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CHAPTER 48.

TOBACCO QUALIFIED ESCROW FUND ENFORCEMENT

SECTION 11-48-10. Legislative findings.

The General Assembly finds that:

(1) potential violations of Chapter 47 of this title, The Tobacco Escrow Fund Act, may threaten the integrity of the Tobacco Master Settlement Agreement, the financial interests of the State, and the public health; and

(2) enacting procedural enhancements may deter potential violations and promote the enforcement of The Tobacco Escrow Fund Act, safeguard the Master Settlement Agreement, the financial interests of the State, and the public health.

HISTORY: 2005 Act No. 61, Section 1.A.

SECTION 11-48-20. Definitions.

As used in this chapter:

(1) "Brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors including, but not limited to, menthol, lights, kings, and 100s and includes the use of a brand name alone or in conjunction with another 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 11-47-20(d).

(3) "Nonparticipating manufacturer" means a tobacco product manufacturer that is not a participating manufacturer.

(4) "Participating manufacturer" has the meaning given that term in Section 11(jj) of the Master Settlement Agreement and all amendments to it.

(5) "Qualified escrow fund" has the same meaning as that term is defined in Section 11-47-20(f).

(6) "Cigarette distributor" means a person required to pay the tax imposed by Section 12-21-620 or authorized to affix a tax stamp to a cigarette package pursuant to Title 12.

(7) "Tobacco product manufacturer" has the same meaning as that term is defined in Section 11-47-20(i).

(8) "Units sold" has the same meaning as that term is defined in Section 11-47-20(j).

HISTORY: 2005 Act No. 61, Section 1.A.

SECTION 11-48-30. Compliance certification by tobacco product manufacturers; brand family lists; public inspection; affixing stamp to or offering to sell tobacco products not listed on certification; penalties.

(A) Each tobacco product manufacturer whose cigarettes are sold in this State, whether directly or through a distributor, retailer, or similar intermediary or intermediaries shall execute and deliver on a form or in the manner prescribed by the Attorney General a certification to the Attorney General no later than the thirtieth day of April each year, certifying under penalty of perjury that, as of the date of this certification, the tobacco product manufacturer either is a participating manufacturer or is in full compliance with Section 11-47-30.

(1) A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update the list thirty days before any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General.

(2) A nonparticipating manufacturer shall include in its certification a complete list of all of its brand families:

(a) separately listing brand families of cigarettes and the number of units sold for each brand family in the State during the preceding calendar year;

(b) listing all of its brand families that have been sold in the State at any time during the current calendar year;

(c) indicating by an asterisk a 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. The nonparticipating manufacturer shall update the list thirty days before any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General.

(3) In the case of a nonparticipating manufacturer, the certification must certify further that:

(a) it is registered to do business in the State or has appointed an agent resident within South Carolina for service of process and provided notice of the appointment;

(b) it has established and continues to maintain a qualified escrow fund governed by an executed qualified escrow fund agreement that has been reviewed and approved by the Attorney General;

(c) it is in full compliance with Section 11-47-30 and this chapter and regulations promulgated pursuant to them; and

(d) the following information is accurate and complete:

(i) name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established the qualified escrow fund required pursuant to Section 11-47-30(b) and its regulations;

(ii) the account number of the qualified escrow fund and subaccount number for the State of South Carolina;

(iii) 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 evidence or verification considered necessary by the Attorney General to confirm that information; and

(iv) amounts of and dates of a withdrawal or transfer of funds the nonparticipating manufacturer made at any time from the qualified escrow fund or from another qualified escrow fund into which it made qualified escrow fund payments pursuant to Section 11-47-30(b) and its regulations.

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

(i) in the case of a participating manufacturer, it affirms that the brand family is to be considered its cigarettes for purposes of calculating its payments under the Master Settlement Agreement for the relevant year, in the volume and shares determined pursuant to the Master Settlement Agreement; and

(ii) in the case of a nonparticipating manufacturer, it affirms that the brand family is considered its cigarettes for purposes of Chapter 47 of this title.

(b) This item does not limit or otherwise affect 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 Chapter 47 of this title.

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

(B) The Attorney General shall develop and make available for public inspection or publish on the office web site a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (A) and all brand families that are listed in the certifications except:

(1) The Attorney General shall not include or retain in the directory the name or brand families of a nonparticipating manufacturer that fails to provide the required certification or whose certification the Attorney General determines is not in compliance with items (2) and (3) of subsection (A), unless the Attorney General determines that the violation is cured to his satisfaction.

(2) Neither a tobacco product manufacturer nor brand family may be included or retained in the directory if the Attorney General concludes in the case of a nonparticipating manufacturer that:

(a) all qualified escrow fund payments required pursuant to Section 11-47-30(b) for any period for a brand family, whether or not listed by the nonparticipating manufacturer, have not been paid fully into a qualified escrow fund governed by a qualified escrow fund agreement approved by the Attorney General; or

(b) all outstanding final judgments, including interest on them, for violations of Section 11-47-30(b) have not been fully satisfied for the brand family and the manufacturer.

(3) The Attorney General shall update the directory as necessary to correct mistakes, to add or remove a tobacco product manufacturer or brand families, and to keep the directory in conformity with the requirements of this chapter.

(4) A cigarette distributor shall provide and update as necessary an electronic mail address to the Attorney General for the purpose of receiving notifications required by this chapter.

(5) Notwithstanding the provisions of items (1) and (2) of this subsection, in the case of a nonparticipating manufacturer who has established a qualified escrow fund account that has been approved by the Attorney General, the manufacturer or its brand families must not be removed from the directory unless the manufacturer has been given at least fourteen days notice of the intended action. For the purposes of this section, notice is considered sufficient if it is sent either electronically to an electronic-mail address or by first class to a postal mailing address provided by the manufacturer in its most recent certification filed pursuant to this section. The notified nonparticipating manufacturer has fourteen days from the receipt of the notice to comply. At the time that the Attorney General sends notice of its intent to remove the manufacturer from the directory, the Attorney General shall post the notice directly.

(C)(1) It is unlawful for any person to:

(a) affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory if such a stamp is required by law; or

(b) sell, offer, acquire, hold, own, possess, transport, import or cause to be imported, for sale in this State cigarettes of a tobacco product manufacturer or brand family not included in the directory, or to import such cigarettes for personal consumption.

(2) A person who violates the provisions of item (1) of this subsection engages in an unfair and deceptive trade practice in violation of Chapter 5, Title 39.

(3) A person who, with knowledge of the prohibitions provided in item (1) of this section violates the provisions of item (1) of this section, is guilty of a misdemeanor and, upon conviction, must be punished by a fine not to exceed one thousand dollars or imprisoned for not more than one year, or both. Each day a violation occurs constitutes a separate offense.

HISTORY: 2005 Act No. 61, Section 1.A.

SECTION 11-48-40. Nonresident nonparticipating manufacturer not registered to do business in State; appointment of agent for service of process.

(A) A 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 its brand families listed 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 the service of process on whom all process and action or proceeding against it concerning or arising out of the enforcement of Chapter 47 of this title, may be served in a manner authorized by law. That service is legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, phone number, and proof of the appointment and availability of the agent to, and to the satisfaction of the Attorney General.

(B) The nonparticipating manufacturer shall provide notice to the Attorney General thirty calendar days before termination of the authority of an agent and proof to the satisfaction of the Attorney General of the appointment of a new agent no fewer than five calendar 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 calendar days and shall include proof to the satisfaction of the Attorney General of the appointment of a new agent.

(C) A nonparticipating manufacturer whose cigarettes 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 may be proceeded against in courts of this State by service of process upon the Secretary of State; except that, appointment of the Secretary of State as the agent does not satisfy the condition precedent to having its brand families listed or retained in the directory.

HISTORY: 2005 Act No. 61, Section 1.A.

SECTION 11-48-50. Compliance information by cigarette distributors; proof of establishment by nonparticipating manufacturers of qualified escrow funds; submission of packaging or labeling samples; authority to promulgate regulations requiring quarterly escrow deposits.

(A) No later than twenty days after the end of each calendar quarter, and more frequently if so directed by the Attorney General, a cigarette distributor shall submit information the Attorney General requires to facilitate compliance with this chapter including, but not limited to, a list by brand family of the total number of cigarettes or in the case of roll-your-own, the equivalent stick count for which the cigarette distributor affixed stamps during the previous calendar quarter, or otherwise paid the tax due for the cigarettes. The cigarette distributor shall maintain, and make available to the Attorney General, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and other information relied upon in reporting to the Attorney General for a period of five years. The distributors also shall provide this information and documentation to the Department of Revenue and any other documentation requested by the Department of Revenue. The Department of Revenue shall process this information as needed by that agency and as needed by the Attorney General for the purposes of this chapter and the Tobacco Escrow Fund Act.

(B) The Attorney General may share the information received pursuant to this chapter with other federal, state, or local agencies only for purposes of enforcement of this chapter, Chapter 47 of this title, or corresponding laws of other states. The Attorney General is further authorized to disclose to a cigarette manufacturer any information that has been provided by a tobacco product distributor as required by this act regarding the purchases from that manufacturer.

(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 Chapter 47 of this title of the amount of money in the qualified escrow fund exclusive of interest, the dates of deposits, and the amounts and dates of all withdrawals from the qualified escrow fund.

(D) In addition to the information required to be submitted pursuant to Section 11-48-30, the Attorney General may require a cigarette distributor or tobacco product manufacturer to submit additional information including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to enable the Attorney General to determine if a tobacco product manufacturer is in compliance with this chapter.

(E) To promote compliance with the provisions of this chapter, the Attorney General may promulgate regulations requiring a tobacco product manufacturer subject to the requirements of item (2) of Section 11-48-30(A) to make the qualified escrow fund deposits required in quarterly installments during the year in which the sales covered by such 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.

HISTORY: 2005 Act No. 61, Section 1.A.

SECTION 11-48-60. Enforcement by revocation or suspension of license of cigarette distributor, civil penalties, forfeitures, and injunctions; costs.

(A) In addition to or instead of another civil or criminal remedy provided by law, upon a determination that a cigarette distributor has violated Section 11-48-30(C) or a regulation promulgated pursuant to it, the Attorney General may cause to be revoked or suspended the license of a cigarette distributor in the manner provided by Sections 12-60-1310 through 12-60-1350. Each stamp affixed, should such a stamp be required by law, and each offer to sell cigarettes in violation of Section 11-48-30(C) constitutes a separate violation. The Attorney General also may impose a civil penalty for each violation in an amount not to exceed the greater of five times the retail value of the cigarettes or five thousand dollars upon a determination of violation of Section 11-48-30(C).

(B) Cigarettes that have been sold, offered, or possessed for sale in this State or imported for personal consumption in this State in a civil or criminal violation of Section 11-48-30(C) are declared contraband, and may be seized pending adjudication of the violation. Upon a determination of violation, the cigarettes are forfeited and must be destroyed.

(C) The Attorney General may seek an injunction to restrain a threatened or actual violation of Sections 11-48-30(C)(1), 11-48-50(A), or 11-48-50(D) by a cigarette distributor and to compel the cigarette distributor to comply with the sections. In an action brought pursuant to this section, the State may recover the costs of investigation, costs of the action, and reasonable attorney's fees.

HISTORY: 2005 Act No. 61, Section 1.A.

SECTION 11-48-70. Review of refusal to list or removal of brand family from list.

A determination of the Attorney General to not list in, or to remove from, the directory a brand family or tobacco product manufacturer is subject to review in the manner provided pursuant to Article 3, Chapter 23 of Title 1.

HISTORY: 2005 Act No. 61, Section 1.A.

SECTION 11-48-80. Certification of intention to comply with chapter; authority to promulgate regulations; recovery of investigation and litigation costs; relation to Chapter 47; severability.

(A) A person must not be issued a license or granted a renewal of a license to act as a cigarette distributor unless the person has certified in writing, under penalty of perjury, that he intends to comply fully with this chapter.

(B) For the year 2005, the first report of cigarette distributors required by Section 11-48-50(A) is due thirty days after the effective date of this chapter; the certifications by a tobacco product manufacturer described in Section 11-48-30(A) are due forty-five days after the effective date of this chapter; and the directory described in Section 11-48-30(B) must be published or made available within ninety days after the effective date of this chapter.

(C) The Attorney General may promulgate regulations necessary to effect the purposes of this chapter.

(D) In any action brought by the State to enforce this chapter, the Office of the Attorney General is entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney fees for a successful investigation or action.

(E) Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this State.

(F) If a court of competent jurisdiction finds that the provisions of this chapter and Chapter 47 conflict and cannot be harmonized, then the provisions of Chapter 47 must control. If any section, paragraph, item, or subitem, sentence, clause, or phrase of this chapter causes Chapter 47 of Title 11 to no longer constitute a Qualifying or Model Statute, as those terms are defined in the Master Settlement Agreement, then that portion of this chapter is invalid. If any section, paragraph, item, subitem, subsubitem, sentence, clause, or phrase of this chapter is held to be invalid, unlawful, or unconstitutional, that decision does not affect the validity of the remaining portions of this chapter or any part of it.

HISTORY: 2005 Act No. 61, Section 1.A.

SECTION 11-48-90. Sale or possession of counterfeit cigarettes; penalties; definition; seizure as contraband.

(A) It is unlawful for a cigarette manufacturer, cigarette importer, cigarette distributor, or cigarette retailer to sell or possess counterfeit cigarettes. A person who violates this subsection is guilty of a felony and, upon conviction, must be punished as follows for a:

(1) first violation with a total quantity of fewer than two cartons of cigarettes, by a fine of one thousand dollars or five times the retail value of the cigarettes involved, whichever is greater, or imprisonment not to exceed five years, or both;

(2) subsequent violation with a total quantity of fewer than two cartons of cigarettes, by a fine of five thousand dollars or five times the retail value of the cigarettes involved, whichever is greater, or imprisonment not to exceed five years, or both the fine and imprisonment, and the revocation by the Department of Revenue of any license required pursuant to Article 5, Chapter 21, of Title 12, held by the cigarette manufacturer, cigarette importer, cigarette distributor, or cigarette retailer;

(3) first violation with a total quantity of two cartons of cigarettes or more by a fine of two thousand dollars or five times the retail value of the cigarettes involved, whichever is greater, or imprisonment not to exceed five years, or both; or

(4) subsequent violation with a quantity of two cartons of cigarettes or more by a fine of fifty thousand dollars or five times the retail value of the cigarettes involved, whichever is greater, or imprisonment not to exceed five years, or both the fine and imprisonment, and revocation by the Department of Revenue of any license required pursuant to Article 5, Chapter 21, of Title 12 held by the cigarette manufacturer, cigarette importer, cigarette distributor, or cigarette retailer license.

(B)(1) For purposes of this section, counterfeit cigarettes includes cigarettes with false manufacturing labels or packages of cigarettes bearing counterfeit tax stamps.

(2) Counterfeit cigarettes and related machinery encountered by a law enforcement agency in connection with a charged violation of this section are declared contraband and must be seized by the law enforcement agency and held by it pending adjudication of the charges. Upon conviction, the counterfeit cigarettes and related machinery are forfeited and must be destroyed.

HISTORY: 2005 Act No. 61, Section 1.A.

SECTION 11-48-100. Violations of chapter; penalty.

It is unlawful for any person knowingly to violate any provision of this chapter and any regulations promulgated pursuant to this chapter. Where no specific criminal penalty is provided in this chapter, such a violation is a misdemeanor, and upon conviction, the person must be fined not more than one thousand dollars or imprisoned for not more than one year, or both.

HISTORY: 2005 Act No. 61, Section 1.A.

SECTION 11-48-110. Interpretation with Chapter 48.

This Chapter 48 is intended as an aid to the enforcement of, and not as an amendment or modification to, Chapter 47 of this title. The General Assembly hereby finds and declares that any agreement of the State to enforce Chapter 47 of this title pursuant to the Master Settlement Agreement shall not be modified, varied, amended, supplemented, increased, or extended by the enactment and enforcement of this Chapter 48. Without limiting the generality of the foregoing, the interpretation and the method or degree of enforcement of this Chapter 48 shall not be allowed to serve as evidence that the provisions of Chapter 47 of this title are not being diligently enforced as contemplated by the Master Settlement Agreement.

HISTORY: 2005 Act No. 61, Section 1.A.