

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.

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

- 2 1. In addition to any other civil remedy or criminal penalty provided by law, upon a
3 determination that a dealer or distributor has violated subsection 3 of section 2 of
4 this Act or any rule adopted to implement this Act, the attorney general may revoke
5 or suspend the license of the dealer or distributor in the manner provided under
6 section 57-36-04. Each sale or offer to sell cigarettes in violation of subsection 3 of
7 section 2 of this Act constitutes a separate violation. For each violation, the
8 attorney general also may impose a civil penalty in an amount not to exceed the
9 greater of five hundred percent of the retail value of the cigarettes or five thousand
10 dollars upon a determination of a violation.
- 11 2. Any cigarettes that have been sold, offered for sale, or possessed for sale in this
12 state or imported for personal consumption in this state in violation of subsection 3
13 of section 2 of this Act are deemed contraband under section 57-36-14 and the
14 cigarettes are subject to seizure and forfeiture as provided in that section. Any
15 cigarettes seized and forfeited must be destroyed and may not be resold.
- 16 3. The attorney general may seek an injunction to restrain a threatened or actual
17 violation of subsection 3 of section 2 or subsection 1 or 4 of section 4 of this Act by
18 a dealer or distributor and to compel the dealer or distributor to comply. In any
19 action brought under this section, the state is entitled to recover the costs of
20 investigation, costs of the action, and reasonable attorney's fees.
- 21 4. It is unlawful for a person to sell or distribute cigarettes or acquire, hold, own,
22 possess, transport, import, or cause to be imported cigarettes that the person
23 knows or should know are intended for distribution or sale in the state in violation of
24 subsection 3 of section 2 of this Act. A violation of this subsection is a class A
25 misdemeanor.
- 26 5. A person who violates subsection 3 of section 2 of this Act engages in an unfair
27 trade practice in violation of chapter 51-10.
- 28 6. If a court determines that a person has violated this Act, the court shall order any
29 profits, gain, gross receipts, or other benefit from the violation to be paid to the
30 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.