

**Sixty-seventh Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 5, 2021**

SENATE BILL NO. 2259
(Senators Lee, Davison)
(Representatives Dockter, M. Johnson)

AN ACT to create and enact chapter 51-25.1 of the North Dakota Century Code, relating to tobacco product manufacturer certification, service, and reporting requirements; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 51-25.1 of the North Dakota Century Code is created and enacted as follows:

51-25.1-01. Definitions.

As used in this chapter:

1. "Brand family" means any style of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including "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 or similar to, or identifiable with, a previously known brand of cigarettes.
2. "Cigarette" has the same meaning as in section 51-25-01.
3. "Commissioner" means the tax commissioner.
4. "Distributor" has the same meaning as in section 57-36-01.
5. "Master settlement agreement" has the same meaning as in section 51-25-01.
6. "Nonparticipating manufacturer" means a tobacco product manufacturer that is not a participating manufacturer.
7. "Participating manufacturer" has the same meaning as in section 11(jj) of the master settlement agreement of 1998.
8. "Qualified escrow fund" has the same meaning as in section 51-25-01.
9. "Tobacco product manufacturer" has the same meaning as in section 51-25-01.
10. "Units sold" has the same meaning as in section 51-25-01.

51-25.1-02. Certification - Directory.

1. Before April thirtieth of each year, a tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer, or similar intermediary, shall execute and deliver on a form prescribed by the attorney general a certification to the attorney general certifying under penalty of perjury that, as of the date of the certification, the tobacco product manufacturer either is a participating manufacturer or is in compliance with subsection 5 of section 51-25.1-04, subsection 2 of section 51-25-02, and any rules adopted under these provisions.
 - a. The participating manufacturer shall include a list of its brand families in the participating manufacturer's certification. The participating manufacturer shall update the list thirty calendar days before any addition to, or modification of, the participating manufacturer's

brand families by executing and delivering a supplemental certification to the attorney general. The participating manufacturer shall include an electronic mail address and facsimile number in the certification to receive any notification required by this chapter.

b. A nonparticipating manufacturer shall include in the certification:

- (1) A list of all the nonparticipating manufacturer's brand families and the number of units sold for each brand family sold in the state during the preceding calendar year;
- (2) A list of all the nonparticipating manufacturer's brand families sold in the state during the current calendar year; and
 - (a) Indicate by an asterisk any brand family sold in the state during the preceding calendar year which is no longer being sold in the state as of the date of certification; and
 - (b) Identify by name and address any other manufacturer of the brand families in the preceding or current calendar year; and
- (3) An electronic mail address and facsimile number to receive any notification required by this chapter.

c. The nonparticipating manufacturer shall update its list of brand families thirty days before any addition to, or modification of, the nonparticipating manufacturer's brand families by executing and delivering a supplemental certification to the attorney general.

d. The certification of the nonparticipating manufacturer further must certify:

- (1) The nonparticipating manufacturer is registered to do business in the state or has appointed a resident agent for service of process, and provided notice thereof, as required by section 51-25.1-03.
- (2) The nonparticipating manufacturer has:
 - (a) Established and continues to maintain a qualified escrow fund; and
 - (b) Executed a qualified escrow agreement that has been reviewed and approved by the attorney general which governs the qualified escrow fund.
- (3) The nonparticipating manufacturer is in compliance with this chapter, chapter 51-25, and any rules adopted under these chapters.
- (4) With respect to a qualified escrow fund:
 - (a) The name, address, and telephone number of the financial institution in which the nonparticipating manufacturer has established the qualified escrow fund, and any rules adopted thereunder;
 - (b) The account number of the qualified escrow fund and any subaccount number for the state;
 - (c) The amount the nonparticipating manufacturer placed in the qualified escrow fund for cigarettes sold in the state during the preceding calendar year, the date and amount of each deposit, and any evidence or verification the attorney general deems necessary; and
 - (d) The amount and date of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from the qualified escrow fund or from any other qualified escrow fund into which the nonparticipating

manufacturer ever made any escrow payment under subsection 5 of section 51-25.1-04, chapter 51-25, and any rules adopted under these provisions.

- e. A tobacco product manufacturer may not include a brand family in the certification unless:
 - (1) In the case of a participating manufacturer, the participating manufacturer affirms the brand family is the participating manufacturer's cigarettes for purposes of calculating the participating manufacturer's payments under the master settlement agreement for the relevant year, in the volume and shares determined under the master settlement agreement; and
 - (2) In the case of a nonparticipating manufacturer, the nonparticipating manufacturer affirms the brand family is to be deemed the nonparticipating manufacturer's cigarettes for purposes of chapter 51-25.
 - f. This section does not limit the state's right to maintain that a brand family constitutes the cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the master settlement agreement or for purposes of chapter 51-25.
 - g. The tobacco product manufacturer shall retain all invoices and documentation of sales and other information relied on for the certification for a period of five years, unless otherwise required by law.
2. The attorney general shall develop and publish on the attorney general's website, a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection 1 and all brand families listed in the certifications, except as otherwise provided in this subsection.
- a. The attorney general may not include or retain in the directory the name or brand family of any tobacco product manufacturer that fails to provide the required certification or whose certification the attorney general determines is not in compliance with subsection 1, unless the attorney general has determined the violation has been cured.
 - b. A tobacco product manufacturer or brand family may be included or retained in the directory if the attorney general determines:
 - (1) In the case of a nonparticipating manufacturer, an escrow payment required under subsection 5 of section 51-25.1-04 or subsection 2 of section 51-25-02, for any period for any brand family, whether listed by the nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement approved by the attorney general.
 - (2) Any outstanding final judgment, including any interest, for a violation of chapter 51-25 has not been fully satisfied for the brand family and the tobacco product manufacturer.
 - c. The attorney general shall update the directory as necessary to correct mistakes, to add or remove a tobacco product manufacturer or brand family, and to keep the directory in conformity with the requirements of this chapter.
3. The attorney general may not remove a tobacco product manufacturer or the tobacco product manufacturer's brand family from the directory until the tobacco product manufacturer has been provided at least fifteen days' notice of the intended action. Notice is sufficient if sent either electronically or by facsimile to the electronic mail address or facsimile number provided by the tobacco product manufacturer in the tobacco product manufacturer's most recent certification filed under subsection 1.

4. It is unlawful for any person to sell, offer, or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory.
5. A person is deemed to have received notice that cigarettes of a tobacco product manufacturer or a brand family are not included in the directory maintained by the attorney general under subsection 2 at the time the attorney general's website fails to list any tobacco product manufacturer or brand family in the directory or at the time the attorney general removes the tobacco product manufacturer or brand family from the directory.

51-25.1-03. Agent for service of process.

1. Any nonresident or foreign nonparticipating manufacturer that has not registered to do business in the state as a foreign corporation or business entity, as a condition precedent to having the nonparticipating manufacturer's brand families included or retained in the directory, shall 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 the nonparticipating manufacturer concerning or arising out of the enforcement of this chapter and chapter 51-25, may be served in any manner authorized by law. This service constitutes legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, telephone number, and proof of the appointment and availability of the agent to the attorney general.
2. The nonparticipating manufacturer shall provide notice to the attorney general no less than thirty days before termination of the authority of an agent. The nonparticipating manufacturer shall provide proof, to the satisfaction of the attorney general, of the appointment of a new agent no less than five days before the termination of an existing agent appointment. If an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the attorney general of the termination within five days and shall include proof, to the satisfaction of the attorney general, of the appointment of a new agent.
3. A nonparticipating manufacturer whose products are sold in this state, without appointing or designating an agent as required by this section, is deemed to have appointed the secretary of state as the agent and the nonparticipating manufacturer may be proceeded against in courts of this state by service of process upon the secretary of state. The appointment of the secretary of state as the agent does not satisfy the condition precedent in subsection 1 for having the nonparticipating manufacturer's brand families included or retained in the directory.

51-25.1-04. Reporting of information - Escrow installments.

1. Not later than twenty days after the end of each calendar quarter, and more frequently if directed by the attorney general, a distributor shall submit information the attorney general requires to facilitate compliance with this chapter, including a list by brand family of the total number of cigarettes or, in the case of "roll-your-own", the equivalent stick count the distributor paid the excise tax due for the cigarettes. The distributor 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 years. The distributor shall provide the information and documentation to the commissioner, together with any other information and documentation requested by the commissioner. The commissioner shall process the information and documentation as needed by the commissioner and as needed by the attorney general for the purposes of this chapter and chapter 51-25.
2. The commissioner may disclose to the attorney general any information in the commissioner's possession requested by the attorney general for purposes of determining compliance with and enforcement of this chapter. The commissioner and attorney general may share the information received under this chapter, and may share the information

with a federal, state, or local agency for purposes of enforcement of chapter 51-25, this chapter, or any equivalent law of another state.

3. The attorney general may require from the nonparticipating manufacturer, at any time, proof from the financial institution in which the nonparticipating manufacturer has established a qualified escrow fund for the purpose of compliance with subsection 2 of section 51-25-02 of the amount of money in the qualified escrow fund, exclusive of interest, being held on behalf of the state, and the amount and date of each deposit to, and withdrawal from, the qualified escrow fund.
4. In addition to the information required to be submitted under chapter 51-25 and this chapter, the attorney general may require a distributor or tobacco product manufacturer to submit any additional information, including samples of packaging or labeling of a brand family, as necessary to enable the attorney general to determine whether a tobacco product manufacturer is or will continue to be in compliance with this chapter and chapter 51-25.
5. In addition to the requirements of subsection 2 of section 51-25-02, and to promote compliance with this chapter:
 - a. The attorney general may require any nonparticipating manufacturer to make escrow deposits required by subsection 2 of section 51-25-02 in quarterly installments. Any escrow deposits required to be made in quarterly installments must be deposited into a qualified escrow fund no later than thirty calendar days after the end of the quarter in which the sales were made. The failure by a nonparticipating manufacturer to make any quarterly installment required by the attorney general subjects the nonparticipating manufacturer to any penalty and other remedy provided under section 51-25.1-02 and subsection 2 of section 51-25-02.
 - b. The attorney general may require production of information sufficient to enable the attorney general to determine the adequacy of each escrow deposit under this subsection and subsection 2 of section 51-25-02.

51-25.1-05. Penalties - Remedies.

1. In addition to any other civil or criminal remedy provided by law, upon a determination that a distributor has violated subsection 4 of section 51-25.1-02, or any rule adopted under that subsection, the attorney general may revoke the license of a distributor in the manner provided by section 57-36-04. Each sale or offer to sell cigarettes in violation of subsection 4 of section 51-25.1-02 constitutes a separate violation. For each violation, the attorney general may impose a civil penalty in an amount not to exceed five hundred percent of the retail value of the cigarettes sold or five thousand dollars, whichever is greater, upon a determination of violation of subsection 4 of section 51-25.1-02 or any rules adopted under that subsection.
2. Any cigarettes sold, offered for sale, or possessed for sale in this state, or imported for personal consumption in this state in violation of subsection 4 of section 51-25.1-02 are deemed contraband and are subject to seizure, by a law enforcement officer, and forfeiture as follows:
 - a. Upon the seizure of the cigarettes, and within two days thereafter, the law enforcement officer making the seizure shall deliver an inventory of the cigarettes seized to the person from whom the seizure was made, if known, and shall file a copy of the inventory with the attorney general.
 - b. Within ten days after the date of service of the inventory, the person from whom the seizure was made, or any other person claiming an interest in the cigarettes seized, may file a demand with the attorney general for a judicial determination of the issues

of whether the cigarettes seized were, or lawfully are, subject to seizure and forfeiture. Within thirty days of the date of a timely demand, the attorney general shall institute an action in the district court of the county in which the seizure was made for a determination of the issues. The action must be brought by the attorney general in the name of the state. The district court shall hear the action and determine the issues of fact and law.

- c. If a judgment of forfeiture is entered, the attorney general shall destroy the forfeited cigarettes unless the judgment is stayed pending an appeal to the supreme court.
 - d. If a demand for a judicial determination is made, and in the absence of an action commenced under this section or a stipulated settlement, the attorney general shall release the seized cigarettes to the person entitled to the cigarettes.
 - e. If a demand for judicial determination is not made, the seized cigarettes must be deemed forfeited to the state by operation of law and the cigarettes must be destroyed.
3. The attorney general may seek an injunction to restrain a threatened or actual violation of subsection 4 of section 51-25.1-02 or subsections 1 or 4 of section 51-25.1-04 by any person and to compel the person to comply with this subsection. In an action brought under this section, the state is entitled to recover the costs of investigation, costs of the action, and reasonable attorney's fees.
4. A person may not sell, distribute, acquire, hold, own, possess, transport, import, or cause to be imported cigarettes the person knows or should know are intended for distribution or sale in the state in violation of subsection 4 of section 51-25.1-02. A violation of this subsection is a class A misdemeanor.

51-25.1-06. Miscellaneous provisions - Penalties and remedies cumulative - Joint and several liability.

- 1. Any determination by the attorney general not to include in or to remove from the directory a tobacco product manufacturer or brand family is subject to judicial review by the filing of a civil action for prospective declaratory or injunctive relief. The Burleigh County district court has exclusive jurisdiction over the civil action.
- 2. A license or renewal of a license to act as a distributor may not be issued to a person unless the person certifies in writing the person will comply with this chapter.
- 3. A licensed distributor shall provide to the attorney general, and update as necessary, an electronic mail address and facsimile number to receive any notification required by this chapter.
- 4. The first report of a distributor required under subsection 1 of section 51-25.1-04 is due thirty days after the effective date of this chapter.
 - a. The first certification of a tobacco product manufacturer described under subsection 1 of section 51-25.1-02 is due forty-five days after the effective date of this chapter.
 - b. The directory described in subsection 2 of section 51-25.1-02 must be developed and made available for public inspection within one hundred twenty days after the effective date of this chapter.
- 5. The attorney general and commissioner may adopt rules necessary to effect the purposes of this chapter and chapter 51-25.

6. In any action brought by the state to enforce this chapter, the state is entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney's fees.
7. If a court determines a person has violated this chapter, the court shall order any profits, gain, gross receipts, or other benefit from the violation disgorged and paid to the general fund, and the court shall order payment of any taxes due under chapter 57-36.
8. Unless otherwise provided, remedies or penalties provided by this chapter are cumulative to each other and to remedies or penalties available under all other laws of this state.
9. If a court of competent jurisdiction finds this chapter in conflict with chapter 51-25 and the conflict cannot be harmonized, chapter 51-25 must control. If any portion of this chapter causes chapter 51-25 to no longer constitute a qualifying or model statute, as the terms are defined in the master settlement agreement, that portion of this chapter must be held to be invalid.
10. For each nonparticipating manufacturer located outside the United States, each importer into the United States of the nonparticipating manufacturer's brand families sold in the state has joint and several liability with the nonparticipating manufacturer for deposit of all escrow amounts due under subsection 2 of section 51-25-02 and payment of all penalties imposed under subsection 2 of section 51-25-02.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-seventh Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2259.

Senate Vote: Yeas 46 Nays 0 Absent 1

House Vote: Yeas 66 Nays 26 Absent 2

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2021.

Approved at _____ M. on _____, 2021.

Governor

Filed in this office this _____ day of _____, 2021,

at _____ o'clock _____ M.

Secretary of State