

**TOBACCO COMPLIANCE AMENDMENTS**

2004 GENERAL SESSION

STATE OF UTAH

**Sponsor: David L. Hogue**

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**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:

**59-14-408**, as last amended by Chapter 131, Laws of Utah 2003

**59-22-202**, as last amended by Chapter 1 and renumbered and amended by Chapter 229,

Laws of Utah 2000

**59-22-203**, as renumbered and amended by Chapter 229, Laws of Utah 2000

**59-22-308**, as renumbered and amended by Chapter 229, Laws of Utah 2000

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

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

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

(1) As used in this section:

(a) "cigarette" has the same meaning as defined in Section 59-22-202; and

(b) "tobacco product manufacturer" has the same meaning as defined in Section 59-22-202.

(2) No person may affix, or cause to be affixed, a stamp to an individual package or container of cigarettes under Section 59-14-205, or pay the tax levied under Part 3, Tobacco Products, if the tobacco product manufacturer is not included on the list published by the commission under Subsection (3).

(3) (a) The commission shall make available for public inspection a list of tobacco product manufacturers that have provided the certification required by Subsection (4) and the cigarette brands of those manufacturers sold for consumption in the state.

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

(c) A person is not liable for a violation of Subsection (2) if the cigarette brand and manufacturer is included in the commission's list at the time the stamp is affixed or the tax paid.

(4) A tobacco product manufacturer shall certify to the commission under penalty of perjury, that:

(a) the manufacturer is:

(i) a participating manufacturer as defined in Subsection 59-22-203(1)(a); or

(ii) in full compliance with Subsection 59-22-203(1)(b);

(b) the list attached to the certification is a complete and updated list of all cigarette brands sold by the manufacturer for consumption in the state;

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

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

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

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

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

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

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

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

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

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

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

reasonable attorney fees.

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

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

As used in this part:

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

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

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

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

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

product manufacturers.

(6) "Qualified escrow fund" means an escrow arrangement with a federally or State chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least \$1,000,000,000 where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds' principal except as consistent with Subsection 59-22-203(2).

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

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

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

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

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

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

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

(10) "Units sold" means the number of individual cigarettes sold in the State by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer or

similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the State on packs (or "roll-your-own" tobacco containers) [~~bearing the excise tax stamp of the State~~]. The State Tax Commission shall promulgate such regulations as are necessary to ascertain the amount of State excise tax paid on the cigarettes of such tobacco product manufacturer for each year.

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

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

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

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

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

- (i) 1999: \$.0094241 per unit sold after the date of enactment of this Act;
- (ii) 2000: \$.0104712 per unit sold;
- (iii) for each of 2001 and 2002: \$.0136125 per unit sold;
- (iv) for each of 2003 through 2006: \$.0167539 per unit sold; and
- (v) for each of 2007 and each year thereafter: \$.0188482 per unit sold.

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

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

- (i) in the order in which they were placed into escrow; and
- (ii) only to the extent and at the time necessary to make payments required under such

judgment or settlement;

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

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

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

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

(b) in the case of a knowing violation, be required within 15 days to place such funds into

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

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

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

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

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

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

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

(1) A Subsequent Participating Manufacturer shall have payment obligations under this Agreement only in the event that its Market Share in any calendar year exceeds the greater of (1) its 1998 Market Share or (2) 125% of its 1997 Market Share, subject to the provisions of subsection (i)(4). In the year following any such calendar year, such Subsequent Participating Manufacturer shall make payments corresponding to those due in that same following year from the Original Participating Manufacturers pursuant to subsections VI(c), except for the payment due on March 31, 1999, IX(c)(1), IX(c)(2) and IX(e). The amounts of such corresponding payments by a Subsequent Participating Manufacturer are in addition to the corresponding payments that are due from the Original Participating Manufacturers and shall be determined as described in subsection (2) and (3) below. Such payments by a Subsequent Participating Manufacturer shall (A) be due on the same dates as the corresponding payments are due from

Original Participating manufacturers; (B) be for the same purpose as such corresponding payments; and (C) be paid, allocated and distributed in the same manner as such corresponding payments.

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

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

(4) For purposes of this Subsection (i), the 1997, or 1998, as applicable, Market Share,

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

**Section 5. Severability clause.**

If a court of competent jurisdiction finds that any part of the amendments to Subsection 59-22-203(2)(b) of this bill are unconstitutional, then the provisions of Subsection 59-22-203(2)(b) shall be repealed in their entirety, and the provisions of Subsection 59-22-203(2)(b) shall be restored as if no amendments were made to Subsection 59-22-203(2)(b) by this bill. A holding of unconstitutionality or the repeal of Subsection 59-22-203(2)(b) does not affect, impair, or invalidate any other portion of Section 59-22-203, or the application of the section to any other person or circumstance, and the remaining portions of Section 59-22-203 shall at all times continue in full force and effect.