

ENROLLED ACT NO. 88, HOUSE OF REPRESENTATIVES

FIFTY-SEVENTH LEGISLATURE OF THE STATE OF WYOMING
2003 GENERAL SESSION

AN ACT relating to the sale of tobacco products; providing for the regulation of licensed tobacco wholesalers as specified; specifying duties of the department of revenue and the attorney general; establishing licensing and certification requirements and a directory; authorizing seizure and destruction of tobacco products; authorizing attorney fees and costs; providing penalties; providing definitions; granting rulemaking authority; and providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 9-4-1205 through 9-4-1210 are created to read:

9-4-1205. Certifications; directory; tax stamps.

(a) Every tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer or similar intermediary, shall annually execute and deliver on a form prescribed by the attorney general a certification to the department and the attorney general no later than April 30 of each year, certifying under penalty of false swearing that, as of the date of the certification, the tobacco manufacturer either is a participating manufacturer or is otherwise in full compliance with this act and W.S. 9-4-1202.

(b) A participating manufacturer shall include a complete list of its brand families in its certification under this section. The participating manufacturer shall update its list thirty (30) days prior to any addition to, or modification of, its brand families by executing and delivering a supplemental certification to the department and the attorney general.

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(c) In the case of a nonparticipating manufacturer:

(i) The certification shall include a complete list of its brand families:

(A) Separately listing its brand families of cigarettes and the number of units sold for each brand family that were sold in the state during the preceding calendar year;

(B) That have been sold in the state at any time during the current calendar year;

(C) Indicating by an asterisk, any brand family sold in the state during the preceding calendar year that is no longer being sold in the state as of the date of the certification; and

(D) Identifying by name and address any other manufacturer of the brand families in the preceding or current calendar year.

(ii) The certification shall further certify:

(A) That the nonparticipating manufacturer is registered to do business in the state or has appointed a resident agent in the state for service of process and has provided notice with respect to the appointment of an agent as required by W.S. 9-4-1206(b);

(B) That the nonparticipating manufacturer has established and continues to maintain a qualified escrow fund and has executed a qualified escrow agreement that has been reviewed and approved by the attorney general and that governs the qualified escrow fund;

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(C) That the nonparticipating manufacturer is in full compliance with W.S. 9-4-1202, this act and any regulations promulgated thereto;

(D) The name, address and telephone number of the financial institution where the nonparticipating manufacturer has established the qualified escrow fund required under W.S. 9-4-1202(a)(ii), the account number of the qualified escrow fund and subaccount number for the state, the amount the nonparticipating manufacturer placed in the fund for cigarettes sold in the state during the preceding calendar year, the date and amount of each deposit and evidence or verification as may be deemed necessary by the attorney general to confirm the deposit and the amount and date of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from the fund or from any other qualified escrow fund into which it ever made escrow payments pursuant to W.S. 9-4-1202.

(d) A tobacco product manufacturer shall not include a brand family in its certification unless:

(i) In the case of a participating manufacturer, the participating manufacturer affirms that the brand family is to be deemed to be its cigarettes for the purpose of calculating payments under the master settlement agreement for the relevant year, in the volume and shares determined pursuant to the master settlement agreement; or

(ii) In the case of a nonparticipating manufacturer, the nonparticipating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of W.S. 9-4-1202.

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(e) Nothing in this section shall be construed as limiting or otherwise affecting the state's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the master settlement agreement or for purposes of this act and W.S. 9-4-1202.

(f) The tobacco product manufacturer shall maintain all invoices and documentation of sales and other information relied upon for the certifications required under this section for a period of five (5) years, unless otherwise required by law to maintain the information for a longer period of time.

(g) The attorney general shall develop and make available for public inspection a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of this section and all brand families that are listed in the certifications, except as follows:

(i) The attorney general shall not include or retain in the directory the name or brand families of any nonparticipating manufacturer who fails to provide the required certification or whose certification the attorney general determines is not in compliance with subsection (c) of this section and W.S. 9-4-1206, unless the attorney general has determined that the violation has been cured to his satisfaction;

(ii) Neither a tobacco product manufacturer nor a brand family shall be included or retained in the directory if the attorney general concludes that:

(A) In the case of a nonparticipating manufacturer, all escrow payments required pursuant to W.S.

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9-4-1202 for any period for any brand family, whether or not listed by the nonparticipating manufacturer, have not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the attorney general; or

(B) All outstanding final judgments, including interest thereon, for violations of W.S. 9-4-1202 have not been fully satisfied for the brand family and the manufacturer.

(h) The attorney general shall update the directory required under subsection (g) of this section as necessary to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements of this act. A determination by the attorney general to remove from the directory, or not to list on the directory, a tobacco product manufacturer or brand family shall be subject to review as provided by the Wyoming Administrative Procedure Act.

(j) Every licensed wholesaler shall provide and update as necessary a current address to the attorney general for the purpose of receiving any notifications that may be required under this act.

(k) No person shall affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory required under subsection (g) of this section, or sell, offer for sale or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory.

9-4-1206. Agent for service of process.

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(a) Any nonresident or foreign nonparticipating manufacturer who has not registered to do business in the state as a foreign corporation or business entity shall, as a condition precedent to having its brand families listed or retained in the directory required under W.S. 9-4-1205(g), appoint and continually engage without interruption the services of an agent in this state to act as agent for service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of this act and W.S. 9-4-1202, may be served in any manner authorized by law. The service shall constitute legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, phone number and proof of appointment and availability of the agent to the satisfaction of the attorney general.

(b) The nonparticipating manufacturer shall provide notice to the attorney general thirty (30) calendar days prior to the termination of the authority of an agent appointed under this section and shall further provide proof to the satisfaction of the attorney general of the appointment of a new agent no less than five (5) calendar days prior to the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the attorney general of the termination within five (5) calendar days and shall include proof to the satisfaction of the attorney general of the appointment of a new agent.

9-4-1207. Reporting of information; escrow installments.

(a) No later than twenty (20) days after the end of a calendar quarter, and more frequently if directed by the

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attorney general, each licensed wholesaler shall submit information the attorney general requires to facilitate compliance with this act, including, but not limited to, a list by brand family of the total number of cigarettes or in the case of roll your own cigarettes, the equivalent stick count for which the licensed wholesaler affixed stamps during the previous calendar quarter or otherwise paid the tax due for the cigarettes. The licensed wholesaler shall maintain and make available to the attorney general all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the attorney general for a period of five (5) years.

(b) The department is authorized to disclose to the attorney general any information received under this act and requested by the attorney general for purposes of determining compliance with and enforcing the provisions of this act. The director of the department and the attorney general shall share the information received under this act and may share the information with other federal, state or local agencies only for the purposes of enforcement of this act, W.S. 9-4-1202 or corresponding laws of other states.

(c) The attorney general may require at any time from the nonparticipating manufacturer, proof from the financial institution in which the manufacturer has established a qualified escrow fund for the purpose of compliance with W.S. 9-4-1202 of the amount of money in the fund being held on behalf of the state, the dates of deposits and listing the amounts of all withdrawals from the account and the dates of the withdrawals.

(d) In addition to the information required to be submitted pursuant to subsection (a) of this section, the attorney general may require a licensed wholesaler or

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tobacco product manufacturer to submit any additional information including, but not limited to, samples of the packaging or labeling of each family brand as is necessary to enable the attorney general to determine whether a tobacco product manufacturer is in compliance with this act.

(e) To promote compliance with this act, the attorney general may promulgate rules and regulations requiring a tobacco product manufacturer subject to the requirements of W.S. 9-4-1205(c) to make the escrow deposits required in installments during the year in which the sales covered by the deposits are made. The attorney general may require production of information sufficient to enable the attorney general to determine the adequacy of the amount of the installment deposit.

9-4-1208. Penalties and other remedies.

(a) In addition to, or in lieu of, any other civil or criminal remedy provided by law, upon a determination that any person has violated subsection W.S. 9-4-1205(k), the department may revoke or suspend the license of any licensed wholesaler in the manner provided by W.S. 39-18-108(c)(v). Each stamp affixed and each offer to sell cigarettes in violation of W.S. 9-4-1205(k) shall constitute a separate violation. For each violation under W.S. 9-4-1205(k), the department may also impose a civil penalty in an amount not to exceed the greater of five hundred percent (500%) of the retail value of the cigarettes sold, or five thousand dollars (\$5,000.00) upon a determination of a violation of W.S. 9-4-1205(k).

(b) Any cigarettes that have been sold, offered for sale or possessed for sale in this state, or imported for

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personal consumption in this state in violation of W.S.
9-4-1205(k) shall be:

(i) Deemed contraband under W.S.
39-18-108(c) (i);

(ii) Subject to seizure and forfeiture as
provided in W.S. 39-18-108(c) (i); and

(iii) Destroyed.

(c) The attorney general may seek an injunction to
restrain a threatened or actual violation of W.S.
9-4-1205(k) or 9-4-1207(a) or (d) by a licensed wholesaler
and to compel the licensed wholesaler to comply with those
provisions.

(d) No person shall sell or distribute cigarettes or
acquire, hold, own, possess, transport, import or cause to
be imported cigarettes that the person knows or should know
are intended for distribution or sale in this state in
violation of W.S. 9-4-1205(k). Any person who violates
this section is guilty of a misdemeanor punishable by a
fine of not more than one hundred dollars (\$100.00),
imprisonment for not more than six (6) months, or both.

(e) Any person who violates W.S. 9-4-1205(k) engages
in an unfair and deceptive trade practice in violation of
W.S. 40-12-105(a) (i).

(f) In any action brought by the state to enforce
this act, the state may recover the costs of investigation,
expert witness fees, costs of the action and reasonable
attorney fees.

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(g) If a court determines that a person has violated any provision of this act, the court shall order any profits, gain or other benefit from the violation to be surrendered and paid to the Wyoming tobacco settlement trust fund established by W.S. 9-4-1203. Unless otherwise expressly provided, the remedies or penalties provided by this act are cumulative to each other and to the remedies or penalties available under all other laws of this state.

9-4-1209. Rules and regulations.

The department and the attorney general may promulgate rules and regulations necessary to effect the purposes of this act.

9-4-1210. Definitions.

(a) As used in this act:

(i) "Brand family" means all styles of cigarettes sold under the same trademark and differentiated by means of additional modifiers or descriptors, including, but not limited to, "menthol," "lights," "kings" and "100s" and includes any brand name, alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, recognizable pattern of colors or any other indicia of product identification identical, similar to or identifiable with a previously known brand of cigarettes;

(ii) "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;

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(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 subparagraph (A) of this paragraph. The term "cigarette" includes "roll-your-own" meaning 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 "roll your own" cigarettes, nine one-hundredths (.09) ounces of "roll-your-own" tobacco shall constitute one (1) individual cigarette.

(iii) "Department" means the Wyoming department of revenue;

(iv) "Licensed wholesaler" means a person authorized to affix tax stamps to packages or other containers or cigarettes under W.S. 39-18-102(a) or any person who is required to pay the cigarette tax imposed under W.S. 39-18-103;

(v) "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;

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(vi) "Nonparticipating manufacturer" means any tobacco product manufacturer who is not a participating manufacturer;

(vii) "Participating manufacturer" means as defined in section II(jj) of the master settlement agreement;

(viii) "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 one billion dollars (\$1,000,000,000.00) where the arrangement requires that the 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 W.S. 9-4-1202(b);

(ix) "Tobacco product manufacturer" means, but shall not include an affiliate of a tobacco product manufacturer unless the affiliate itself falls within any of subparagraphs (A) through (C) of this paragraph, an entity that after the date of enactment of this act directly and not exclusively through any affiliate:

(A) Manufactures cigarettes anywhere that the manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer, (except where the importer is an original participating manufacturer, as that term is defined in the master settlement agreement, who will be responsible for the payments under the master settlement agreement with respect to the cigarettes as a result of the provisions of subsection II(mm) of the master settlement

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agreement and who pays the taxes specified in subsection II(z) of the master settlement agreement, and provided that the manufacturer of the cigarettes does not market or advertise the cigarettes in the United States);

(B) 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

(C) Becomes a successor of an entity described in subparagraph (A) or (B) of this paragraph.

(x) "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 department of revenue shall promulgate regulations as are necessary to ascertain the amount of state excise tax paid on the cigarettes of such tobacco product manufacturer for each year;

(xi) "This act" means W.S. 9-4-1205 through 9-4-1210.

Section 2. W.S. 39-18-106(a) is amended to read:

39-18-106. Licensing; permits.

(a) Every wholesaler who sells or offers to sell cigarettes, cigars, snuff or other tobacco products in this state must have a license to do so issued by the department. No license or renewal of a license shall be

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granted under this section unless the wholesaler states in writing, under penalty for false swearing, that he shall comply fully with W.S. 9-4-1201 through 9-4-1209. The license fee is ten dollars (\$10.00) per year or fraction thereof and is valid through June 30 in each year. The license will be granted only to wholesalers who own or operate the place from which sales are made and additional licenses must be obtained for each separate location. The licenses are transferable pursuant to rules and regulations promulgated by the department.

Section 3.

(a) For the calendar year 2003:

(i) The first report of a licensed wholesaler required by W.S. 9-4-1207(a), as created in section 1 of this act, shall be due no later than thirty (30) days after the effective date of this act;

(ii) The certifications by tobacco product manufacturers required by W.S. 9-4-1205(a), as created in section 1 of this act, shall be due no later than forty-five (45) days after the effective date of this act; and

(iii) The directory required under W.S. 9-4-1205(g), as created in section 1 of this act, shall be made available no later than ninety (90) days after the effective date of this act.

Section 4. To the extent the provisions of W.S. 9-4-1205 through 9-4-1210, as created by section 1 of this act, and the provisions of W.S. 9-4-1201 and 9-4-1202 conflict, the provisions of W.S. 9-4-1201 and 9-4-1202 shall control. If any provision created by section 1 of this act causes W.S. 9-4-1201 and 9-4-1202 to fail as a

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qualifying or model statute, as those terms are defined in the master settlement agreement entered into on November 23, 1998, by the state and leading United States tobacco product manufacturers, then that portion of this act shall not be valid.

Section 5. This act is effective immediately upon completion of all acts necessary for a bill to become law as provided by Article 4, Section 8 of the Wyoming Constitution.

(END)

Speaker of the House

President of the Senate

Governor

TIME APPROVED: _____

DATE APPROVED: _____

I hereby certify that this act originated in the House.

Chief Clerk