

State of Arizona
House of Representatives
Fifty-second Legislature
Second Regular Session
2016

HOUSE BILL 2594

AN ACT

AMENDING SECTION 44-7111, ARIZONA REVISED STATUTES; RELATING TO TOBACCO
PRODUCT MANUFACTURERS ESCROW ACCOUNTS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 44-7111, Arizona Revised Statutes, is amended to
3 read:

4 44-7111. Tobacco; nonparticipating manufacturers; civil
5 penalty; violation; classification

6 This state enacts the model nonparticipating manufacturers legislation
7 as follows:

8 Section 1. Findings and Purpose.

9 The legislature finds that violations of section 44-7101 threaten the
10 integrity of the tobacco master settlement agreement, the fiscal soundness of
11 the state and the public health. The legislature finds that enacting
12 procedural enhancements will aid the enforcement of section 44-7101 and
13 thereby safeguard the master settlement agreement, the fiscal soundness of
14 the state and the public health.

15 Section 2. Definitions.

16 (a) "Brand family" means all styles of cigarettes sold under the same
17 trade mark and differentiated from one another by means of additional
18 modifiers or descriptors, including, but not limited to, "menthol", "lights",
19 "kings" and "100s", and includes any brand name (alone or in conjunction with
20 any other word), trademark, logo, symbol, motto, selling message,
21 recognizable pattern of colors or any other indicia of product identification
22 identical or similar to, or identifiable with, a previously known brand of
23 cigarettes.

24 (b) "Cigarette" has the same meaning prescribed in section 44-7101.

25 (c) "Department" means the department of revenue.

26 (d) "Director" means the director of the department.

27 (e) "Distributor" has the same meaning prescribed in section 42-3001.

28 (f) "Master settlement agreement" has the same meaning prescribed in
29 section 44-7101.

30 (g) "Nonparticipating manufacturer" means any tobacco product
31 manufacturer that is not a participating manufacturer.

32 (h) "Participating manufacturer" has the meaning given that term in
33 section II(jj) of the master settlement agreement and all amendments thereto.

34 (i) "Qualified escrow fund" has the same meaning prescribed in section
35 44-7101.

36 (j) "Tobacco product manufacturer" has the same meaning prescribed in
37 section 44-7101.

38 (k) "Units sold" has the same meaning prescribed in section 44-7101.

39 Section 3. Certifications; Directory; Tax Stamps.

40 (a) Certification. Every tobacco product manufacturer whose
41 cigarettes are sold in this state, whether directly or through a distributor,
42 retailer or similar intermediary or intermediaries, shall execute and deliver
43 on a form prescribed by the attorney general a certification to the attorney
44 general not later than the thirtieth day of April each year, certifying that,
45 as of the date of the certification, the tobacco product manufacturer either

1 is a participating manufacturer or is in full compliance with section
2 44-7101, section 3(b), including all quarterly installment payments required
3 by regulations as may be promulgated by the attorney general pursuant to
4 section 5(f) of this article. As to all certifications required by this
5 article, if the certification is rejected due to incompleteness or
6 incorrectness, the tobacco product manufacturer may not submit supplemental
7 documentation to try to cure the rejection and must execute and deliver an
8 entirely new certification to the attorney general.

9 (1) A participating manufacturer shall include in its certification a
10 list of its brand families. The participating manufacturer shall update the
11 list thirty days prior to any addition to or modification of its brand
12 families by executing and delivering a supplemental certification to the
13 attorney general.

14 (2) A nonparticipating manufacturer shall include in its certification
15 (i) a list of all of its brand families and the number of units sold for each
16 brand family that were sold in the state during the preceding calendar year,
17 (ii) a list of all of its brand families that have been sold in the state at
18 any time during the current calendar year, (iii) indicating by an asterisk,
19 any brand family sold in the state during the preceding calendar year that is
20 no longer being sold in the state as of the date of the certification and
21 (iv) identifying by name and address any other manufacturer of the brand
22 families in the preceding or current calendar year and (v) for each of the
23 current calendar year and the preceding calendar year, a list of all of this
24 state's resident and nonresident distributors that the manufacturer sold
25 cigarettes to or that the manufacturer believes or has reason to believe
26 purchased or received any of the manufacturer's cigarettes from another
27 source. The nonparticipating manufacturer must execute and deliver a
28 supplemental certification to the attorney general to request any addition to
29 or modification of its brand families. The supplemental certification
30 requesting the addition or modification does not relieve the brand families
31 from the prohibitions set forth in sections 3(c) and 6(d) until the request
32 is approved by the attorney general and the addition or modification to the
33 brand families is listed or made in the directory.

34 (3) In the case of a nonparticipating manufacturer, the certification
35 shall further certify:

36 (a) That the nonparticipating manufacturer is registered to do
37 business in the state or has appointed a resident agent for service of
38 process and provided notice thereof as required by section 4.

39 (b) That the nonparticipating manufacturer (i) has established and
40 continues to maintain a qualified escrow fund and (ii) has executed a
41 qualified escrow agreement that has been reviewed and approved by the
42 attorney general and that governs the qualified escrow fund.

43 (c) That the nonparticipating manufacturer is in full compliance with
44 section 44-7101, section (3)(b) and this article, and any regulations
45 promulgated pursuant thereto;

1 (d) (i) The name, address and telephone number of the financial
2 institution where the nonparticipating manufacturer has established the
3 qualified escrow fund required pursuant to section 44-7101, section 3(b) and
4 all regulations promulgated pursuant thereto, (ii) the account number of the
5 qualified escrow fund and any subaccount number for the state, (iii) the
6 amount the nonparticipating manufacturer placed in the fund for cigarettes
7 sold in the state during the preceding calendar year, the date and amount of
8 each deposit and such evidence or verification as may be deemed necessary by
9 the attorney general to confirm the foregoing and (iv) the amount of and date
10 of any withdrawal or transfer of funds the nonparticipating manufacturer made
11 at any time from the fund or from any other qualified escrow fund into which
12 it ever made escrow payments pursuant to section 44-7101, section 3(b) and
13 all regulations promulgated pursuant thereto.

14 (e) Unless the nonparticipating manufacturer or its affiliate is
15 licensed as a tobacco distributor in this state, that all sales or shipments
16 made by the nonparticipating manufacturer or its affiliate within or into
17 this state are made to a tobacco distributor that is licensed in this state.

18 (f) All other information and materials specifically requested by this
19 section or the attorney general in the course of enforcing this section.

20 (4) A tobacco product manufacturer may not include a brand family in
21 its certification unless (i) in the case of a participating manufacturer, the
22 participating manufacturer affirms that the brand family is to be deemed to
23 be its cigarettes for purposes of calculating its payments under the master
24 settlement agreement for the relevant year, in the volume and shares
25 determined pursuant to the master settlement agreement, and (ii) in the case
26 of a nonparticipating manufacturer, the nonparticipating manufacturer affirms
27 that the brand family is to be deemed to be its cigarettes for purposes of
28 section 44-7101, section 3(b). Nothing in this section shall be construed as
29 limiting or otherwise affecting the state's right to maintain that a brand
30 family constitutes cigarettes of a different tobacco product manufacturer for
31 purposes of calculating payments under the master settlement agreement or for
32 purposes of section 44-7101.

33 (5) Tobacco product manufacturers shall maintain all invoices and
34 documentation of sales and other information relied upon for the
35 certification for a period of five years, unless otherwise required by law to
36 maintain them for a greater period of time.

37 (6) A tobacco product manufacturer that is not currently listed in the
38 directory must submit an initial certification subject to the same
39 requirements and review process set forth in this article for annual
40 certifications. The tobacco product manufacturers brand families remain
41 subject to the prohibitions set forth in sections 3(c) and 6(d) until listed
42 in the directory.

43 (b) Directory of cigarettes approved for stamping and sale. Not later
44 than ninety days after the effective date of this article, the attorney
45 general shall develop and publish on the attorney general's web site a

1 directory listing all tobacco product manufacturers that have provided
2 current and accurate certifications conforming to the requirements of
3 section 3(a) and all brand families that are listed in those certifications
4 (the "directory"), except as noted below.

5 (1) The attorney general shall not include or retain in the directory
6 the name or brand families of any nonparticipating manufacturer that fails to
7 provide the required certification or whose certification the attorney
8 general determines is not in compliance with any term of this article, unless
9 the attorney general has determined that the violation has been cured to the
10 satisfaction of the attorney general.

11 (2) Neither a tobacco product manufacturer nor brand family shall be
12 included or retained in the directory if the attorney general concludes, in
13 the case of a nonparticipating manufacturer, that (i) any escrow payment
14 required pursuant to section 44-7101, section 3(b) for any period for any
15 brand family, whether or not listed by the nonparticipating manufacturer, has
16 not been fully paid into a qualified escrow fund governed by a qualified
17 escrow agreement that has been approved by the attorney general, or (ii) any
18 outstanding final judgment, including interest thereon, for a violation of
19 section 44-7101 has not been fully satisfied for the brand family or the
20 manufacturer.

21 (3) The attorney general shall update the directory as necessary in
22 order to correct mistakes and to add or remove a tobacco product manufacturer
23 or brand family to keep the directory in conformity with the requirements of
24 this article.

25 (4) A distributor that has lawfully affixed stamps to cigarettes and
26 subsequently is unable to sell those cigarettes lawfully because the
27 cigarettes have been removed from the directory pursuant to section 3(b)(2)
28 of this article, may apply to the department for a refund of the cost of such
29 stamps.

30 (5) Every distributor shall provide and update as necessary an
31 electronic mail address to the director and attorney general for the purpose
32 of receiving any notifications as may be required by this article.

33 (6) A tobacco product manufacturer included in the directory may
34 request that a new brand family be added to the directory by executing and
35 delivering a supplemental certification with the necessary information to the
36 attorney general and the director. Not later than forty-five business days
37 after receiving such a request, and at such earlier time as is reasonable to
38 do so, the attorney general shall either (i) certify the new brand family or
39 (ii) deny the request. However, in cases where the attorney general
40 reasonably determines that it needs additional information to ascertain
41 whether the requestor is the tobacco product manufacturer of the new brand
42 family, the attorney general may take whatever additional time is reasonably
43 needed to process the request, to locate and assemble information or
44 documents needed to process the request, and to notify persons or agencies
45 affected by the request.

1 (c) Prohibition against stamping or sale of cigarettes not in the
2 directory. It shall be unlawful for any person (1) to affix a stamp to a
3 package or other container of cigarettes of a tobacco product manufacturer or
4 brand family not included in the directory or (2) to sell, offer or possess
5 for sale, in this state, including for sale within or outside of this state,
6 cigarettes of a tobacco product manufacturer or brand family not included in
7 the directory.

8 (d) Every nonparticipating manufacturer shall post a bond for the
9 exclusive benefit of this state.

10 (e) The bond shall be posted at least ten days in advance of each
11 calendar quarter as a condition to the nonparticipating manufacturer and its
12 brand families being included in the state directory for that quarter. The
13 amount of the bond shall be the greater of (i) the greatest required escrow
14 amount due from the nonparticipating manufacturer or its predecessor for any
15 of the twelve preceding calendar quarters or (ii) fifty thousand dollars.
16 The bond certifications and materials must be submitted as part of the
17 initial, annual and supplemental certifications required by this article.

18 (f) If a nonparticipating manufacturer that posted a bond has failed
19 to make or have made on its behalf deposits equal to the full amount owed for
20 a quarter within fifteen days following the due date of the quarter under
21 section 5, subparagraph (g), the state may execute on the bond in the amount
22 equal to any remaining amount of the escrow due. Amounts that the state
23 collects on a bond shall be deposited into the state treasury and shall
24 reduce the amount of escrow due from that nonparticipating manufacturer in
25 the dollar amount collected. Escrow obligations above the amount collected
26 on the bond remain due from that nonparticipating manufacturer and, as
27 provided in any joint and several provision in this section, from the
28 importers that sold its cigarettes during that calendar quarter.

29 (g) The office of the attorney general shall adopt rules necessary to
30 implement subparagraphs (d), (e) and (f) of this section.

31 (h) Nonparticipating manufacturers located outside the United States
32 must provide a declaration in a form prescribed by the attorney general from
33 each of its importers into the United States of any of its brand families,
34 that the importer accepts joint and several liability with the
35 nonparticipating manufacturer for all escrow deposits due pursuant to section
36 44-7101 as well as all penalties and other relief available to the state
37 pursuant to section 44-7101 and this section. The declaration shall appoint
38 a resident agent for service of process in this state pursuant to section 4.
39 The declarations shall be submitted as part of the certifications required
40 pursuant to this section and updated at least thirty days before any other
41 importer begins the importation of the manufacturer's cigarettes. Failure to
42 comply with this subparagraph is grounds for removal from the directory. For
43 the purposes of this subparagraph, "importer" has the same meaning as in 27
44 Code of Federal Regulations section 41.11 (2012). The importer declaration

1 must be submitted as part of the initial, annual and supplemental
2 certifications required by this article.

3 (i) The attorney general shall have the authority to not retain or
4 refuse to include in the directory any nonparticipating manufacturer or the
5 manufacturer's brand families, that (i) does not certify that it is subject
6 to the enforcement of section 44-7101, this section and section 36-798.06
7 without any immunity, (ii) provides incorrect, false or misleading statements
8 in any certification submitted to this state pursuant to section 44-7101 or
9 this section with regard to any year or (iii) was previously or is currently
10 not in compliance with any other federal or state laws, including another
11 state's qualifying statute as defined in the master settlement agreement or
12 if the attorney general has reason to believe that the tobacco product
13 manufacturer will not comply with the laws.

14 (j) The attorney general has the authority to require any
15 nonparticipating manufacturer to submit all information, certifications,
16 affidavits and other materials that the attorney general deems appropriate to
17 determine compliance with this section and other related laws, including the
18 grounds for not retaining or not including in the directory any
19 nonparticipating manufacturer or the manufacturer's brand families.

20 Section 4. Agent for Service of Process.

21 (a) Requirement for agent for service of process. Any nonresident or
22 foreign nonparticipating manufacturer that has not registered to do business
23 in the state as a foreign corporation or business entity shall, as a
24 condition precedent to having its brand families included or retained in the
25 directory, appoint and continually engage without interruption the services
26 of an agent in this state to act as agent for the service of process on whom
27 all process, and any action or proceeding against it concerning or arising
28 out of the enforcement of this article and section 44-7101, may be served in
29 any manner authorized by law. Such service on the agent constitutes legal
30 and valid service of process on the nonparticipating manufacturer. The
31 nonparticipating manufacturer shall provide the name, address, phone number
32 and proof of the appointment and availability of the agent to and to the
33 satisfaction of the attorney general.

34 (b) The nonparticipating manufacturer shall provide notice to the
35 attorney general thirty calendar days prior to termination of the authority
36 of an agent and shall further provide proof to the satisfaction of the
37 attorney general of the appointment of a new agent not less than five
38 calendar days prior to the termination of an existing agent appointment. In
39 the event an agent terminates an agency appointment, the nonparticipating
40 manufacturer shall notify the attorney general of the termination within five
41 calendar days and shall include proof to the satisfaction of the attorney
42 general of the appointment of a new agent.

43 (c) Any nonparticipating manufacturer whose cigarettes are sold in
44 this state and who has not appointed and engaged an agent as herein required
45 shall be deemed to have appointed the secretary of state as the agent and may

1 be proceeded against in courts of this state by service of process upon the
2 secretary of state; provided, however, that the appointment of the secretary
3 of state as the agent shall not satisfy the condition precedent to having the
4 brand families of the nonparticipating manufacturer included or retained in
5 the directory.

6 Section 5. Reporting of Information; Escrow Installments.

7 (a) Reporting by distributors. Not later than twenty calendar days
8 after the end of each calendar month, and more frequently if so directed by
9 the director, each distributor shall submit to the department on a form
10 prescribed by the department such information as the director requires to
11 facilitate compliance with this article, including, but not limited to, a
12 list by brand family of the total number of cigarettes or, in the case of
13 roll your own, the equivalent stick count, for which the distributor affixed
14 stamps during the previous calendar quarter or otherwise paid the tax due for
15 the cigarettes. The department shall review all information reported by the
16 distributor for accuracy and completeness. The distributor shall maintain,
17 and make available to the director and the attorney general, all invoices and
18 documentation of sales of all nonparticipating manufacturer cigarettes and
19 any other information relied upon in reporting to the director for a period
20 of five years.

21 (b) Disclosure of information. The department is authorized to
22 disclose to the attorney general any information received under this article
23 and requested by the attorney general for purposes of determining compliance
24 with and enforcing the provisions of this article. The department and
25 attorney general shall share with each other the information received under
26 this article, and may share the information with other federal, state or
27 local agencies only for purposes of enforcement of this article, section
28 44-7101 or corresponding laws of other states.

29 (c) If a tobacco product manufacturer required to establish a
30 qualified escrow fund under section 44-7101, section 3(b) disputes the
31 attorney general's determination of the amount that the manufacturer is
32 required to deposit into escrow and the attorney general determines that the
33 dispute can likely be resolved by information contained in reports submitted
34 by distributors to the department indicating sales or purchases of the
35 manufacturer's cigarettes, then the attorney general shall produce the
36 relevant portions of the reports to the manufacturer. However, before
37 disclosing the foregoing information, the attorney general may require the
38 manufacturer to provide all records related to its sales of the cigarettes in
39 dispute. The disclosure provided by the attorney general to a tobacco
40 product manufacturer pursuant to this subsection shall be limited to
41 information concerning the cigarettes alleged by the state to be subject to
42 the requirements of section 44-7101, section 3(b), may be used by the
43 manufacturer only for the limited purpose of determining the appropriate
44 escrow deposit, and may not be disclosed by the manufacturer to any third
45 parties.

1 (d) Verification of qualified escrow fund. The attorney general may
2 require at any time from the nonparticipating manufacturer, proof from the
3 financial institution in which the manufacturer has established a qualified
4 escrow fund for the purpose of compliance with section 44-7101, section 3(b)
5 of the amount of money in the fund, exclusive of interest, the amount and the
6 date of each deposit to the fund, and the amount and date of each withdrawal
7 from the fund.

8 (e) Requests for additional information. In addition to the
9 information required to be submitted pursuant to this article, the director
10 and attorney general may require a distributor or tobacco product
11 manufacturer to submit any additional information including, but not limited
12 to, samples of the packaging or labeling of each brand family, as is
13 necessary to enable the attorney general to determine whether a tobacco
14 product manufacturer is in compliance with this article.

15 (f) Quarterly escrow installments. To promote compliance with the
16 provisions of this article, the attorney general may promulgate regulations
17 requiring tobacco product manufacturers subject to the requirements of
18 section 3(a)(2) to make the escrow deposits required in quarterly
19 installments during the year in which the sales covered by the deposits are
20 made:

21 (1) In circumstances where the attorney general reasonably concludes
22 that a manufacturer may not fully and timely comply with section 44-7101,
23 section 3(b).

24 (2) Where manufacturers have not made escrow deposits pursuant to
25 section 44-7101, section 3(b) during the preceding calendar year.
26 The attorney general may require production of information sufficient to
27 enable the attorney general to determine the adequacy of the amount of the
28 installment deposit.

29 (g) A tobacco product manufacturer that is subject to the requirements
30 of section 3(a)(2) shall make the required escrow deposits in quarterly
31 installments following each sales quarter. The attorney general may require
32 the production of information that is sufficient to enable the attorney
33 general to determine the adequacy of the amount of the installment deposit.
34 Quarterly escrow installment deposits must be made pursuant to the following
35 schedule:

36 (1) For the first quarter, January through March, on or before May 31
37 of the calendar year.

38 (2) For the second quarter, April through June, on or before August 31
39 of the calendar year.

40 (3) For the third quarter, July through September, on or before
41 November 30 of the calendar year.

42 (4) For the fourth quarter, October through December, on or before
43 February 28 of the following calendar year.

1 Section 6. Penalties and Other Remedies.

2 (a) License revocation and civil penalty. In addition to or in lieu
3 of any other civil or criminal remedy provided by law, upon a determination
4 that a distributor has violated section 3(c) or any regulation adopted
5 pursuant to this article, the director may revoke or suspend the license of
6 the distributor in the manner provided by title 41, chapter 6, article 10 for
7 contested cases. Each stamp affixed and each sale or offer to sell
8 cigarettes in violation of section 3(c) shall constitute a separate
9 violation. The director may also impose a civil penalty in an amount not to
10 exceed the greater of five hundred ~~per-cent~~ PERCENT of the retail value of
11 the cigarettes or five thousand dollars upon a determination of violation of
12 section 3(c) or any regulations promulgated pursuant thereto. The penalty
13 shall be imposed in the manner provided by title 41, chapter 6, article 10
14 for contested cases.

15 (b) Contraband and seizure. Any cigarettes that have been sold,
16 offered for sale or possessed for sale in this state in violation of
17 section 3(c) shall be deemed contraband and the cigarettes shall be subject
18 to seizure by the department and forfeiture, and all the cigarettes so seized
19 and forfeited shall be destroyed and not resold.

20 (c) Injunction. The attorney general, on behalf of the director, may
21 seek an injunction to restrain a threatened or actual violation of
22 section 3(c), 5(a) or 5(d) by a distributor and to compel the distributor to
23 comply with those sections. In any action brought pursuant to this section,
24 the state shall be entitled to recover the costs of investigation, costs of
25 the action and reasonable attorney fees.

26 (d) Unlawful sale and distribution. It shall be unlawful for a person
27 to (i) sell or distribute cigarettes, or (ii) acquire, hold, own, possess,
28 transport, import or cause to be imported cigarettes, that the person knows
29 or should know are intended for distribution or sale in the state in
30 violation of section 3(c). A violation of this section is a class 1
31 misdemeanor.

32 (e) Deceptive trade practice. A person who violates section 3(c)
33 engages in an unlawful practice in violation of section 44-1522. Standing to
34 bring an action to enforce title 44, chapter 10, article 7 for violation of
35 section 3(c) shall lie solely with the attorney general.

36 Section 7. Miscellaneous Provisions.

37 (a) Notice and review of determination. A determination of the
38 attorney general to not include or to remove from the directory a brand
39 family or tobacco product manufacturer shall be subject to review as an
40 appealable agency action in the manner prescribed by title 41, chapter 6,
41 article 10.

42 (b) Dates. For the year 2003, the first report of distributors
43 required by section 5(a) shall be due thirty calendar days after the
44 effective date of this article. The certifications by a tobacco product
45 manufacturer described in section 3(a) shall be due forty-five calendar days

1 after the effective date and the directory described in section 3(b) shall be
2 published or made available within ninety calendar days after the effective
3 date.

4 (c) Promulgation of regulations. The department and the attorney
5 general may promulgate regulations necessary to effect the purposes of this
6 article.

7 (d) Recovery of costs and fees by attorney general. In any action
8 brought by the state to enforce this article, the state shall be entitled to
9 recover the costs of investigation, expert witness fees, costs of the action
10 and reasonable attorney fees.

11 (e) Disgorgement of profits for violations of article. If a court
12 determines that a person has violated this article, the court shall order any
13 profits, gain, gross receipts or other benefit from the violation to be
14 disgorged and paid to the state general fund. Unless otherwise expressly
15 provided, the remedies or penalties provided by this article are cumulative
16 to each other and to the remedies or penalties available under all other laws
17 of this state.

18 (f) Construction and severability. If a court of competent
19 jurisdiction finds that the provisions of this article and section 44-7101
20 conflict and cannot be harmonized, then the provisions of section 44-7101
21 shall control. If any section, subsection, subdivision, paragraph, sentence,
22 clause or phrase of this article causes section 44-7101 to no longer
23 constitute a qualifying or model statute, as those terms are defined in the
24 master settlement agreement, then that portion of this article shall not be
25 valid. If any section, subsection, subdivision, paragraph, sentence, clause
26 or phrase of this article is for any reason held to be invalid, unlawful or
27 unconstitutional, the decision shall not affect the validity of the remaining
28 portions of this article or any part thereof.

29 (g) TOBACCO SALES DATA CONFIDENTIALITY. ALL TOBACCO SALES DATA
30 PROVIDED TO THE ATTORNEY GENERAL OR THE DEPARTMENT OF REVENUE PURSUANT TO THE
31 MASTER SETTLEMENT OR AGREEMENTS REGARDING DISPUTES UNDER THE MASTER
32 SETTLEMENT AGREEMENT SHALL BE CONFIDENTIAL AND SHALL NOT BE MADE PUBLIC.