section 5 of this

1 Act by a stamping agent and to compel the stamping agent to comply with such
2 subsections. In any action brought pursuant to this section, the state is entitled to
3 recover the costs of investigation, costs of the action, and reasonable attorney
4 fees.

5 4. It is unlawful for any person to sell or distribute cigarettes or to acquire, hold, own,
6 possess, transport, import, or cause to be imported cigarettes that the person
7 knows or should know are intended for distribution or sale in the state in violation of
8 subsection 3 of section 3 of this Act. A violation of this section is a class B
9 misdemeanor;

10 5. A person who violates subsection 3 of section 3 of this Act engages in an unfair
11 and deceptive trade practice in violation of chapter 51-10.

12 **SECTION 7. Administrative provisions - Penalties and remedies cumulative.**

13 1. A determination of the state tax commissioner to not list or to remove from the
14 directory a brand family or tobacco product manufacturer is subject to review in the
15 manner prescribed under chapter 28-32.

16 2. A person may not be issued a license or granted a renewal of a license to act as a
17 stamping agent unless the person has certified in writing that the person will
18 comply with this Act.

19 3. The state tax commissioner may adopt rules necessary to effect the purposes of
20 this Act.

21 4. In any action brought by the state to enforce this Act, the state is entitled to recover
22 the costs of investigation, expert witness fees, costs of the action, and reasonable
23 attorney fees.

24 5. If a court determines that a person has violated this Act, the court shall order any
25 profits, gain, gross receipts, or other benefit from the violation to be disgorged and
26 paid to the state treasurer for deposit in the general fund. Unless otherwise
27 expressly provided the remedies or penalties provided by this Act are cumulative to
28 each other and to the remedies or penalties available under all other laws of this
29 state.