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Document No. 4427
ATTORNEY GENERAL
CHAPTER 13

Statutory Authority: 1976 Code Sections 11-48-10 et seq. (Supp. 2005)

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Synopsis:

The South Carolina Office of the Attorney General proposes to add Article 3 to its Regulations, establishing a requirement of quarterly escrow deposits for certain tobacco product manufacturers as well as requirements related to the tobacco product manufacturer's annual Certificate of Compliance and various reports filed with the Office of the Attorney General.

The Notice of Drafting was published in the *State Register* on September 27, 2013.

Instructions:

Regulations should be placed in Chapter 13 of the Code of State Regulations. The Regulations should be placed as Article 3 immediately following Article 2, Securites, Subarticle 6. These Regulations should be published as Article 3, Tobacco Enforcement.

Text:

ARTICLE 3

TOBACCO ENFORCEMENT

13-1101. Definitions.

A. The following definitions shall apply to all rules promulgated and contained in Article 3:

1. "Brand Family" has the same meaning as in South Carolina Code Section 11-48-20(1).
2. "Cigarette distributor" has the same meaning as in South Carolina Code Section 11-48-20(6).
3. "Cigarette" has the same meaning as in South Carolina Code Section 11-48-20(2).
4. "Directory" means the listing of tobacco product manufacturers and brands maintained by the Attorney General pursuant to South Carolina Code Section 11-48-30.
5. "Escrow deposit" means deposits required to be made into a qualified escrow fund pursuant to South Carolina Code Section 11-47-30.

6. "Falsification" means no person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, when the statement is made with purpose to secure the issuance by a governmental agency of a license, permit, authorization, certificate, registration, release, or provider agreement.

7. "Master Settlement Agreement" has the same meaning as in South Carolina Code Section 11-47-20(e).

8. "Nonparticipating manufacturer" has the same meaning as in South Carolina Code Section 11-48-20(3).

9. "Participating manufacturer" has the same meaning as in South Carolina Code Section 11-48-20(4).

10. "Qualified escrow fund" has the same meaning as in South Carolina Code Section 11-48-20(5)."

11. "Tobacco product manufacturer" has the same meaning as in South Carolina Code Section 11-48-20(7).

12. "Tobacco Product Manufacturer Certificate of Compliance" or "Certificate of Compliance" or "Certification" or "Certification application" or "application" means the application required to be completed and executed by all tobacco product manufacturers pursuant to South Carolina Code Section 11-48-30.

13. "Units sold" has the same meaning as in South Carolina Code Section 11-48-20(8).

13-1102. Quarterly Certifications and Escrow Deposits.

A. As authorized by South Carolina Code Section 11-48-50 and in order to promote compliance with South Carolina Code Section 11-47-10, et seq., all escrow deposits shall be made on a quarterly basis.

B. Quarterly escrow deposits shall be made no later than 30 days after the end of each calendar quarter in which sales are made.

C. Each failure to make a full, timely quarterly deposit shall constitute a separate violation of the South Carolina Code Sections 11-47-10, et seq. and 11-48-10, et seq.

D. The Attorney General's Office shall review the amount deposited by each nonparticipating manufacturer for each calendar quarter, and shall invoice each nonparticipating manufacturer for which it concludes that an additional deposit was owed.

E. An importer shall be jointly and severally liable for all escrow deposits due from a nonparticipating manufacturer with respect to nonparticipating manufacturer cigarettes that it imports.

13-1103. Notification of Compliance.

A. Nonparticipating manufacturers shall provide the Attorney General with official notification of the quarterly escrow deposit no later than midnight of the day upon which an escrow deposit is required. Nonparticipating manufacturers shall also provide their quarterly reports within the same deadline. Nothing in this rule eliminates the requirement under South Carolina Code Section 11-48-30 for a nonparticipating manufacturer to file its annual certification due on April thirtieth of each year.

13-1104. Quarterly Periods Defined.

A. For purposes of this Article, the calendar year shall be divided into the following quarters: January first through March thirty-first; April first through June thirtieth; July first through September thirtieth; and October first through December thirty-first.

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13-1105. Untimely or Incomplete Quarterly Reports or Escrow Deposits.

A. If the required quarterly escrow deposit is not timely made in full, or the required quarterly report is not provided to the Attorney General, or the Attorney General does not receive timely official notice of the quarterly escrow deposit, the delinquent nonparticipating manufacturer and its brand families shall be removed from the directory in accordance with South Carolina Code Section 11-48-30. Any such nonparticipating manufacturer that fails in any quarter to place into escrow the funds required herein shall be subject to the penalty provisions of Section 11-47-30; shall be deemed to have failed to comply with Section 11-48-30; and shall be subject to all enforcement actions available for a violation of Section 11-48-30.

13-1106. Certification of Tobacco Product Manufacturers for Tobacco Directory.

A. Pursuant to South Carolina Code Section 11-48-30, tobacco product manufacturers who seek to certify their cigarette brands for sale in South Carolina must complete and submit no later than the thirtieth day of April each year the "Tobacco Product Manufacturer Certificate of Compliance" made available on the South Carolina Office of the Attorney General website.

B. In exercising the discretion granted by Section 11-48-30 when considering an application submitted for certification, the Attorney General may consider the following:

1. Whether the entity tendering a certification request is a tobacco product manufacturer;
2. Whether the tobacco product manufacturer is the tobacco product manufacturer, as defined by Section 11-47-20(i), of the cigarette brand listed on the certification application;
3. Whether the brand family sought to be certified by the tobacco product manufacturer is also manufactured by another entity; and whether the tobacco product manufacturer has exclusive rights to the trademark for the brand family. Whether any other tobacco product manufacturer also manufactures cigarettes within the same brand family
4. Completeness, or lack thereof, of the certification request made by the tobacco product manufacturer;
5. Whether the tobacco product manufacturer has provided all requested documents supporting its certification request;
6. Whether the certification request is based on misrepresentation, falsification of facts, false information, nondisclosure, or concealment of facts;
7. Whether the tobacco product manufacturer is in full compliance with all provisions of local, state and federal law;
8. Whether the tobacco product manufacturer, predecessor of the tobacco product manufacturer, or previous manufacturer of the brand is the subject of litigation, including but not limited to violations of any South Carolina statute, regulation, or other law, including, but not limited to, violations of Sections 11-47-10, et seq., through 11-48-10, et seq.;
9. Whether the tobacco product manufacturer has failed to fully fund a qualified escrow fund approved by the Attorney General in a timely and thorough manner;
10. Whether all final judgments and penalties, including interest, costs and attorney fees thereon, in favor of the State of South Carolina, for violation of any South Carolina statute, regulation or other law, including but not limited to violations of Sections 11-47-10, et seq., through 11-48-10, et seq., have been fully satisfied for the brand family, or tobacco product manufacturer;

11. Whether the tobacco product manufacturer has failed to pay any judgment obtained in any jurisdiction, including any civil penalty stemming from any jurisdiction’s escrow deposit laws, or whether the tobacco product manufacturer is a defendant in a pending lawsuit brought by another state for failing to sufficiently fund an escrow account pursuant to that state’s escrow laws; or whether the tobacco product manufacturer has been removed from another state’s tobacco directory;

12. Whether the tobacco product manufacturer has corrected deficiencies in its certification request or criteria set forth herein in a timely and thorough manner;

13. Whether the tobacco product manufacturer has complied in a timely and thorough manner with any request by the Attorney General for additional information or documentation supporting its certification request or the criteria set forth herein;

14. Whether the tobacco product manufacturer is owned, either all or in part, by a person or entity with a current or prior interest in any other tobacco product manufacturer that is, or has been, not in compliance with any South Carolina statute, regulation, or other law, including but not limited to Sections 11-47-10, et seq., through 11-48-10, et seq., or is the subject of litigation for the same;

15. Whether the tobacco product manufacturer is managed or operated by a person with a current or prior interest in any other tobacco product manufacturer that is, or has been, not in compliance with any South Carolina statute, regulation, or other law, including but not limited to Sections 11-47-10, et seq., to 11-48-10, et seq., or is the subject of litigation for the same;

16. Whether the tobacco product manufacturer is owned, either all or in part, by a person or entity, that has failed to pay any judgment obtained in any jurisdiction, including any civil penalty stemming from any jurisdiction’s escrow deposit laws; and

17. Any other facts or circumstances the Attorney General determines are relevant.

C. Each Tobacco Product Manufacturer certified on the directory will be required to report its sales of cigarettes into South Carolina for each quarter, utilizing the form provided by the Attorney General on the Attorney General website.

13-1107. Removal of Tobacco Product Manufacturer from Tobacco Directory.

A. In a manner provided in Section 11-48-30, the Attorney General shall remove a tobacco product manufacturer or brand family from the directory if the Attorney General determines that the tobacco product manufacturer or the brand family no longer meets the requirements of Sections 11-47-10, et seq., through 11-48-10, et seq., and regulations promulgated thereto.

13-1108. Rejection of Certification Application of Tobacco Product Manufacturers.

A. In a manner provided in Section 11-48-30, the Attorney General shall reject the certification application of a tobacco product manufacturer or brand family to be listed in the directory if the Attorney General determines that the tobacco product manufacturer or the brand family does not meet the requirements of Sections 11-47-10, et seq., to 11-48-10, et seq., and regulations promulgated thereto.

13-1109. Notice of Approved Certification, Denial of Certification, and Removal from Tobacco Directory.

A. The Attorney General shall promptly notify a tobacco product manufacturer in writing at the address supplied in the certification form by facsimile, electronic mail, or regular mail if the manufacturer has met the

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requirements of Section 11-48-30 and will be included in the directory. The notice shall include each brand family that the Attorney General determines will be included in the directory.

B. If the Attorney General intends to deny a tobacco product manufacturer or brand family a place in the directory, to remove a manufacturer or brand family from the directory, or to exclude an entity because the entity is not a tobacco product manufacturer, the Attorney General shall mail a written "Notice of Removal" to the manufacturer or entity. The "Notice of Removal" shall specify:

1. The factual and legal basis upon which the Attorney General's intended action rests;
2. The actions that the tobacco product manufacturer or entity must undertake to cure the factual or legal deficiencies upon which the intended action is based, if any; and,
3. The date upon which attempts to cure the deficiencies, if any, must be completed and documentation of completion must be submitted to the Attorney General. In no event shall the Attorney General allow the tobacco product manufacturer or entity less than seven days within which to cure the deficiencies, if any, upon which the Attorney General's intended action is based.

C. If the deficiencies have been cured to the satisfaction of the Attorney General, the Attorney General shall notify a tobacco product manufacturer in writing by facsimile, electronic mail, or regular mail that the manufacturer or brand name family will be included in the directory in accordance with Section 11-48-30.

D. If any of the deficiencies have not been cured to the satisfaction of the Attorney General, the Attorney General shall take action in accordance with Section 11-48-30 denying or removing a manufacturer, brand family, or entity a place in the directory.

E. The Attorney General may, for any reason and at the Attorney General's discretion, extend any time period allowed by this article.

13-1110. Bond Requirement for Nonparticipating Manufacturer

A. In order to promote compliance with the South Carolina Tobacco Escrow Fund Act, if a newly qualified nonparticipating manufacturer is to be listed on the South Carolina Tobacco Directory, or if the Attorney General reasonably determines that any nonparticipating manufacturer who has filed a certification pursuant to Section 11-47-30 poses an elevated risk for noncompliance with the Tobacco Escrow Fund Act, neither such nonparticipating manufacturer nor any of its brand families shall be included in the Directory unless and until such nonparticipating manufacturer, or its United States importer that undertakes joint and several liability for the manufacturer's compliance, has posted a bond.

B. A nonparticipating manufacturer may be deemed to pose an elevated risk for noncompliance if:

1. The nonparticipating manufacturer has not previously established and funded a qualified escrow fund in South Carolina;
2. The nonparticipating manufacturer has been on the tobacco directory for less than one year;
3. The nonparticipating manufacturer has failed to make a timely and/or complete escrow deposit unless (i) the manufacturer did not make underpayment knowingly or recklessly and the manufacturer promptly cured the underpayment within 30 days of notice of it, or (ii) the underpayment or lack of payment is subject to a good faith dispute as documented to the satisfaction of the Attorney General and the underpayment is cured within 30 days;

4. The nonparticipating manufacturer has failed to pay any judgment, regardless of the status of the judgment under applicable statutes of limitations, obtained in any jurisdiction, including any civil penalties and other monetary amounts awarded stemming from any jurisdiction's escrow deposit laws;

5. The nonparticipating manufacturer or its brands or brand families or an affiliate or any of the affiliate's brands or brand families have been removed from the state's tobacco directory for noncompliance with the state law at any time during the calendar year or within the past three calendar years; or

6. In addition to the reasons specified above, the Attorney General may require a bond from a nonparticipating manufacturer if the Attorney General has reasonable grounds to believe the nonparticipating manufacturer may default on its obligations under the Tobacco Escrow Fund Act.

C. The bond shall be posted by corporate surety located within the United States in an amount equal to the greater of one hundred thousand (\$100,000) dollars or the amount of escrow the manufacturer in either its current or predecessor form was required to deposit as a result of its previous calendar year's sales in South Carolina. The bond shall be written in favor of the State of South Carolina and shall be conditioned on the performance by the nonparticipating manufacturer, or its United States importer that undertakes joint and several liability for the manufacturer's performance in accordance with the Tobacco Escrow Fund Act.

D. A newly qualified nonparticipating manufacturer may be required to post a bond under this section for the first three (3) years of the newly qualified nonparticipating manufacturer's listing or longer if the newly qualified nonparticipating manufacturer has been deemed to pose an elevated risk for noncompliance

13-1111. Manufacturer and Importer Reports.

A. Each manufacturer and importer that sells cigarettes in or into the State shall, within 15 days following the end of each month, file a report on a form to be prescribed by the Attorney General and certify to the State that the report is complete and accurate.

B. The report shall contain the following information: the total number of cigarettes sold by that manufacturer or importer in or into the State during that month, and identifying by name and number of cigarettes (i) the manufacturers of those cigarettes, (ii) the brand families of those cigarettes and (iii) the purchasers of those cigarettes. A manufacturer's or importer's report shall include cigarettes sold in or into the State through its sales entity affiliate.

C. The requirements of subsection (a) shall be satisfied and no further report shall be required under this Section with respect to cigarettes if the manufacturer or importer timely submits to the Department of Revenue and the Attorney General the report or reports required to be submitted by it with respect to those cigarettes under 15 U.S.C. § 376 and certifies to the State that the reports are complete and accurate.

D. Upon request by the Attorney General, a manufacturer or importer subject to this Section will provide copies of similar reports that it filed in other States.

E. Each manufacturer and importer that sells cigarettes in or into the State shall either: (i) submit its federal returns, as defined below, to the Attorney General by 60 days after the close of the quarter in which the returns were filed or (ii) submit to the United States Treasury a request or consent under Internal Revenue Code Section 6103(c) authorizing the Alcohol and Tobacco Tax and Trade Bureau and, in the case of a foreign manufacturer or importer, the U.S. Customs Service to disclose the manufacturer's or importer's federal returns, as defined below, to the Attorney General as of 60 days after the close of the quarter in which the returns were filed.

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F. A manufacturer that fails to file a complete and accurate report required herein may be removed from the Tobacco Directory.

Fiscal Impact Statement:

There will be no increased costs to the state or its political subdivisions.

Statement of Rationale:

The rationale for this regulation is to promote and enhance the enforcement of the South Carolina Tobacco Escrow Fund Act and the South Carolina Tobacco Qualified Escrow Fund Enforcement Act.