

1                       **SALES OF CIGARETTES INTENDED FOR**  
 2   **EXPORT**

3   2000 GENERAL SESSION

4   STATE OF UTAH

5   **Sponsor: Robert F. Montgomery**

6 AN ACT RELATING TO CIGARETTES; PROHIBITING THE SALE OF CIGARETTES  
 7 MANUFACTURED FOR EXPORT OR NOT IN COMPLIANCE WITH FEDERAL LAW;  
 8 EXEMPTING PROHIBITED CIGARETTES FROM THE CIGARETTE TAX; REQUIRING  
 9 PERIODIC REPORTING OF CIGARETTES IMPORTED TO THE STATE FROM OUTSIDE  
 10 THE U.S.; IMPOSING PENALTIES AND PROVIDING A PRIVATE RIGHT OF ACTION;  
 11 AUTHORIZING THE DESTRUCTION OF CONTRABAND GOODS; AUTHORIZING  
 12 DISCLOSURE OF DATA; AND PROVIDING AN EFFECTIVE DATE.

13 This act affects sections of Utah Code Annotated 1953 as follows:

14 AMENDS:

15               **59-1-403**, as last amended by Chapter 364, Laws of Utah 1999

16               **59-14-204**, as last amended by Chapter 416, Laws of Utah 1998

17               **59-14-205**, as renumbered and amended by Chapter 2, Laws of Utah 1987

18 ENACTS:

19               **59-14-210**, Utah Code Annotated 1953

20               **59-14-211**, Utah Code Annotated 1953

21               **59-14-212**, Utah Code Annotated 1953

22               **59-14-213**, Utah Code Annotated 1953

23 *Be it enacted by the Legislature of the state of Utah:*

24               Section 1. Section **59-1-403** is amended to read:

25               **59-1-403. Confidentiality -- Penalty -- Application to property tax.**

26               (1) Any tax commissioner, agent, clerk, or other officer or employee of the commission  
 27 or any representative, agent, clerk, or other officer or employee of any county, city, or town may

28 not divulge or make known in any manner any information gained by him from any return filed  
29 with the commission. The officials charged with the custody of such returns are not required to  
30 produce any of them or evidence of anything contained in them in any action or proceeding in any  
31 court, except:

32 (a) in accordance with judicial order;

33 (b) on behalf of the commission in any action or proceeding under this title or other law  
34 under which persons are required to file returns with the commission;

35 (c) on behalf of the commission in any action or proceeding to which the commission is  
36 a party; or

37 (d) on behalf of any party to any action or proceeding under this title when the report or  
38 facts shown thereby are directly involved in such action or proceeding. In any event, the court may  
39 require the production of, and may admit in evidence, any portion of reports or of the facts shown  
40 by them, as are specifically pertinent to the action or proceeding.

41 (2) This section does not prohibit:

42 (a) a person or his duly authorized representative from receiving a copy of any return or  
43 report filed in connection with that person's own tax;

44 (b) the publication of statistics as long as they are classified to prevent the identification  
45 of particular reports or returns;

46 (c) the inspection by the attorney general or other legal representative of the state of the  
47 report or return of any taxpayer:

48 (i) who brings action to set aside or review the tax based on such report or return;

49 (ii) against whom an action or proceeding is contemplated or has been instituted under this  
50 title; or

51 (iii) against whom the state has an unsatisfied money judgment.

52 (3) (a) Notwithstanding Subsection (1) and for purposes of administration, the commission  
53 may, by rule, provide for a reciprocal exchange of information with the United States Internal  
54 Revenue Service or the revenue service of any other state.

55 (b) Notwithstanding Subsection (1) and for all taxes except individual income tax and  
56 corporate franchise tax, the commission may, by rule, share information gathered from returns and  
57 other written statements with the federal government, any other state, any of their political  
58 subdivisions, or any political subdivision of this state, except as limited by Sections 59-12-209 and

59 59-12-210, if these political subdivisions or the federal government grant substantially similar  
60 privileges to this state.

61 (c) Notwithstanding Subsection (1) and for all taxes except individual income tax and  
62 corporate franchise tax, the commission may, by rule, provide for the issuance of information  
63 concerning the identity and other information of taxpayers who have failed to file tax returns or  
64 to pay any tax due.

65 (d) Notwithstanding Subsection (1), the commission shall provide to the Solid and  
66 Hazardous Waste Control Board executive secretary, as defined in Section 19-6-102, any records,  
67 returns, and other information filed with the commission under Title 59, Chapter 13, Motor and  
68 Special Fuel Tax Act, or Section 19-6-410.5 regarding the environmental assurance program  
69 participation fee, as requested by the executive secretary.

70 (e) (i) Notwithstanding Subsection (1), to provide information necessary for the  
71 implementation of Title 26, Chapter 44, Tobacco Manufacturers Responsibility Act, the  
72 commission shall annually report to the executive director of the Department of Health on or  
73 before March 1:

74 (A) the quantity of cigarettes, as defined in Section 26-44-202, produced by each  
75 manufacturer and reported to the commission for the previous calendar year under Section  
76 59-14-407; and

77 (B) the quantity of cigarettes, as defined in Section 26-44-202, produced by each  
78 manufacturer for which a tax refund was granted during the previous calendar year under Section  
79 59-14-401 and reported to the commission under Subsection 59-14-401(1)(a)(v).

80 (ii) The records received by the executive director of the Department of Health under  
81 Subsection (3)(e)(i) are protected records under Title 63, Chapter 2, Government Records Access  
82 and Management Act.

83 (f) Notwithstanding Subsection (1), the commission may:

84 (i) provide to the Division of Consumer Protection within the Department of Commerce  
85 and the attorney general data:

86 (A) reported to the commission under Section 59-14-212; or

87 (B) related to a violation under Section 59-14-211; and

88 (ii) upon request provide to any person data reported to the commission under Subsections  
89 59-14-212(1)(a) through (1)(c) and Subsection 59-14-212(1)(g).

90 (4) Reports and returns shall be preserved for at least three years and then the commission  
91 may destroy them.

92 (5) Any person who violates this section is guilty of a class A misdemeanor. If the  
93 offender is an officer or employee of the state, he shall be dismissed from office and be  
94 disqualified from holding public office in this state for a period of five years thereafter.

95 (6) This part does not apply to the property tax.

96 Section 2. Section **59-14-204** is amended to read:

97 **59-14-204. Tax basis -- Rate -- Future increase -- Restricted account -- Use of**  
98 **revenues.**

99 (1) [There] Except for cigarettes described under Section 59-14-210, there is levied a tax  
100 upon the sale, use, or storage of cigarettes in the state.

101 (2) The rates of the tax levied under Subsection (1) are:

102 (a) 2.575 cents on each cigarette, for all cigarettes weighing not more than three pounds  
103 per thousand cigarettes; and

104 (b) 3.175 cents on each cigarette, for all cigarettes weighing in excess of three pounds per  
105 thousand cigarettes.

106 (3) The tax levied under Subsection (1) shall be paid by the manufacturer, jobber,  
107 distributor, wholesaler, retailer, user, or consumer.

108 (4) The tax rates specified in this section shall be increased by the commission by the same  
109 amount as any future reduction in the federal excise tax on cigarettes.

110 (5) (a) There is created within the General Fund a restricted account known as the  
111 "Cigarette Tax Restricted Account."

112 (b) Beginning on July 1, 1998, \$250,000 of the revenues generated by the increase in the  
113 cigarette tax under this section enacted during the 1997 Annual General Session shall be annually  
114 deposited into the account.

115 (c) The Department of Health shall expend the funds in the account for a tobacco  
116 prevention and control media campaign targeted towards children.

117 Section 3. Section **59-14-205** is amended to read:

118 **59-14-205. Stamping procedure -- Rules -- Exceptions.**

119 (1) The taxes imposed on cigarettes by this chapter shall be paid by affixing stamps in the  
120 manner and at the time prescribed in this section, unless otherwise required by rules promulgated

121 by the commission.

122 (2) All manufacturers, distributors, wholesalers, and retail dealers shall securely affix the  
123 stamps to each individual package or container of cigarettes.

124 (3) Stamps shall be securely affixed to each individual package within 72 hours after any  
125 of the cigarettes are received by any wholesaler, distributor, or retailer within the state. All  
126 cigarettes shall be stamped before sale within the state. If products subject to this chapter are  
127 manufactured within the state they shall be stamped by the manufacturer when and as sold.

128 (4) The commission may, where it is practical and reasonable for the enforcement of the  
129 collection of taxes, promulgate rules to permit any of the articles taxable under this chapter to  
130 remain unstamped in the hands of the wholesaler or distributor until the original case or crate is  
131 broken, unpacked, or sold.

132 (5) The commission may permit any manufacturer, wholesaler, or distributor to sell and  
133 export to a regular dealer in these articles outside the state, any of the articles without affixing the  
134 stamps. Where the articles are allowed to remain unstamped in the hands of the wholesaler or  
135 distributor, the commission may require the wholesaler or distributor to secure a surety bond from  
136 a surety company authorized to do business in this state. The bond shall be conditioned to secure  
137 the payment of all taxes and penalties provided in this chapter.

138 (6) No manufacturer, distributor, wholesaler, or retail dealer may remove, conceal, or  
139 obscure a cigarette package:

140 (a) notice described under Subsection 59-14-210(1)(a)(i); or

141 (b) warning label not in compliance with 15 U.S.C. 1333 of the Federal Cigarette Labeling  
142 and Advertising Act.

143 [(6)] (7) Any person failing to properly affix and cancel stamps to the cigarettes under  
144 rules promulgated by the commission, may be required by the commission to pay as part of the tax,  
145 a penalty of \$25 for each offense, to be assessed and collected by the commission as provided in  
146 Section 59-14-405. Each article, package, or container found not having proper stamps affixed to  
147 it shall be deemed a separate offense. The presence of any package or container in a place of  
148 business conducting retail sales shall be prima facie evidence that it is intended for sale and subject  
149 to taxes under this chapter.

150 Section 4. Section **59-14-210** is enacted to read:

151 **59-14-210. Prohibited sales of cigarettes.**

152 (1) Except as provided in Subsection (2), a person licensed under Section 59-14-202 may  
153 not barter, sell, exchange, or offer for sale cigarettes:

154 (a) in a package which:

155 (i) bears a statement, label, stamp, sticker, or other notice that the manufacturer did not  
156 intend the cigarettes to be sold, distributed, or used in the United States, including the following  
157 and similar notices:

158 (A) "For Export Only";

159 (B) "U.S. Tax-Exempt"; and

160 (C) "For Use Outside the U.S."; or

161 (ii) does not comply with federal law, including 15 U.S.C. 1333 of the Federal Cigarette  
162 Labeling and Advertising Act, regarding warning labels and other package information;

163 (b) imported to the United States in violation of 26 U.S.C. 5754;

164 (c) the licensee knows or has reason to know were not manufactured for sale, distribution,  
165 or use in the United States;

166 (d) for which a list of added ingredients has not been submitted to the federal Department  
167 of Health and Human Services pursuant to 15 U.S.C. 1335a of the Federal Cigarette Labeling and  
168 Advertising Act; or

169 (e) known by the licensee to be otherwise in violation of other related federal law.

170 (2) Subsection (1) does not apply to cigarettes sold or intended to be sold as duty-free  
171 merchandise by a duty-free sales enterprise in accordance with the provisions of 19 U.S.C. 1555(b)  
172 and any implementing regulations unless the cigarettes are brought back into the customs territory  
173 for resale within the customs territory.

174 Section 5. Section **59-14-211** is enacted to read:

175 **59-14-211. Penalties for dealing with prohibited cigarettes -- Private right of action.**

176 (1) A person, regardless of whether the person is a licensee under Section 59-14-202, is  
177 guilty of a class B misdemeanor for each instance in which the person knowingly or with reason  
178 to know:

179 (a) sells or distributes cigarettes described under Section 59-14-210;

180 (b) acquires, holds, owns, possesses, transports, imports, or causes to be imported  
181 cigarettes:

182 (i) described under Section 59-14-210; and

- 183 (ii) intended for distribution or sale in the state;  
184 (c) alters the package of any cigarettes prior to their sale or distribution to the ultimate  
185 consumer to remove, conceal, or obscure a notice, warning label, or other package information  
186 described in Subsection 59-14-210(1)(a); or  
187 (d) affixes a stamp used to pay the tax imposed under Section 59-14-204 to a package or  
188 container of cigarettes:  
189 (i) described under Section 59-14-210; or  
190 (ii) known by the person affixing the stamp to be altered as described under Subsection  
191 (1)(c).  
192 (2) If a person knowingly or with reason to know commits an act described in Subsections  
193 (1)(a) through (1)(d), the commission may:  
194 (a) suspend or revoke a license issued to the person under Section 59-14-202; and  
195 (b) regardless of whether the person is licensed under Section 59-14-202, impose a civil  
196 penalty in an amount not to exceed the greater of:  
197 (i) 500% of the retail value of the cigarettes; or  
198 (ii) \$5,000.  
199 (3) Any person whose commercial interests have been adversely affected as a result of a  
200 violation of this section may bring an action for injunctive relief, damages, or both.  
201 Section 6. Section **59-14-212** is enacted to read:  
202 **59-14-212. Contraband goods.**  
203 (1) Except as provided under Subsection (2), any manufacturer, distributor, wholesaler,  
204 or retail dealer who under Section 59-14-205 affixes a stamp to an individual package or container  
205 of cigarettes imported to the United States shall provide to the commission the following as they  
206 pertain to the imported cigarettes:  
207 (a) a copy of the importer's federal import permit;  
208 (b) the customs form showing the tax information required by federal law;  
209 (c) a statement signed under penalty of perjury by the manufacturer or importer that the  
210 manufacturer or importer has complied with:  
211 (i) 15 U.S.C. 1333 of the Federal Cigarette Labeling and Advertising Act, regarding  
212 warning labels and other package information; and  
213 (ii) 15 U.S.C. 1335a of the Federal Cigarette Labeling and Advertising Act, regarding

214 reporting of added ingredients:

215 (d) the name of the person from whom the person affixing the stamp received the  
216 cigarettes;

217 (e) the name of the person to whom the person affixing the stamp delivered the cigarettes,  
218 unless the person receiving the cigarettes was the ultimate consumer;

219 (f) the quantity of cigarettes in the package or container; and

220 (g) the brand and brand style of the cigarettes.

221 (2) Subsection (1) does not apply to cigarettes sold or intended to be sold as duty-free  
222 merchandise by a duty-free sales enterprise in accordance with the provisions of 19 U.S.C. 1555(b)  
223 and any implementing regulations unless the cigarettes are brought back into the customs territory  
224 for resale within the customs territory.

225 (3) The information under Subsection (1) shall be provided on a quarterly basis pursuant  
226 to rules established by the commission in accordance with Title 63, Chapter 46a, Utah  
227 Administrative Rulemaking Act.

228 (4) A person who fails to comply with the reporting requirement or provides false or  
229 misleading information under Subsection (1):

230 (a) is guilty of a class B misdemeanor; and

231 (b) may be subject to:

232 (i) revocation or suspension of a license issued under Section 59-14-202; and

233 (ii) a civil penalty imposed by the commission in an amount not to exceed the greater of:

234 (A) 500% of the retail value of the cigarettes for which a report was not properly made;

235 or

236 (B) \$5,000.

237 (5) The information under Subsection (1) may be disclosed by the commission as provided  
238 under Subsection 59-1-403(3)(f).

239 Section 7. Section **59-14-213** is enacted to read:

240 **59-14-213. Reporting of imported cigarettes -- Penalty.**

241 (1) Any cigarettes in violation of Section 59-14-211 or not properly reported under  
242 Subsection 59-14-212(1) are contraband goods and may be seized without a warrant by the  
243 commission, its employees, or any peace officer of the state or its political subdivisions.

244 (2) Any seized goods shall be delivered to the commission and destroyed.



245 Section 8. **Effective date.**  
246 This act takes effect on July 1, 2000.

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**Legislative Review Note**  
**as of 2-8-00 9:55 AM**

This legislation raises the following constitutional or statutory concerns:

This bill makes it a violation of state law for a person to be in the business of selling or distributing cigarettes in Utah that violate federal cigarette labeling and import laws. The bill imposes criminal and civil penalties and extends a private right of action for violations.

The Federal Cigarette Labeling and Advertising Act contains a preemption clause in Section 1334, which places a limit on the kinds of laws a state can enact in this area. Specifically, that clause states:

No requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Because the overall effect of the bill is to incorporate federal labeling and import laws into state law, the bill does not impose any new substantive requirement or prohibition. It is conceivable, however, that the bill could be subject to legal challenge on the grounds that the addition of state-based remedies, including civil and criminal penalties and a private right of action, constitute new requirements or prohibitions in violation of the preemption clause.

To be successful on such a claim, a challenger would have to show: (1) that the requirement or prohibition is based on smoking and health, (2) that the requirement or prohibition is with respect to advertising or promotion, and (3) that the cigarette package is labeled in conformity with the Federal Cigarette Labeling and Advertising Act. *See, e.g., Cipollone v. Liggett Group, Inc.* 505 U.S. 504 (1992) (preemption of claim for failure to warn, but no preemption of fraudulent misrepresentation claim based on a more general duty not to deceive); *Mangini v. R. J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994) (preemption of claim for failure to warn, but no preemption of unfair competition claim based on a duty not to encourage minors to engage in illegal conduct).

**Office of Legislative Research and General Counsel**