

COUNTERFEIT TOBACCO PRODUCTS

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: Eric K. Hutchings

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

- ▶ adds definitions;
- ▶ amends provisions related to place of business and license requirements;
- ▶ changes penalties for selling in violation of the chapter;
- ▶ provides for taxation of cigarettes purchased by nontribal members on Indian lands;
- ▶ amends stamping procedures; and
- ▶ amends provisions related to unstamped cigarettes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill takes effect on July 1, 2004.

Utah Code Sections Affected:

AMENDS:

59-14-102, as renumbered and amended by Chapter 2, Laws of Utah 1987

59-14-201, as last amended by Chapter 319, Laws of Utah 1998

59-14-202, as last amended by Chapter 198, Laws of Utah 1999

59-14-203, as last amended by Chapter 319, Laws of Utah 1998

59-14-204, as last amended by Chapter 248, Laws of Utah 2002

59-14-205, as last amended by Chapter 190, Laws of Utah 2000

59-14-209, as renumbered and amended by Chapter 2, Laws of Utah 1987

59-14-211, as last amended by Chapter 175, Laws of Utah 2002

59-14-213, as last amended by Chapters 52 and 175, Laws of Utah 2002

ENACTS:

59-14-204.5, Utah Code Annotated 1953

59-14-207.5, Utah Code Annotated 1953

59-14-207.6, Utah Code Annotated 1953

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

Section 1. Section **59-14-102** is amended to read:

59-14-102. Definitions.

As used in this chapter:

(1) "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape, and whether or not such tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco.

(2) "Counterfeit cigarette" means:

(a) cigarettes that have false manufacturing labels; or

(b) packages of cigarettes bearing counterfeit tax stamps.

(3) "Importer" means any person who imports into the United States, either directly or indirectly, a finished cigarette for sale or distribution.

(4) "Indian tribal entity" means a federally recognized Indian tribe, tribal entity, or any other person doing business as a distributor or retailer of cigarettes on tribal lands located in the state.

(5) "Manufacturer" means any person who manufactures, fabricates, assembles, processes, or labels a finished cigarette.

(6) "Retailer" means any person who sells or distributes cigarettes or intends to sell or distribute cigarettes to a consumer in the state.

(7) "Stamp" or "stamps" means the indicia required to be placed on a cigarette package

that evidences payment of the tax on cigarettes required by Section 59-14-204.

~~[(2)]~~ (8) "Tobacco products" means all products made of, or containing tobacco, except cigarettes.

(9) "Tribal lands" means land held by the United States in trust for a federally recognized Indian tribe.

Section 2. Section **59-14-201** is amended to read:

59-14-201. License -- Fee -- Bond -- Exceptions.

(1) It is unlawful for any person in this state to manufacture, import, distribute, barter, sell, exchange, or offer cigarettes for sale without first having obtained a license issued by the commission under Section 59-14-202.

(2) (a) A license may not be issued for the sale of cigarettes until the applicant has paid a license fee of \$30 or a license renewal fee of \$20, as appropriate.

(b) The fee for reinstatement of a license that has been revoked, suspended, or allowed to expire is \$30.

(3) (a) A license may not be issued until the applicant files a bond with the commission. The commission shall determine the form and the amount of the bond, the minimum amount of which shall be \$500. The bond shall be executed by the applicant as principal, with a corporate surety, payable to the state and conditioned upon the faithful performance of all the requirements of this chapter, including the payment of all taxes, penalties, and other obligations.

(b) Applicants are not required to post a bond who:

(i) purchase during the license year only products which have the proper state stamp affixed as required by this chapter; and

(ii) file an affidavit with their application attesting to this fact.

Section 3. Section **59-14-202** is amended to read:

59-14-202. Issuance of licenses -- Common carrier licenses -- Contents -- Valid for three years -- Revocation -- Distribution requirements.

(1) Cigarette licenses may be issued only to a person owning or operating the place or cigarette vending machine from which the cigarette sales are made.

(2) (a) ~~[If sales are made at two or more separate places by that person, a separate]~~ A license is required for each separate place of business [is required].

(b) A licensee shall notify the commission within 30 days in the event that it changes the location of the business.

(3) Applications for a license under this chapter shall be submitted on a form authorized by the commission. Each application shall state:

(a) the name and address of the applicant;

(b) the address of each place of business where the applicant's business will be conducted within this state; and

(c) any other information the commission may require relevant to license qualification.

~~[(3)]~~ (4) A common carrier is not required to obtain more than one license for sales on conveyances operated by that carrier within the state. All conveyances owned by a common carrier are considered as one place of business for the purpose of this chapter.

(5) No license may be granted, maintained, or renewed:

(a) if any combination of people owning directly or indirectly, in the aggregate, more than 10% of the ownership interests in the applicant:

(i) has been convicted of knowingly:

(A) selling stolen or counterfeit cigarettes;

(B) receiving stolen or counterfeit cigarettes; or

(C) being involved in the smuggling or counterfeiting of cigarettes;

(ii) is a cigarette manufacturer or importer that is not a:

(A) participating manufacturer as defined in subsection II(jj) of the "Master Settlement Agreement"; or

(B) in full compliance with the provisions of this chapter dealing with nonparticipating manufacturers;

(iii) has imported, or caused to be imported, into the United States any cigarette in violation of 19 U.S.C. 1681a; or

(iv) has imported, or caused to be imported into the United States, or manufactured for

sale or distribution in the United States any cigarette that does not fully comply with the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et. seq.; and

(b) until the applicant:

(i) has paid any delinquent cigarette taxes; and

(ii) has served the period of suspension resulting from any prior revoked license.

~~[(4)]~~ (6) Each license shall be numbered, show the residence and place of business of the licensee, and is nontransferable.

~~[(5)]~~ (7) (a) Each license is in effect for three years from the date of issuance, unless the license is earlier revoked by the commission.

(b) The license expires on the expiration date shown on the license, unless the licensee renews it in accordance with commission rules.

(c) The commission shall by rule establish procedures for the renewal and reinstatement of licenses.

~~[(6)]~~ (8) (a) ~~[The]~~ In addition to any civil or criminal penalty provided by law, the commission shall, after providing notice and a hearing, revoke the license of any person:

(i) found to have violated this title[-]; or

(ii) who no longer qualifies for licensure under Subsection (5).

(b) ~~[A]~~ In the case of a revocation under Subsection (8)(a)(i), a license may not be issued to that person within a period of two years after the violation.

~~[(7)]~~ (9) A licensee may not barter, sell, exchange, or offer for sale:

(a) cigarettes in an individual package or container that contains less than 20 cigarettes;

or

(b) roll-your-own cigarettes in an individual package or container that contains less than 0.6 ounces of tobacco.

(10) (a) The commission shall maintain a list that includes the identity of all people licensed under this section.

(b) The list shall:

(i) include the type of license possessed; and

(ii) be updated by the commission at least once per quarter.

Section 4. Section **59-14-203** is amended to read:

59-14-203. Failure to obtain a license -- Penalty.

Any person engaging in the business of manufacturing, importing, distributing, or selling or offering to sell cigarettes without holding a valid license that is currently not suspended or revoked is guilty of a class B misdemeanor for each offense.

Section 5. Section **59-14-204** is amended to read:

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

(1) Except for cigarettes described under [~~Section~~] Subsection 59-14-210(3), there is levied a tax upon the sale, use, [~~or~~] storage, or distribution of cigarettes in the state.

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

(a) 3.475 cents on each cigarette, for all cigarettes weighing not more than three pounds per thousand cigarettes; and

(b) 4.075 cents on each cigarette, for all cigarettes weighing in excess of three pounds per thousand cigarettes.

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

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

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

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

(c) The Department of Health shall expend the funds deposited in the account under Subsection (5)(b) for a tobacco prevention and control media campaign targeted towards children.

(d) The following revenue generated from the tax increase imposed under Subsection (1) during the 2002 General Session shall be deposited in the Cigarette Tax Restricted Account:

(i) 22% of the revenue to be annually appropriated to the Department of Health for tobacco prevention, reduction, cessation, and control programs;

(ii) 15% of the revenue to be annually appropriated to the University of Utah Health Sciences Center for the Huntsman Cancer Institute for cancer research; and

(iii) 21% of the revenue to be annually appropriated to the University of Utah Health Sciences Center for medical education at the University of Utah School of Medicine.

(e) Any balance remaining in the Cigarette Tax Restricted Account at the end of the fiscal year shall be appropriated during the next fiscal year for the purposes set forth in Subsections (5)(d)(i) through (5)(d)(iii) in proportion to the amount of revenue deposited into the account for each purpose.

(f) The Legislature shall give particular consideration to appropriating any revenues resulting from the change in tax rates under Subsection (2) adopted during the 2002 Annual General Session and not otherwise appropriated pursuant to Subsection (5)(d) to enhance Medicaid provider reimbursement rates and medical coverage for the uninsured.

(g) Any program or entity that receives funding under Subsection (5)(d) shall provide an annual report to the Health and Human Services Interim Committee no later than September 1 of each year. The report shall include:

(i) the amount funded;

(ii) the amount expended;

(iii) a description of the effectiveness of the program; and

(iv) if the program is a tobacco cessation program, the report required in Section 63-97-401.

Section 6. Section **59-14-204.5** is enacted to read:

59-14-204.5. Application of excise tax on tribal lands.

(1) (a) Cigarettes sold to or received by members of a federally recognized Indian tribe that are purchased or received on the tribal lands are not subject to the tax imposed by Section

59-14-204.

(b) Cigarettes exempt from tax under 26 U.S.C. Sec. 5701 and distributed in accordance with federal regulations are not subject to the tax imposed by Section 59-14-204.

(2) (a) (i) The tax applicable to cigarettes sold to or received by nontribal members on tribal lands is equal to the state tax imposed by Section 59-14-204, minus any tribal tax actually paid.

(ii) For purposes of this section, nontribal members includes any person who is not a member of the Indian tribe that is selling the cigarettes.

(b) If the application of the tax offset for tribal taxes permitted in Subsection (2)(a) results in a negative balance, the taxes owed to the state are zero.

(c) (i) Cigarettes taxed pursuant to this Subsection (2) shall bear a tax stamp as required by Section 59-14-205 in an amount equal to the tax imposed by Section 59-14-204.

(ii) The commission shall at least semi-annually rebate to an Indian tribal entity that is in compliance with this chapter the lesser of:

(A) an amount equal to the tribal tax imposed on sales under this Subsection (2); or

(B) the face value of the tax stamps affixed to cigarettes sold under this Subsection (2).

Section 7. Section **59-14-205** is amended to read:

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

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

(2) All manufacturers, importers, distributors, wholesalers, and retail dealers shall securely affix the stamps to each individual package or container of cigarettes sold in the state, and may not sell or provide cigarette stamps to any other person.

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

sold.

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

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

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

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

(b) warning label not in compliance with 15 U.S.C. 1333 of the Federal Cigarette

Labeling and Advertising Act.

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

Section 8. Section **59-14-207.5** is enacted to read:

59-14-207.5. Transactions only with licensed manufacturers, importers, distributors, and retailers.

(1) A manufacturer or importer may sell or distribute cigarettes to a licensee if that person is located or doing business in the state, including on any tribal lands located in the state.

(2) An importer may obtain cigarettes only from a licensed manufacturer.

(3) (a) A distributor may obtain cigarettes only from a licensed manufacturer, importer, or distributor.

(b) A distributor may sell or distribute cigarettes to a person who is a licensed distributor or retailer, if that person is located or doing business in the state, including on any tribal lands in the state.

(4) A retailer may obtain cigarettes only from a properly licensed person.

Section 9. Section **59-14-207.6** is enacted to read:

59-14-207.6. Unstamped cigarettes.

(1) A person who ships unstamped cigarette packages into the state, other than to a licensed manufacturer, importer, distributor, or retailer who is authorized to affix stamps, shall first file with the commission a notice of shipment.

(2) Subsection (1) does not apply to a common or contract carrier that is transporting cigarettes through this state to another location under a proper bill of lading or freight bill, which states the quantity, source, and destination of the cigarettes.

Section 10. Section **59-14-209** is amended to read:

59-14-209. Penalty for willful violation -- Counterfeit cigarettes.

~~[Any]~~ (1) A person ~~[who]~~ is guilty of a third degree felony if the person:

(a) knowingly, or with intent to defraud the state violates Subsection 59-14-211(4);

~~[(+)]~~ (b) knowingly or willfully removes or otherwise prepares any adhesive stamp with the intent to use or cause to be used after it has already been used;

~~[(2)]~~ (c) knowingly or willfully buys, sells, offers for sale, or gives away any washed or restored stamp to any person;

~~[(3)]~~ (d) knowingly or willfully uses or has in his possession any washed or restored stamp that has been removed from the package or container to which it had been previously affixed;

~~[(4)]~~ (e) reuses any stamp that has already been used to pay a tax provided in this chapter, in order to indicate that person's payment of any tax; or

~~[(5)] (f) buys, sells, or offers for sale or has in his possession any counterfeit stamp[?].~~
~~[is guilty of a third degree felony.]~~

(2) In addition to any other provision of law, the sale or possession for sale of counterfeit cigarettes, as they are defined in Section 59-14-102, by a manufacturer, importer, distributor, or retailer shall result:

(a) in the seizure by the commission or law enforcement agency of the manufacturer's, importer's, distributor's, or retailer's:

(i) counterfeit cigarettes; and

(ii) any personal property used in direct connection with the sale or possession for sale of counterfeit cigarettes; and

(b) the forfeiture of the seized assets to the state.

Section 11. Section **59-14-211** is amended to read:

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

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

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

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

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

(ii) intended for distribution or sale in the state;

(c) alters the package of any cigarettes prior to their sale or distribution to the ultimate consumer to remove, conceal, or obscure a notice, warning label, or other package information described in Subsection 59-14-210(1)(a); or

(d) affixes a stamp used to pay the tax imposed under Section 59-14-204, Part 3, Tobacco Products, or Part 4, Cigarettes and Tobacco Products, to a package or container of cigarettes:

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

(ii) known by the person affixing the stamp to be altered as described under Subsection (1)(c); or

(iii) in violation of Section 59-14-408.

(2) If a person knowingly or with reason to know commits an act described in Subsections (1)(a) through (d), the commission ~~[may]~~ shall:

(a) suspend or revoke a license issued to the person under Section 59-14-202; and

(b) regardless of whether the person is licensed under Section 59-14-202, impose a civil penalty in an amount not to exceed the greater of:

(i) 500% of the retail value of the cigarettes; or

(ii) \$5,000.

(3) Any person whose commercial interests have been adversely affected as a result of a violation of this section may bring an action for injunctive relief, damages, or both.

(4) (a) The sale or possession for sale of counterfeit cigarettes by a manufacturer, importer, distributor, or retailer is punishable by a court of law as follows:

(i) a first violation involving a total quantity of less than 100 cartons of cigarettes is punishable by a fine in an amount the greater of \$500 or five times the retail value of the cigarettes;

(ii) a subsequent violation involving a total quantity of less than 100 cartons of cigarettes is punishable by:

(A) the greater of a fine of \$2,000 or five times the retail value of the cigarettes;

(B) imprisonment not to exceed one year; or

(C) both imprisonment and a fine imposed by this Subsection (4)(a)(ii); and

(D) the revocation by the commission of the manufacturer, importer, distributor, or retailer license for a period of up to two years;

(iii) a first violation involving a total quantity of 100 cartons of cigarettes or more is punishable by:

(A) the greater of a fine of \$2,500 or five times the retail value of the cigarettes;

(B) imprisonment not to exceed five years; or

- (C) both the fine and imprisonment imposed by this Subsection (4)(a)(iii);
- (iv) a second violation involving a quantity of 100 cartons of cigarettes or more is punishable by:
 - (A) the greater of a fine of \$10,000 or five times the retail value of the cigarettes;
 - (B) imprisonment not to exceed five years; or
 - (C) both the fine and imprisonment imposed by this Subsection (4)(a)(iv); and
 - (D) the revocation by the commission of the manufacturer, importer, distributor, or retailer license for a period of up to five years; and
- (v) a third and subsequent violation involving a quantity of 100 cartons of cigarettes or more is punishable by:
 - (A) the greater of a fine of \$25,000 or five times the retail value of the cigarettes;
 - (B) imprisonment not to exceed five years; or
 - (C) both the fine and imprisonment imposed by this Subsection (4)(a)(v); and
 - (D) the revocation by the commission of the manufacturer, importer, distributor, or retailer license for a period of up to five years; and
- (b) any counterfeit cigarette seized by the commission shall be destroyed.

Section 12. Section **59-14-213** is amended to read:

59-14-213. Contraband goods.

(1) Any cigarettes in violation of the requirements of this chapter or of any state or federal law, including Sections 59-14-203, 59-14-205, 59-14-209, 59-14-211, or Subsection 59-14-212(1) are contraband goods and may be seized without a warrant by the commission, its employees, or any peace officer of the state or its political subdivisions.

(2) Any goods seized pursuant to Subsection (1) shall be delivered to the commission and destroyed.

(3) Any cigarettes, as defined in Subsection 59-22-202(4), in violation of Subsection 59-14-408(2) are contraband goods and may be seized in accordance with Subsections (1) and (2).

Section 13. **Effective date.**

H.B. 279

Enrolled Copy

This bill takes effect on July 1, 2004.