

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005**

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HOUSE BILL 1490

Short Title: Tobacco Escrow Compliance Changes. (Public)

Sponsors: Representatives Johnson; Daughtridge and McGee.

Referred to: Rules, Calendar, and Operations of the House.

April 21, 2005

1 A BILL TO BE ENTITLED
2 AN ACT TO ESTABLISH SEVERAL PROCEDURAL ENHANCEMENTS THAT
3 WILL PROTECT THE MASTER SETTLEMENT AGREEMENT, AID IN THE
4 ENFORCEMENT OF THE TOBACCO RESERVE FUND ACT, AND WILL
5 SAFEGUARD THE FISCAL SOUNDNESS OF THE STATE AND PUBLIC
6 HEALTH.

7 The General Assembly of North Carolina enacts:

8 **SECTION 1.** G.S. 66-292 reads as rewritten:

9 "**§ 66-292. Definitions.**

10 The following definitions apply in this Part:

11 (1) Brand family. – All styles of cigarettes sold under the same trademark
12 and differentiated from one another by means of additional modifiers
13 or descriptors, including, but not limited to, "menthol", "lights",
14 "kings", and "100s". 100s, and includes any brand name (alone or in
15 conjunction with any other word), trademark, logo, symbol, motto,
16 selling message, recognizable patterns of colors, or any other indicia of
17 product identification identical or similar to, or identifiable with, a
18 previously known brand of cigarettes.

19 (1a) Department. – The Department of Revenue.

20 (1b) Directory. – The listing developed and published in accordance with
21 G.S. 66-294.3.

22 (1c) Distributor. – Either of the following as defined in G.S. 105-113.4(3).

23 (2) Escrow Agreement. – An agreement by which a qualified escrow fund
24 is created and maintained.

25 (3) Nonparticipating manufacturer. – A tobacco product manufacturer that
26 is not a participating manufacturer.

27 (4) Participating manufacturer. – Defined in subsection II(jj) of the Master
28 Settlement Agreement." Agreement and all amendments thereto."

29 **SECTION 2.** G.S. 66-293, 66-294, and 66-294.1 are repealed.

1 **SECTION 3.** Part 2 of Article 37 of Chapter 66 of the General Statutes is
2 amended by adding the following new sections to read:

3 **"§ 66-294.2. Certification; directory; tax stamps.**

4 (a) Every tobacco product manufacturer whose cigarettes are sold in this State,
5 whether directly or through a distributor, retailer or similar intermediary or
6 intermediaries, shall execute and deliver on a form prescribed by the Attorney General a
7 certification to the Attorney General, no later than the 30th day of April each year,
8 certifying that, as of the date of the certification, the tobacco product manufacturer
9 either is a participating manufacturer, or is in full compliance with G.S. 66-291.

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

14 (c) A nonparticipating manufacturer shall include in its certification all of the
15 following:

16 (1) A list of all of its brand families and the number of units sold for each
17 brand family that were sold in the State during the preceding calendar
18 year.

19 (2) A list of all of its brand families that have been sold in the State at
20 anytime during the current calendar year.

21 (3) Any brand family sold in the State during the preceding calendar year
22 that is no longer being sold in the State as of the date of the
23 certification (indicated by an asterisk).

24 (4) The name and address of any other manufacturer of brand families in
25 the preceding or current calendar year.

26 The nonparticipating manufacturer shall update its brand families by executing and
27 delivering a supplemental certification to the Attorney General.

28 (d) In the case of a nonparticipating manufacturer, the certification shall certify
29 all of the following:

30 (1) That the nonparticipating manufacturer is registered to do business in
31 the State or has appointed a resident agent for service of process and
32 provided notice thereof as required by G.S. 66-294.5.

33 (2) That the nonparticipating manufacturer has established and continues
34 to maintain a qualified escrow fund and has executed a qualified
35 escrow agreement that has been reviewed and approved by the
36 Attorney General and that governs the qualified escrow fund.

37 (3) That the nonparticipating manufacturer is in full compliance with this
38 Part and Part 1 of this Article.

39 (4) For a qualified escrow fund, all of the following:

40 a. The name, address, and telephone number of the financial
41 institution where the nonparticipating manufacturer has
42 established a qualified escrow fund.

43 b. The account number of such qualified escrow fund and any
44 subaccount number for the State.

1 c. The amount the nonparticipating manufacturer placed in the
2 qualified escrow fund for cigarettes sold in the State during the
3 preceding calendar year, the date and amount of each deposit,
4 and such evidence or verification as may be deemed necessary
5 by the Attorney General to confirm the foregoing.

6 d. The amount and date of any withdrawal or transfer of funds the
7 nonparticipating manufacturer made at anytime from the fund
8 or from any other qualified escrow fund into which the
9 nonparticipating manufacturer ever has made escrow payments
10 pursuant to G.S. 66-291.

11 (e) A tobacco product manufacturer may not include a brand family in its
12 certification unless one of the following applies:

13 (1) In the case of a participating manufacturer, the participating
14 manufacturer affirms that the brand family is to be deemed to be its
15 cigarettes for purposes of calculating its payment under the Master
16 Settlement Agreement.

17 (2) In the case of a nonparticipating manufacturer, the nonparticipating
18 manufacturer affirms that the brand family is to be deemed to be its
19 cigarettes for purposes of Part 1 of this Article.

20 Nothing in this subsection shall be construed or otherwise affecting the State's right
21 to maintain that a brand family constitutes cigarettes of a different tobacco product
22 manufacturer for purposes of calculating payments under the Master Settlement
23 Agreement or for purposes of Part 1 of this Article.

24 (f) Tobacco product manufacturers shall maintain all invoices and
25 documentation of sales and other information relied upon for certification for a period
26 of five years, unless otherwise required by law to maintain them for a greater period of
27 time.

28 **"§ 66-294.3. Directory of cigarettes approved for stamping.**

29 (a) Not later than April 30, 2006, the Attorney General shall develop and publish
30 on its Web site a directory listing all tobacco product manufacturers that have provided
31 current and accurate certifications conforming to the requirements of G.S. 66-294.2 and
32 all brand families that are listed in those certifications, except as set forth in subsections
33 (b) and (c) of this section.

34 (b) The Attorney General shall not include or retain in the directory the name or
35 brand families of any nonparticipating manufacturer that has failed to provide the
36 required certification or whose certification the Attorney General determines is not in
37 compliance with G.S. 66-294.2(c) and (d), unless the Attorney General has determined
38 that such violation has been cured to the satisfaction of the Attorney General.

39 (c) Neither a tobacco product manufacturer nor a brand family shall be included
40 or retained in the directory if the Attorney General concludes either of the following:

41 (1) Any escrow payment required pursuant to G.S. 66-291 for any period
42 for any brand family, whether or not listed by nonparticipating
43 manufacturer, has not been fully paid into a qualified escrow fund

1 governed by a qualified escrow agreement that has been approved by
2 the Attorney General.

3 (2) Any outstanding final judgment, including interest thereon, for a
4 violation of Part 1 of this Article has not been fully satisfied for the
5 brand family or the tobacco product manufacturer.

6 (d) The Attorney General shall update the directory as necessary in order to
7 correct mistakes and to add or remove a tobacco product manufacturer or brand family
8 to keep the directory in conformity with the requirements of this section.

9 (e) Every distributor shall provide and update as necessary an electronic mail
10 address to the Attorney General for the purpose of receiving any notifications as may be
11 required by this Part.

12 **"§ 66-294.4. Prohibition against stamping or sale or import of cigarettes not in the**
13 **directory.**

14 It shall be unlawful for any person to do either of the following:

15 (1) Affix a stamp to a package or other container of cigarettes of a tobacco
16 product manufacturer or brand family not included in the directory.

17 (2) Sell, offer, or possess for sale, in this State, or import for personal
18 consumption in this State, cigarettes of a tobacco product manufacturer
19 or brand family not included in the directory.

20 **"§ 66-294.5. Agent for service of process.**

21 (a) Any nonresident or foreign nonparticipating manufacturer that has not
22 registered to do business in this State as a foreign corporation or business entity shall, as
23 a condition precedent to having its brand families included or retained in the directory,
24 appoint and continually engage without interruption the services of a registered agent in
25 this State to act as agent for the service of process on whom all processes, and any
26 action or proceeding against it concerning or arising out of the enforcement of this Part
27 and Part 1 of this Article, may be served in any manner authorized by law. Such service
28 shall constitute legal and valid service of process on the nonparticipating manufacturer.
29 The nonparticipating manufacturer shall provide the name, address, phone number, and
30 proof of the appointment and availability of the registered agent to, and to the
31 satisfaction of, the Attorney General.

32 (b) The nonparticipating manufacturer shall provide notice to the Attorney
33 General 30 calendar days prior to termination of the authority of a registered agent and
34 shall further provide proof to the satisfaction of the Attorney General of the
35 appointment of a new registered agent no less than five calendar days prior to the
36 termination of an existing registered agent appointment. In the event a registered agent
37 terminates a registered agent appointment, the nonparticipating manufacturer shall
38 notify the Attorney General of the termination within five calendar days and shall
39 include proof to the satisfaction of the Attorney General of the appointment of a new
40 agent.

41 (c) Any nonparticipating manufacturer whose cigarettes are sold in this State,
42 who has not appointed and engaged a registered agent as required in this section, shall
43 be deemed to have appointed the Secretary of State as registered agent and may be
44 proceeded against in courts of this State by service of process upon the Secretary of

1 State; provided, however, that the appointment of the Secretary of State as resident
2 agent shall not satisfy the condition precedent for having the brand families of the
3 nonparticipating manufacturer included or retained in the directory.

4 **"§ 66-294.6. Reporting of information; escrow installments.**

5 (a) Reporting by Distributors. – Not later than 20 calendar days after the end of
6 each calendar quarter, and more frequently if so directed by the Attorney General, each
7 distributor shall submit such information as the Attorney General requires to facilitate
8 compliance with this Part, including a list by brand family of the total number of
9 cigarettes, or, in the case of "roll-your-own", the equivalent stick count, for which the
10 distributor affixed stamps during the previous calendar quarter or otherwise paid the tax
11 due for such cigarettes. The distributor shall maintain, and make available to the
12 Attorney General, all invoices and documentation of sales of all nonparticipating
13 manufacturer cigarettes and any other information relied upon in reporting to the
14 Attorney General for a period of five years.

15 (b) Disclosure of Information. – The Department is authorized to disclose to the
16 Attorney General any information received under this Part and requested by the
17 Attorney General for purposes of determining compliance with and enforcing the
18 provisions of this Part. The Department and the Attorney General shall share with each
19 other the information received under this Part, and may share such information with
20 other federal, state, or local agencies only for purposes of enforcement of this Part, Part
21 1 of this Article, or corresponding laws of other states.

22 (c) Verification of Qualified Escrow Fund. – The Attorney General may require
23 at anytime from the nonparticipating manufacturer proof, from the financial institution
24 in which the nonparticipating manufacturer has established a qualified escrow fund for
25 the purpose of compliance with Part 1 of this Article, of the amount of money in the
26 qualified escrow fund, exclusive of interest, the amount and date of each deposit to the
27 qualified escrow fund, and the amount and date of each withdrawal from the qualified
28 escrow fund.

29 (d) Requests for Additional Information. – In addition to the information required
30 to be submitted pursuant to G.S. 66-291 and this Part, the Attorney General may require
31 a distributor or tobacco product manufacturer to submit any additional information,
32 including samples of the packaging or labeling of each brand family, as is necessary to
33 enable the Attorney General to determine whether a tobacco product manufacturer is in
34 compliance with this Part.

35 (e) Quarterly Escrow Installments. – To promote compliance with this Part, the
36 Attorney General may adopt rules requiring a tobacco product manufacturer subject to
37 the requirements of G.S. 66-294.2(c) to make the escrow deposits required in quarterly
38 installments during the year in which the sales covered by such deposits are made. The
39 Attorney General may require production of information sufficient to enable the
40 Attorney General to determine the adequacy of the amount of the installment deposit.

41 **"§ 66-294.7. Penalties and other remedies.**

42 (a) License Revocation and Civil Penalties. – In addition to or in lieu of any
43 other civil or criminal remedy provided by law, upon a determination that a distributor
44 has violated G.S. 66-294.4 or any rule adopted pursuant to this Part, the Attorney

1 General may revoke or suspend the license of the distributor. Each stamp affixed and
2 each sale or offer to sell cigarettes in violation of G.S. 66-294.4 shall constitute a
3 separate violation. The Attorney General may also impose a civil penalty for each
4 violation of G.S. 66-294.4 or any rule adopted pursuant thereto, in an amount not to
5 exceed the greater of five hundred percent (500%) of the retail value of the cigarettes or
6 five thousand dollars (\$5,000).

7 (b) **Contraband and Seizure.** – Any cigarettes that have been sold, offered for
8 sale, or possessed for sale, in this State, or imported for personal consumption in this
9 State, in violation of G.S. 66-294.4 are contraband, and such cigarettes shall be subject
10 to seizure and disposition as provided in G.S.105-113.31 and G.S.105-113.32. All such
11 cigarettes so seized shall be destroyed and not resold.

12 (c) **Injunction.** – The Attorney General may seek an injunction to restrain a
13 threatened or actual violation of G.S. 66-294.4 or G.S. 66-294.6(a) or (d) by a
14 distributor and to compel the distributor to comply with these subsections.

15 (d) **Unlawful Sale and Distribution.** – For cigarettes that a person knows or
16 should know are intended for distribution or sale in the State in violation of
17 G.S. 66-294.4, it shall be unlawful for a person to do either of the following with
18 cigarettes:

19 (1) **Sell or distribute.**

20 (2) **Acquire, hold, own, possess, transport, import, or cause to be**
21 **imported.**

22 A violation of this section shall be a Class 1 misdemeanor.

23 **§ 66-294.8. Miscellaneous provisions.**

24 (a) **Notice and Review of Determination.** – A determination of the Attorney
25 General to not include or to remove from the directory a brand family or tobacco
26 product manufacturer shall be subject to review in the manner prescribed by Article 3 of
27 Chapter 150B of the General Statutes.

28 (b) **Applicants For Licenses.** – No person shall be issued a license or granted a
29 renewal of a license to act as a distributor unless the person has certified in writing,
30 under penalty of perjury, that the person will comply fully with this Part.

31 (c) **Rule-Making Authority.** – The Attorney General shall adopt rules necessary
32 to implement this Part.

33 (d) **Recovery of Costs and Fees by Attorney General.** – In any action brought by
34 the State to enforce this Part, the State shall be entitled to recover the costs of
35 investigation, expert witness fees, costs of the action, and reasonable attorneys' fees.

36 (e) **Disgorgement of Profits for Violations.** – If a court determines that a person
37 has violated this Part, the court shall order any profits, gain, gross receipts, or other
38 benefit from the violation to be forfeited and paid to the State for deposit in the General
39 Fund. Unless otherwise expressly provided, the remedies or penalties provided by this
40 Part are cumulative to each other and to the remedies or penalties available under all
41 other laws of this State.

42 (f) **Construction and Severability.** – If a court of competent jurisdiction finds that
43 the provisions of this Part and of Part 1 of this Article conflict and cannot be
44 harmonized, then the provisions of Part 1 of this Article shall control. If any of this Part

1 causes the Tobacco Reserve Fund Act to no longer constitute a Qualifying or Model
2 Statute, as those terms are defined in the Master Settlement Agreement, then that
3 portion of this Part shall not be valid. If any of this Part is held to be invalid, unlawful,
4 or unconstitutional, such decision shall not affect the validity of the remaining portions
5 of this Part or any portion thereof."

6 **SECTION 4.** For the year 2005, the first report of distributors required by
7 G.S. 66-294.6(a), as enacted by this act, shall be due 30 calendar days following the end
8 of the calendar quarter on September 30, 2005. The certifications by a tobacco product
9 manufacturer described in G.S. 66-294.2, as enacted by this act, shall be due 45
10 calendar days following the end of the calendar quarter on September 30, 2005. The
11 directory described in G.S. 66-294.3, as enacted by this act, shall be published or made
12 available beginning January 1, 2006.

13 **SECTION 5.** This act becomes effective July 1, 2005.