

TOBACCO COMPLIANCE AMENDMENTS

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: David L. Hogue

LONG TITLE

General Description:

This bill amends the Model Tobacco Settlement Act and the Cigarette and Tobacco Tax and Licensing Act.

Highlighted Provisions:

This bill:

- ▶ modifies escrow requirements for tobacco manufacturers who have not participated in the Master Settlement Agreement;
- ▶ authorizes the State Tax Commission to require that Qualified Escrow Fund deposits be made quarterly;
- ▶ requires a nonparticipating manufacturer to certify compliance with Qualified Escrow Fund requirements;
- ▶ modifies brand reporting requirements for tobacco manufacturers;
- ▶ authorizes the State Tax Commission to recover particular tobacco enforcement costs; and
- ▶ amends a definition within the Model Tobacco Settlement Act.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill provides a severability clause.

Utah Code Sections Affected:

AMENDS:



- 28 **59-14-408**, as last amended by Chapter 131, Laws of Utah 2003
- 29 **59-22-202**, as last amended by Chapter 1 and renumbered and amended by Chapter
- 30 229, Laws of Utah 2000
- 31 **59-22-203**, as renumbered and amended by Chapter 229, Laws of Utah 2000
- 32 **59-22-308**, as renumbered and amended by Chapter 229, Laws of Utah 2000

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

35 Section 1. Section **59-14-408** is amended to read:

36 **59-14-408. Compliance certification -- Prohibition on stamping.**

37 (1) As used in this section:

- 38 (a) "cigarette" has the same meaning as defined in Section 59-22-202; and
- 39 (b) "tobacco product manufacturer" has the same meaning as defined in Section
- 40 59-22-202.

41 (2) No person may affix, or cause to be affixed, a stamp to an individual package or

42 container of cigarettes under Section 59-14-205, or pay the tax levied under Part 3, Tobacco

43 Products, if the tobacco product manufacturer is not included on the list published by the

44 commission under Subsection (3).

45 (3) (a) The commission shall make available for public inspection a list of tobacco

46 product manufacturers that have provided the certification required by Subsection (4) and the

47 cigarette brands of those manufacturers sold for consumption in the state.

48 (b) The commission shall update the list as necessary.

49 (c) A person is not liable for a violation of Subsection (2) if the cigarette brand and

50 manufacturer is included in the commission's list at the time the stamp is affixed or the tax

51 paid.

52 (4) A tobacco product manufacturer shall certify to the commission under penalty of

53 perjury, that:

54 (a) the manufacturer is:

- 55 (i) a participating manufacturer as defined in Subsection 59-22-203(1)(a); or
- 56 (ii) in full compliance with Subsection 59-22-203(1)(b);

57 (b) the list attached to the certification is a complete and updated list of all cigarette

58 brands sold by the manufacturer for consumption in the state;

59 (c) the list will be updated [~~as necessary~~] 30 days prior to any addition or modification
60 of a brand; [and]

61 (d) all escrow payments required by Subsection 59-22-203(1)(b) have, to the best of
62 the manufacturer's knowledge, been made by all other tobacco product manufacturers that
63 previously made or sold the cigarette brands included in the manufacturer's list[-]; and

64 (e) if not a participating manufacturer, the nonparticipating manufacturer has:

65 (i) established and continues to maintain a Qualified Escrow Fund, as defined in
66 Subsection 59-22-202(6); and

67 (ii) has executed a qualified escrow agreement that governs the Qualified Escrow
68 Fund.

69 (5) Notwithstanding the requirement of Subsection (4)(d), if the tobacco product
70 manufacturer sold or manufactured the tobacco product that is the subject of the certification
71 prior to March 1, 2002, the tobacco product manufacturer is only required to identify the
72 predecessor tobacco product manufacturer.

73 (6) The commission may require licensees who affix stamps to individual packages or
74 containers of cigarettes under Section 59-14-205 or who pay the tax under Part 3, Tobacco
75 Products, to submit information necessary to enable the commission to determine whether a
76 tobacco product manufacturer is in compliance with Section 59-22-203.

77 (7) The commission may by rule require tobacco product manufacturers subject to the
78 requirements of Subsection 59-22-203(2) to make the escrow deposits required in quarterly
79 installments during the year in which the sales covered by the deposits are made.

80 [~~(7)~~] (8) The commission may require each tobacco product manufacturer to appoint a
81 registered agent for service of process in the state and identify the registered agent to the
82 commission.

83 [~~(8)~~] (9) A tobacco product manufacturer who falsely represents to any person any
84 information specified in Subsection (4), or who fails to appoint the registered agent required by
85 this section is guilty of a class B misdemeanor for each violation or false representation.

86 (10) In any action brought by the commission to enforce this section, the commission
87 shall be entitled to recover the costs of investigation, expert witness fees, costs of the action,
88 and reasonable attorney fees.

89 Section 2. Section **59-22-202** is amended to read:

90 **59-22-202. Definitions.**

91 As used in this part:

92 (1) "Adjusted for inflation" means increased in accordance with the formula for
93 inflation adjustment set forth in Exhibit C to the Master Settlement Agreement.

94 (2) "Affiliate" means a person who directly or indirectly owns or controls, is owned or
95 controlled by, or is under common ownership or control with, another person. Solely for
96 purposes of this definition, the terms "owns," "is owned" and "ownership" mean ownership of
97 an equity interest, or the equivalent thereof, of 10% or more, and the term "person" means an
98 individual, partnership, committee, association, corporation or any other organization or group
99 of persons.

100 (3) "Allocable share" means Allocable Share as that term is defined in the Master
101 Settlement Agreement.

102 (4) "Cigarette" means any product that contains nicotine, is intended to be burned or
103 heated under ordinary conditions of use, and consists of or contains (a) any roll of tobacco
104 wrapped in paper or in any substance not containing tobacco; or (b) tobacco, in any form, that
105 is functional in the product, which, because of its appearance, the type of tobacco used in the
106 filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a
107 cigarette; or (c) any roll of tobacco wrapped in any substance containing tobacco which,
108 because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is
109 likely to be offered to, or purchased by, consumers as a cigarette described in clause (a) of this
110 definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of
111 its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or
112 purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of
113 "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette."

114 (5) "Master Settlement Agreement" means the settlement agreement (and related
115 documents) entered into on November 23, 1998, by the State and leading United States tobacco
116 product manufacturers.

117 (6) "Qualified escrow fund" means an escrow arrangement with a federally or State
118 chartered financial institution having no affiliation with any tobacco product manufacturer and
119 having assets of at least \$1,000,000,000 where such arrangement requires that such financial
120 institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits

121 the tobacco product manufacturer placing the funds into escrow from using, accessing, or
122 directing the use of the funds' principal except as consistent with Subsection 59-22-203(2).

123 (7) "Released claims" means Released Claims as that term is defined in the Master
124 Settlement Agreement.

125 (8) "Releasing parties" means Releasing Parties as that term is defined in the Master
126 Settlement Agreement.

127 (9) (a) "Tobacco product manufacturer" means an entity that after the date of enactment
128 of this Act directly (and not exclusively through any affiliate):

129 (i) manufactures cigarettes anywhere that such manufacturer intends to be sold in the
130 United States, including cigarettes intended to be sold in the United States through an importer
131 (except where such importer is an original participating manufacturer (as that term is defined in
132 the Master Settlement Agreement) that will be responsible for the payments under the Master
133 Settlement Agreement with respect to such cigarettes as a result of the provisions of Subsection
134 II(mm) of the Master Settlement Agreement and that pays the taxes specified in Subsection
135 II(z) of the Master Settlement Agreement, and provided that the manufacturer of such
136 cigarettes does not market or advertise such cigarettes in the United States);

137 (ii) is the first purchaser anywhere for resale in the United States of cigarettes
138 manufactured anywhere that the manufacturer does not intend to be sold in the United States;
139 or

140 (iii) becomes a successor of an entity described in Subsection (9)(a)(i) or (ii).

141 (b) "Tobacco product manufacturer" shall not include an affiliate of a tobacco product
142 manufacturer unless such affiliate itself falls within any Subsection (9)(a)(i) through (iii).

143 (10) "Units sold" means the number of individual cigarettes sold in the State by the
144 applicable tobacco product manufacturer (whether directly or through a distributor, retailer or
145 similar intermediary or intermediaries) during the year in question, as measured by excise taxes
146 collected by the State on packs (or "roll-your-own" tobacco containers) [~~bearing the excise tax
147 stamp of the State~~]. The State Tax Commission shall promulgate such regulations as are
148 necessary to ascertain the amount of State excise tax paid on the cigarettes of such tobacco
149 product manufacturer for each year.

150 Section 3. Section **59-22-203** is amended to read:

151 **59-22-203. Requirements.**

152 (1) Any tobacco product manufacturer selling cigarettes to consumers within the State
153 (whether directly or through a distributor, retailer or similar intermediary or intermediaries)
154 after the date of enactment of this Act shall do one of the following:

155 (a) become a participating manufacturer (as that term is defined in Section II(jj) of the
156 Master Settlement Agreement) and generally perform its financial obligations under the Master
157 Settlement Agreement; or

158 (b) place into a qualified escrow fund by April 15 of the year following the year in
159 question the following amounts (as such amounts are adjusted for inflation):

160 (i) 1999: \$.0094241 per unit sold after the date of enactment of this Act;

161 (ii) 2000: \$.0104712 per unit sold;

162 (iii) for each of 2001 and 2002: \$.0136125 per unit sold;

163 (iv) for each of 2003 through 2006: \$.0167539 per unit sold; and

164 (v) for each of 2007 and each year thereafter: \$.0188482 per unit sold.

165 (2) A tobacco product manufacturer that places funds into escrow pursuant to
166 Subsection (1)(b) shall receive the interest or other appreciation on such funds as earned. Such
167 funds themselves shall be released from escrow only under the following circumstances:

168 (a) to pay a judgment or settlement on any released claim brought against such tobacco
169 product manufacturer by the State or any releasing party located or residing in the State. Funds
170 shall be released from escrow under this Subsection (2)(a):

171 (i) in the order in which they were placed into escrow; and

172 (ii) only to the extent and at the time necessary to make payments required under such
173 judgment or settlement;

174 (b) to the extent that a tobacco product manufacturer establishes that the amount it was
175 required to place into escrow on account of units sold in the State in a particular year was
176 greater than [~~the State's allocable share of the total payments that such manufacturer would~~
177 ~~have been required to make in that year under the Master Settlement Agreement (as determined~~
178 ~~pursuant to Section IX(i)(2) of the Master Settlement Agreement, and before any of the~~
179 ~~adjustments or offsets described in Section IX(i)(3) of that Agreement other than the Inflation~~
180 ~~Adjustment)] the Master Settlement Agreement payments, as determined pursuant to Section
181 IX(i) of that Agreement including after final determination of all adjustments, that such
182 manufacturer would have been required to make on account of such units sold had it been a~~

183 participating manufacturer, the excess shall be released from escrow and revert back to such
184 tobacco product manufacturer; or

185 (c) to the extent not released from escrow under Subsection (2)(a) or (b), funds shall be
186 released from escrow and revert back to such tobacco product manufacturer 25 years after the
187 date on which they were placed into escrow.

188 (3) Each tobacco product manufacturer that elects to place funds into escrow pursuant
189 to Subsection (1)(b) shall annually certify to the commission that it is in compliance with
190 Subsection (1)(b) and Subsection (2). The commission may bring a civil action on behalf of
191 the State against any tobacco product manufacturer that fails to place into escrow the funds
192 required under Subsection (1)(b) and Subsection (2). Any tobacco product manufacturer that
193 fails in any year to place into escrow the funds required under this Subsection (1)(b) and
194 Subsection (2) shall:

195 (a) be required within 15 days to place such funds into escrow as shall bring it into
196 compliance with Subsection (1)(b) and Subsection (2). The court, upon a finding of a violation
197 of Subsection (1)(b) or Subsection (2), may impose a civil penalty to be paid to the General
198 Fund in an amount not to exceed 5% of the amount improperly withheld from escrow per day
199 of the violation and in a total amount not to exceed 100% of the original amount improperly
200 withheld from escrow;

201 (b) in the case of a knowing violation, be required within 15 days to place such funds
202 into escrow as shall bring it into compliance with Subsection (1)(b) and Subsection (2). The
203 court, upon a finding of a knowing violation of Subsection (1)(b) or Subsection (2), may
204 impose a civil penalty to be paid to the General Fund of the State in an amount not to exceed
205 15% of the amount improperly withheld from escrow per day of the violation and in a total
206 amount not to exceed 300% of the original amount improperly withheld from escrow; and

207 (c) in the case of a second knowing violation, be prohibited from selling cigarettes to
208 consumers within the State (whether directly or through a distributor, retailer or similar
209 intermediary) for a period not to exceed 2 years.

210 (4) Each failure to make an annual deposit required under Subsection (1)(b) shall
211 constitute a separate violation.

212 (5) A court shall award the State its costs and attorneys fees incurred in bringing any
213 action in which the State establishes that a tobacco product manufacturer has violated this

214 section.

215 Section 4. Section **59-22-308** is amended to read:

216 **59-22-308. Payments by subsequent participating manufacturers.**

217 Section XI(i)(2) and IX(i)(3) of the Master Settlement Agreement[~~, which are~~
218 ~~referenced in Subsection 59-22-203(2)(b);~~] involve payments by subsequent participating
219 manufacturers and providers as follows:

220 (1) A Subsequent Participating Manufacturer shall have payment obligations under this
221 Agreement only in the event that its Market Share in any calendar year exceeds the greater of
222 (1) its 1998 Market Share or (2) 125% of its 1997 Market Share, subject to the provisions of
223 subsection (i)(4). In the year following any such calendar year, such Subsequent Participating
224 Manufacturer shall make payments corresponding to those due in that same following year
225 from the Original Participating Manufacturers pursuant to subsections VI(c), except for the
226 payment due on March 31, 1999, IX(c)(1), IX(c)(2) and IX(e). The amounts of such
227 corresponding payments by a Subsequent Participating Manufacturer are in addition to the
228 corresponding payments that are due from the Original Participating Manufacturers and shall
229 be determined as described in subsection (2) and (3) below. Such payments by a Subsequent
230 Participating Manufacturer shall (A) be due on the same dates as the corresponding payments
231 are due from Original Participating manufacturers; (B) be for the same purpose as such
232 corresponding payments; and (C) be paid, allocated and distributed in the same manner as such
233 corresponding payments.

234 (2) The base amount due from a Subsequent Participating Manufacturer on any given
235 date shall be determined by multiplying (A) the corresponding base amount due on the same
236 date from all of the Original Participating Manufacturers, as such base amount is specified in
237 the corresponding subsection of this agreement and is adjusted by the Volume Adjustment,
238 except for the provisions of subsection (B)(ii) of Exhibit E, but before such base amount is
239 modified by any other adjustments, reductions or offsets, by (B) the quotient produced by
240 dividing (i) the result of (x) such Subsequent Participating Manufacturer's Applicable Market
241 Share, the applicable Market Share being that for the calendar year immediately preceding the
242 year in which the payment in question is due, minus (y) the greater of (1) its 1998 Market Share
243 or (2) 125% of its 1997 Market Share, by (ii) the aggregate Market Shares of the Original
244 Participating Manufacturers, the applicable Market Shares being those for the calendar year

245 immediately preceding the year in which the payment in question is due.

246 (3) Any payment due from a Subsequent Participating Manufacturer under subsections
247 (1) and (2) above shall be subject, up to the full amount of such payment, to the Inflation
248 Adjustment, the Nonsettling States Reduction, the NPM Adjustment, the offset for
249 miscalculated or disputed payments described in subsection XI(i), the Federal Tobacco
250 Legislation Offset, the Litigating Releasing Parties Offset and the offsets for claims over
251 described in subsections XII(a)(4)(B) and XII(a)(8), to the extent that such adjustments,
252 reductions or offsets would apply to the corresponding payment due from the Original
253 Participating Manufacturers. Provided, however, that all adjustments and offsets to which a
254 Subsequent Participating Manufacturer is entitled may only be applied against payments by
255 such Subsequent Participating Manufacturer, if any, that are due within 12 months after the
256 date on which the Subsequent Participating Manufacturer becomes entitled to such adjustment
257 or makes the payment that entitles it to such offset, and shall not be carried forward beyond that
258 time even if not fully used.

259 (4) For purposes of this Subsection (i), the 1997, or 1998, as applicable, Market Share,
260 and 125% thereof, of those Subsequent Participating Manufacturers that either (A) became a
261 signatory to the Agreement more than 60 days after the MSA Execution Date or (B) had no
262 Market Share in 1997, or 1998, as applicable, shall equal zero.

263 Section 5. **Severability clause.**

264 If a court of competent jurisdiction finds that the amendments to Section 59-22-203 of
265 this bill and the provisions of Chapter 22, Model Tobacco Settlement Act, conflict and cannot
266 be harmonized, then the provisions of Chapter 22, Model Tobacco Settlement Act, shall
267 control. If any part of the amendments to Section 59-22-203 causes Chapter 22, Model
268 Tobacco Settlement Act to no longer constitute a qualifying or model statute, as defined in the
269 Master Settlement Agreement, that part of the amendments to Section 59-22-203 shall not be
270 valid. If any part of the amendments to Section 59-22-203 is for any reason held to be invalid,
271 unlawful, or unconstitutional, the validity of the remaining part of the amendments to Section
272 59-22-203 shall not be affected.

Legislative Review Note
as of 12-5-03 9:15 AM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel