

HOUSE BILL NO. 1274

Introduced by

Representatives Weisz, Dockter, Grueneich, Porter, M. Ruby

Senators Klein, Lee

1 A BILL for an Act to create and enact two new subsections to section 51-25-02, subsections 6,
2 7, 8, 9, and 10 of section 51-25.1-02, and one new subsection to section 51-25.1-06 of the
3 North Dakota Century Code, relating to assignment of escrow accounts, sell-through periods
4 after removal of tobacco product manufacturer or brand family from directory, and placing
5 burden on a nonparticipating manufacturer to establish an escrow deposit is not required on
6 certain sales; to amend and reenact subsection 10 of section 51-25-01, subsection 2 of section
7 51-25.1-02, subsection 4 of section 51-25.1-02, section 51-25.1-05, subsection 2 of section
8 51-25.1-06, and section 57-36-04 of the North Dakota Century Code, relating to definition of the
9 term "units sold" used to determine escrow to be deposited by a nonparticipating manufacturer,
10 and the regulation of tobacco product manufacturers, distributors, and the lawful sale of
11 cigarettes; to provide a penalty; and to declare an emergency.

12 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

13 **SECTION 1. AMENDMENT.** Subsection 10 of section 51-25-01 of the North Dakota
14 Century Code is amended and reenacted as follows:

15 10. "Units sold" means the number of individual cigarettes sold in the state by the
16 applicable tobacco product manufacturer, whether directly or through a distributor,
17 retailer, or similar intermediary or intermediaries, during the year in question, ~~as~~
18 ~~measured by excise taxes collected by the state on packs or "roll-your-own" tobacco-~~
19 ~~containerson~~ which the state has authority under federal and state law to collect
20 excise tax under chapter 57-36, notwithstanding whether the state excise tax was
21 imposed or collected. Cigarettes exempt from state excise tax under federal law are
22 specifically excluded from this definition. The state tax commissioner shall adopt rules
23 as are necessary to ascertain the amount of state excise tax paid on the cigarettes of
24 the tobacco product manufacturer for each year.

1 **SECTION 2.** Two new subsections to section 51-25-02 of the North Dakota Century Code
2 are created and enacted as follows:

3 Notwithstanding subdivision b of subsection 2, a tobacco product manufacturer that
4 deposits funds into escrow under subdivision a of subsection 2, or a transferee of
5 rights therein, may make an irrevocable assignment of the tobacco manufacturer's
6 interest in the funds to the benefit of the state. The assignment executed in
7 accordance with this section is permanent and applies to all funds in the escrow
8 account and which subsequently may come into the account, including funds
9 deposited into the account before the assignment is executed, funds deposited into
10 the account after the assignment is executed, and interest and other appreciation on
11 the funds. The tobacco product manufacturer, the attorney general, and the financial
12 institution that maintains the escrow account may make an amendment to the qualified
13 escrow account agreement as necessary to effectuate an assignment of the rights
14 executed under this subsection or the withdrawal of funds from the escrow account
15 under subdivision b of subsection 2. An assignment executed under this subsection
16 must be in writing, and be signed by a duly authorized representative of the assignor
17 and assignee and becomes effective upon delivery of the assignment to the attorney
18 general and the financial institution at which the escrow account is maintained.

19
20 Notwithstanding subdivision b of subsection 2, escrow funds assigned to the state
21 under subsection 3 must be withdrawn by the state on the approval of the attorney
22 general. Funds withdrawn under this subsection must be deposited into the general
23 fund and must be calculated on a dollar-for-dollar basis as a credit against any
24 judgment or settlement described in subdivision b of subsection 2 which may be
25 obtained against the tobacco product manufacturer or transferee that has assigned
26 the funds in the escrow account to the state. This section may not be construed to
27 relieve a tobacco product manufacturer from any past, current, or future obligation the
28 manufacturer may have under this chapter or chapter 51-25.1.

29 **SECTION 3. AMENDMENT.** Subsection 2 of section 51-25.1-02 of the North Dakota
30 Century Code is amended and reenacted as follows:

- 1 2. The attorney general shall develop and publish on the attorney general's website, a
2 directory listing all tobacco product manufacturers that have provided current and
3 accurate certifications conforming to the requirements of subsection 1 and all brand
4 families listed in the certifications, except as otherwise provided in this subsection.
- 5 a. The attorney general may not include or retain in the directory the name or brand
6 family of any tobacco product manufacturer that fails to provide the required
7 certification or whose certification the attorney general determines is not in
8 compliance with subsection 1, unless the attorney general has determined the
9 violation has been cured.
- 10 b. ~~Neither a~~ tobacco product manufacturer ~~or~~ brand family may be included or
11 retained in the directory if the attorney general determines:
- 12 (1) Cigarettes of the tobacco product manufacturer are imported into the state
13 by a distributor not licensed under chapter 57-36.
- 14 (2) In the case of a nonparticipating manufacturer, the manufacturer fails to
15 provide the commissioner and attorney general, on a monthly basis, with
16 copies of the reports identified in the Prevent All Cigarette Trafficking Act of
17 2009 [Pub. L. 111-54; 15 U.S.C. 375 et seq.].
- 18 (3) In the case of a nonparticipating manufacturer, an escrow payment required
19 under subsection 5 of section 51-25.1-04 or subsection 2 of section
20 51-25-02, for any period for any brand family, whether listed by the
21 nonparticipating manufacturer, has not been fully paid into a qualified
22 escrow fund governed by a qualified escrow agreement approved by the
23 attorney general.
- 24 ~~(2)~~(4) Any outstanding final judgment, including any interest, for a violation of
25 chapter 51-25 has not been fully satisfied for the brand family and the
26 tobacco product manufacturer.
- 27 c. The attorney general shall update the directory as necessary to correct mistakes,
28 to add or remove a tobacco product manufacturer or brand family, and to keep
29 the directory in conformity with the requirements of this chapter.

30 **SECTION 4. AMENDMENT.** Subsection 4 of section 51-25.1-02 of the North Dakota
31 Century Code is amended and reenacted as follows:

- 1 4. #Except as provided in subsections 8 and 10, it is unlawful for any person to sell, offer,
2 or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand
3 family not included in the directory.

4 **SECTION 5.** Subsections 6, 7, 8, 9, and 10 of section 51-25.1-02 of the North Dakota
5 Century Code are created and enacted as follows:

- 6 6. Upon removal of a tobacco product manufacturer or brand family from the directory,
7 the attorney general also shall transmit notice of the removal by electronic mail or
8 other practicable means to each distributor that reported cigarette sales of that
9 tobacco product manufacturer or brand family in the preceding year. No later than
10 seven days after receiving notice of the removal, the distributor shall provide a copy of
11 the notice to each of the distributor's customers that purchased cigarettes of the
12 tobacco product manufacturer or brand family in the preceding year. The attorney
13 general also shall post notice of the removal in the directory.
- 14 7. An out-of-state distributor may not sell or distribute into the state the cigarettes of the
15 tobacco product manufacturer or brand family that has been removed from the
16 directory until the tobacco product manufacturer or brand family is relisted in the
17 directory.
- 18 8. An in-state distributor shall identify and set aside the cigarettes of a tobacco product
19 manufacturer or brand family that has been removed from the directory for sale or
20 distribution outside the borders of the state within thirty days after the date of removal
21 from the directory of the tobacco product manufacturer or brand family. The in-state
22 distributor shall keep for five years documentation of any cigarettes sold or distributed
23 outside the borders of the state.
- 24 9. An in-state distributor may not purchase, or sell within the borders of this state,
25 cigarettes of a tobacco product manufacturer or brand family that has been removed
26 from the directory until the tobacco product manufacturer or brand family is relisted in
27 the directory.
- 28 10. A retailer may not sell, offer, or possess for sale, for more than twenty days after the
29 date of removal from the directory of a tobacco product manufacturer or brand family,
30 the cigarettes of that tobacco product manufacturer or brand family. Before expiration
31 of the twenty-day period, the retailer shall send any unsold cigarettes to the tobacco

1 product manufacturer or a distributor outside the borders of this state. The retailer
2 shall keep for five years documentation of any cigarettes sent outside the borders of
3 this state.

4 **SECTION 6. AMENDMENT.** Section 51-25.1-05 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **51-25.1-05. Penalties - Remedies.**

- 7 1. In addition to any other civil or criminal remedy provided by law, upon a
8 determination that a distributor has violated subsection 4, 6, 7, 8, or 9 of section
9 51-25.1-02 or subsection 1 or 4 of section 51-25.1-04, or any rule adopted under
10 ~~that subsection~~those subsections, the attorney general may revoke the license of a
11 distributor in the manner provided by section 57-36-04. Each sale or offer to sell
12 cigarettes in violation of subsection 4 of section 51-25.1-02 constitutes a separate
13 violation. For each violation, the attorney general may impose a civil penalty in an
14 amount not to exceed five hundred percent of the retail value of the cigarettes sold
15 or five thousand dollars, whichever is greater, upon a determination of violation of
16 subsection 4 of section 51-25.1-02 or any rules adopted under that subsection.
- 17 2. Any cigarettes sold, offered for sale, or possessed for sale in this state, or
18 imported for personal consumption in this state in violation of subsection 4 of
19 section 51-25.1-02 are deemed contraband and are subject to seizure, by a law
20 enforcement officer, and forfeiture as follows:
- 21 a. Upon the seizure of the cigarettes, and within two days thereafter, the law
22 enforcement officer making the seizure shall deliver an inventory of the
23 cigarettes seized to the person from whom the seizure was made, if known,
24 and shall file a copy of the inventory with the attorney general.
- 25 b. Within ten days after the date of service of the inventory, the person from
26 whom the seizure was made, or any other person claiming an interest in the
27 cigarettes seized, may file a demand with the attorney general for a judicial
28 determination of the issues of whether the cigarettes seized were, or lawfully
29 are, subject to seizure and forfeiture. Within thirty days of the date of a timely
30 demand, the attorney general shall institute an action in the district court of
31 the county in which the seizure was made for a determination of the issues.

1 The action must be brought by the attorney general in the name of the state.
2 The district court shall hear the action and determine the issues of fact and
3 law.

4 c. If a judgment of forfeiture is entered, the attorney general shall destroy the
5 forfeited cigarettes unless the judgment is stayed pending an appeal to the
6 supreme court.

7 d. If a demand for a judicial determination is made, and in the absence of an
8 action commenced under this section or a stipulated settlement, the attorney
9 general shall release the seized cigarettes to the person entitled to the
10 cigarettes.

11 e. If a demand for judicial determination is not made, the seized cigarettes must
12 be deemed forfeited to the state by operation of law and the cigarettes must
13 be destroyed.

14 3. The attorney general may seek an injunction to restrain a threatened or actual
15 violation of subsection 4, 7, 8, 9, or 10 of section 51-25.1-02 or
16 ~~subsections~~subsection 1 or 4 of section 51-25.1-04 by any person and to compel
17 the person to comply with this subsection. In an action brought under this section,
18 the state is entitled to recover the costs of investigation, costs of the action, and
19 reasonable attorney's fees.

20 4. A person may not sell, distribute, acquire, hold, own, possess, transport, import, or
21 cause to be imported cigarettes the person knows or should know are intended for
22 distribution or sale in the state in violation of subsection 4, 7, 8, 9, or 10 of section
23 51-25.1-02. A violation of this subsection is a class A misdemeanor.

24 **SECTION 7. AMENDMENT.** Subsection 2 of section 51-25.1-06 of the North Dakota
25 Century Code is amended and reenacted as follows:

26 2. A license or renewal of a license to act as a distributor may not be issued to a
27 person unless the person certifies in writing the person will comply with this
28 chapter and chapter 57-36.

29 **SECTION 8.** A new subsection to section 51-25.1-06 of the North Dakota Century Code
30 is created and enacted as follows:

1 For purposes of the definition of "units sold" in this chapter and chapter 51-25, the
2 burden of establishing a sale of cigarettes is exempt from state excise tax under
3 federal law, such that an escrow deposit for the sale is not required under section
4 51-25-02 or subsection 5 of section 51-25.1-04, is on the nonparticipating
5 manufacturer claiming the exemption. To establish a claim a transaction involving the
6 sale of cigarettes is exempt from state excise tax by federal law, such that an escrow
7 deposit for the sale is not required, the nonparticipating manufacturer shall submit to
8 the attorney general supporting information contained in a form prescribed or
9 approved by the attorney general.

10 **SECTION 9. AMENDMENT.** Section 57-36-04 of the North Dakota Century Code is
11 amended and reenacted as follows:

12 **57-36-04. Revocation of license - Penalty.**

13 The attorney general may revoke the license of any dealer or distributor for failure to comply
14 with any of the provisions of this chapter or chapter 51-25.1, or any of the rules or regulations
15 prescribed by the tax commissioner or the attorney general. When a license has been legally
16 revoked, no license may be issued again to the licensee for a period of one year thereafter. A
17 person may not sell any cigarettes, cigarette papers, snuff, cigars, or tobacco after that person's
18 license has been revoked as provided in this chapter.

19 **SECTION 10. EMERGENCY.** Sections 1 and 8 of this Act are declared to be an emergency
20 measure.