

**Sixty-eighth Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 3, 2023**

HOUSE BILL NO. 1274
(Representatives Weisz, Dockter, Grueneich, Porter, M. Ruby)
(Senators Klein, Lee)

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

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

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

10. "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 on which the state has authority under federal and state law to collect excise tax under chapter 57-36, notwithstanding whether the state excise tax was imposed or collected. Cigarettes exempt from state excise tax under federal law are specifically excluded from this definition. The state tax commissioner shall adopt rules as are necessary to ascertain the amount of state excise tax paid on the cigarettes of the tobacco product manufacturer for each year.

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

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

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

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

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. ~~Neither a~~ tobacco product manufacturer ~~or~~ brand family may be included or retained in the directory if the attorney general determines:
 - (1) Cigarettes of the tobacco product manufacturer are imported into the state by a distributor not licensed under chapter 57-36.
 - (2) In the case of a nonparticipating manufacturer, the manufacturer fails to provide the commissioner and attorney general, on a monthly basis, with copies of the reports identified in the Prevent All Cigarette Trafficking Act of 2009 [Pub. L. 111-54; 15 U.S.C. 375 et seq.].
 - (3) 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)~~(4) 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.

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

4. ~~Except as provided in subsections 8 and 10, 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.~~

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

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

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

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, 6, 7, 8, or 9 of section 51-25.1-02 or subsection 1 or 4 of section 51-25.1-04, or any rule adopted under ~~that subsection~~ those subsections, 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, 7, 8, 9, or 10 of section 51-25.1-02 or ~~subsections~~ subsection 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, 7, 8, 9, or 10 of section 51-25.1-02. A violation of this subsection is a class A misdemeanor.

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

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 and chapter 57-36.

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

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

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

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

The attorney general may revoke the license of any dealer or distributor for failure to comply with any of the provisions of this chapter or chapter 51-25.1, or any of the rules or regulations prescribed by the tax commissioner or the attorney general. When a license has been legally revoked, no license may be issued again to the licensee for a period of one year thereafter. A person may not sell any cigarettes,

cigarette papers, snuff, cigars, or tobacco after that person's license has been revoked as provided in this chapter.

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

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Sixty-eighth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1274 and that two-thirds of the members-elect of the House of Representatives voted in favor of said law.

Vote: Yeas 72 Nays 18 Absent 4

Speaker of the House

Chief Clerk of the House

This certifies that two-thirds of the members-elect of the Senate voted in favor of said law.

Vote: Yeas 46 Nays 1 Absent 0

President of the Senate

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2023.

Approved at _____ M. on _____, 2023.

Governor

Filed in this office this _____ day of _____, 2023,
at _____ o'clock _____ M.

Secretary of State