

**GENERAL ASSEMBLY OF NORTH CAROLINA**  
**SESSION 2005**

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**HOUSE DRH30248-RY-7 (04/13)**

Short Title: Tobacco Escrow Compliance Changes. (Public)

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Sponsors: Representative Johnson.

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Referred to:

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A BILL TO BE ENTITLED

AN ACT TO ESTABLISH SEVERAL PROCEDURAL ENHANCEMENTS THAT WILL PROTECT THE MASTER SETTLEMENT AGREEMENT, AID IN THE ENFORCEMENT OF THE TOBACCO RESERVE FUND ACT, AND WILL SAFEGUARD THE FISCAL SOUNDNESS OF THE STATE AND PUBLIC HEALTH.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 66-292 reads as rewritten:

**"§ 66-292. Definitions.**

The following definitions apply in this Part:

- (1) Brand family. – 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~~". "100s", and includes any brand name (alone or in conjunction with any other word), trademark, logo, symbol, motto, selling message, recognizable patterns of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.
- (1a) Department. – The Department of Revenue.
- (1b) Directory. – The listing developed and published in accordance with G.S. 66-294.3.
- (1c) Distributor. – Either of the following as defined in G.S. 105-113.4(3).
- (2) Escrow Agreement. – An agreement by which a qualified escrow fund is created and maintained.
- (3) Nonparticipating manufacturer. – A tobacco product manufacturer that is not a participating manufacturer.

1 (4) Participating manufacturer. – Defined in subsection II(jj) of the Master  
2 Settlement Agreement." Agreement and all amendments thereto."

3 **SECTION 2.** G.S. 66-293, 66-294, and 66-294.1 are repealed.

4 **SECTION 3.** Part 2 of Article 37 of Chapter 66 of the General Statutes is  
5 amended by adding the following new sections to read:

6 "**§ 66-294.2. Certification; directory; tax stamps.**

7 (a) Every tobacco product manufacturer whose cigarettes are sold in this State,  
8 whether directly or through a distributor, retailer or similar intermediary or  
9 intermediaries, shall execute and deliver on a form prescribed by the Attorney General a  
10 certification to the Attorney General, no later than the 30<sup>th</sup> day of April each year,  
11 certifying that, as of the date of the certification, the tobacco product manufacturer  
12 either is a participating manufacturer, or is in full compliance with G.S. 66-291.

13 (b) A participating manufacturer shall include in its certification a list of its brand  
14 families. The participating manufacturer shall update the list 30 calendar days prior to  
15 any addition to or modification of its brand families by executing and delivering a  
16 supplemental certification to the Attorney General.

17 (c) A nonparticipating manufacturer shall include in its certification all of the  
18 following:

- 19 (1) A list of all of its brand families and the number of units sold for each  
20 brand family that were sold in the State during the preceding calendar  
21 year.  
22 (2) A list of all of its brand families that have been sold in the State at  
23 anytime during the current calendar year.  
24 (3) Any brand family sold in the State during the preceding calendar year  
25 that is no longer being sold in the State as of the date of the  
26 certification (indicated by an asterisk).  
27 (4) The name and address of any other manufacturer of brand families in  
28 the preceding or current calendar year.

29 The nonparticipating manufacturer shall update its brand families by executing and  
30 delivering a supplemental certification to the Attorney General.

31 (d) In the case of a nonparticipating manufacturer, the certification shall certify  
32 all of the following:

- 33 (1) That the nonparticipating manufacturer is registered to do business in  
34 the State or has appointed a resident agent for service of process and  
35 provided notice thereof as required by G.S. 66-294.5.  
36 (2) That the nonparticipating manufacturer has established and continues  
37 to maintain a qualified escrow fund and has executed a qualified  
38 escrow agreement that has been reviewed and approved by the  
39 Attorney General and that governs the qualified escrow fund.  
40 (3) That the nonparticipating manufacturer is in full compliance with this  
41 Part and Part 1 of this Article.  
42 (4) For a qualified escrow fund, all of the following:

- 1           a.     The name, address, and telephone number of the financial  
2                 institution where the nonparticipating manufacturer has  
3                 established a qualified escrow fund.
- 4           b.     The account number of such qualified escrow fund and any  
5                 subaccount number for the State.
- 6           c.     The amount the nonparticipating manufacturer placed in the  
7                 qualified escrow fund for cigarettes sold in the State during the  
8                 preceding calendar year, the date and amount of each deposit,  
9                 and such evidence or verification as may be deemed necessary  
10                by the Attorney General to confirm the foregoing.
- 11          d.     The amount and date of any withdrawal or transfer of funds the  
12                 nonparticipating manufacturer made at anytime from the fund  
13                 or from any other qualified escrow fund into which the  
14                 nonparticipating manufacturer ever has made escrow payments  
15                 pursuant to G.S. 66-291.

16          (e)    A tobacco product manufacturer may not include a brand family in its  
17          certification unless one of the following applies:

- 18           (1)    In the case of a participating manufacturer, the participating  
19                 manufacturer affirms that the brand family is to be deemed to be its  
20                 cigarettes for purposes of calculating its payment under the Master  
21                 Settlement Agreement.
- 22           (2)    In the case of a nonparticipating manufacturer, the nonparticipating  
23                 manufacturer affirms that the brand family is to be deemed to be its  
24                 cigarettes for purposes of Part 1 of this Article.

25          Nothing in this subsection shall be construed or otherwise affecting the State's right  
26          to maintain that a brand family constitutes cigarettes of a different tobacco product  
27          manufacturer for purposes of calculating payments under the Master Settlement  
28          Agreement or for purposes of Part 1 of this Article.

29          (f)    Tobacco product manufacturers shall maintain all invoices and  
30          documentation of sales and other information relied upon for certification for a period  
31          of five years, unless otherwise required by law to maintain them for a greater period of  
32          time.

33          **"§ 66-294.3. Directory of cigarettes approved for stamping.**

34          (a)    Not later than April 30, 2006, the Attorney General shall develop and publish  
35          on its Web site a directory listing all tobacco product manufacturers that have provided  
36          current and accurate certifications conforming to the requirements of G.S. 66-294.2 and  
37          all brand families that are listed in those certifications, except as set forth in subsections  
38          (b) and (c) of this section.

39          (b)    The Attorney General shall not include or retain in the directory the name or  
40          brand families of any nonparticipating manufacturer that has failed to provide the  
41          required certification or whose certification the Attorney General determines is not in  
42          compliance with G.S. 66-294.2(c) and (d), unless the Attorney General has determined  
43          that such violation has been cured to the satisfaction of the Attorney General.

1       (c) Neither a tobacco product manufacturer nor a brand family shall be included  
2 or retained in the directory if the Attorney General concludes either of the following:

3           (1) Any escrow payment required pursuant to G.S. 66-291 for any period  
4 for any brand family, whether or not listed by nonparticipating  
5 manufacturer, has not been fully paid into a qualified escrow fund  
6 governed by a qualified escrow agreement that has been approved by  
7 the Attorney General.

8           (2) Any outstanding final judgment, including interest thereon, for a  
9 violation of Part 1 of this Article has not been fully satisfied for the  
10 brand family or the tobacco product manufacturer.

11       (d) The Attorney General shall update the directory as necessary in order to  
12 correct mistakes and to add or remove a tobacco product manufacturer or brand family  
13 to keep the directory in conformity with the requirements of this section.

14       (e) Every distributor shall provide and update as necessary an electronic mail  
15 address to the Attorney General for the purpose of receiving any notifications as may be  
16 required by this Part.

17 **"§ 66-294.4. Prohibition against stamping or sale or import of cigarettes not in the**  
18 **directory.**

19       It shall be unlawful for any person to do either of the following:

20           (1) Affix a stamp to a package or other container of cigarettes of a tobacco  
21 product manufacturer or brand family not included in the directory.

22           (2) Sell, offer, or possess for sale, in this State, or import for personal  
23 consumption in this State, cigarettes of a tobacco product manufacturer  
24 or brand family not included in the directory.

25 **"§ 66-294.5. Agent for service of process.**

26       (a) Any nonresident or foreign nonparticipating manufacturer that has not  
27 registered to do business in this State as a foreign corporation or business entity shall, as  
28 a condition precedent to having its brand families included or retained in the directory,  
29 appoint and continually engage without interruption the services of a registered agent in  
30 this State to act as agent for the service of process on whom all processes, and any  
31 action or proceeding against it concerning or rising out of the enforcement of this Part  
32 and Part 1 of this Article, may be served in any manner authorized by law. Such service  
33 shall constitute legal and valid service of process on the nonparticipating manufacturer.  
34 The nonparticipating manufacturer shall provide the name, address, phone number, and  
35 proof of the appointment and availability of the registered agent to, and to the  
36 satisfaction of, the Attorney General.

37       (b) The nonparticipating manufacturer shall provide notice to the Attorney  
38 General 30 calendar days prior to termination of the authority of a registered agent and  
39 shall further provide proof to the satisfaction of the Attorney General of the  
40 appointment of a new registered agent no less than five calendar days prior to the  
41 termination of an existing registered agent appointment. In the event a registered agent  
42 terminates a registered agent appointment, the nonparticipating manufacturer shall  
43 notify the Attorney General of the termination within five calendar days and shall

1 include proof to the satisfaction of the Attorney General of the appointment of a new  
2 agent.

3 (c) Any nonparticipating manufacturer whose cigarettes are sold in this State,  
4 who has not appointed and engaged a registered agent as required in this section, shall  
5 be deemed to have appointed the Secretary of State as registered agent and may be  
6 proceeded against in courts of this State by service of process upon the Secretary of  
7 State; provided, however, that the appointment of the Secretary of State as resident  
8 agent shall not satisfy the condition precedent for having the brand families of the  
9 nonparticipating manufacturer included or retained in the directory.

10 **"§ 66-294.6. Reporting of information; escrow installments.**

11 (a) Reporting by Distributors. – Not later than 20 calendar days after the end of  
12 each calendar quarter, and more frequently if so directed by the Attorney General, each  
13 distributor shall submit such information as the Attorney General requires to facilitate  
14 compliance with this Part, including a list by brand family of the total number of  
15 cigarettes, or, in the case of "roll-your-own", the equivalent stick count, for which the  
16 distributor affixed stamps during the previous calendar quarter or otherwise paid the tax  
17 due for such cigarettes. The distributor shall maintain, and make available to the  
18 Attorney General, all invoices and documentation of sales of all nonparticipating  
19 manufacturer cigarettes and any other information relied upon in reporting to the  
20 Attorney General for a period of five years.

21 (b) Disclosure of Information. – The Department is authorized to disclose to the  
22 Attorney General any information received under this Part and requested by the  
23 Attorney General for purposes of determining compliance with and enforcing the  
24 provisions of this Part. The Department and the Attorney General shall share with each  
25 other the information received under this Part, and may share such information with  
26 other federal, state, or local agencies only for purposes of enforcement of this Part, Part  
27 1 of this Article, or corresponding laws of other states.

28 (c) Verification of Qualified Escrow Fund. – The Attorney General may require  
29 at anytime from the nonparticipating manufacturer proof, from the financial institution  
30 in which the nonparticipating manufacturer has established a qualified escrow fund for  
31 the purpose of compliance with Part 1 of this Article, of the amount of money in the  
32 qualified escrow fund, exclusive of interest, the amount and date of each deposit to the  
33 qualified escrow fund, and the amount and date of each withdrawal from the qualified  
34 escrow fund.

35 (d) Requests for Additional Information. – In addition to the information required  
36 to be submitted pursuant to G.S. 66-291 and this Part, the Attorney General may require  
37 a distributor or tobacco product manufacturer to submit any additional information,  
38 including samples of the packaging or labeling of each brand family, as is necessary to  
39 enable the Attorney General to determine whether a tobacco product manufacturer is in  
40 compliance with this Part.

41 (e) Quarterly Escrow Installments. – To promote compliance with this Part, the  
42 Attorney General may adopt rules requiring a tobacco product manufacturer subject to  
43 the requirements of G.S. 66-294.2(c) to make the escrow deposits required in quarterly  
44 installments during the year in which the sales covered by such deposits are made. The

1 Attorney General may require production of information sufficient to enable the  
2 Attorney General to determine the adequacy of the amount of the installment deposit.

3 **"§ 66-294.7. Penalties and other remedies.**

4 (a) License Revocation and Civil Penalties. – In addition to or in lieu of any  
5 other civil or criminal remedy provided by law, upon a determination that a distributor  
6 has violated G.S. 66-294.4 or any rule adopted pursuant to this Part, the Attorney  
7 General may revoke or suspend the license of the distributor. Each stamp affixed and  
8 each sale or offer to sell cigarettes in violation of G.S. 66-294.4 shall constitute a  
9 separate violation. The Attorney General may also impose a civil penalty for each  
10 violation of G.S. 66-294.4 or any rule adopted pursuant thereto, in an amount not to  
11 exceed the greater of five hundred percent (500%) of the retail value of the cigarettes or  
12 five thousand dollars (\$5,000).

13 (b) Contraband and Seizure. – Any cigarettes that have been sold, offered for  
14 sale, or possessed for sale, in this State, or imported for personal consumption in this  
15 State, in violation of G.S. 66-294.4 are contraband, and such cigarettes shall be subject  
16 to seizure and disposition as provided in G.S.105-113.31 and G.S.105-113.32. All such  
17 cigarettes so seized shall be destroyed and not resold.

18 (c) Injunction. – The Attorney General may seek an injunction to restrain a  
19 threatened or actual violation of G.S. 66-294.4 or G.S. 66-294.6(a) or (d) by a  
20 distributor and to compel the distributor to comply with these subsections.

21 (d) Unlawful Sale and Distribution. – For cigarettes that a person knows or  
22 should know are intended for distribution or sale in the State in violation of  
23 G.S. 66-294.4, it shall be unlawful for a person to do either of the following with  
24 cigarettes:

25 (1) Sell or distribute.

26 (2) Acquire, hold, own, possess, transport, import, or cause to be  
27 imported.

28 A violation of this section shall be a Class 1 misdemeanor.

29 **"§ 66-294.8. Miscellaneous provisions.**

30 (a) Notice and Review of Determination. – A determination of the Attorney  
31 General to not include or to remove from the directory a brand family or tobacco  
32 product manufacturer shall be subject to review in the manner prescribed by Article 3 of  
33 Chapter 150B of the General Statutes.

34 (b) Applicants For Licenses. – No person shall be issued a license or granted a  
35 renewal of a license to act as a distributor unless the person has certified in writing,  
36 under penalty of perjury, that the person will comply fully with this Part.

37 (c) Rule-Making Authority. – The Attorney General shall adopt rules necessary  
38 to implement this Part.

39 (d) Recovery of Costs and Fees by Attorney General. – In any action brought by  
40 the State to enforce this Part, the State shall be entitled to recover the costs of  
41 investigation, expert witness fees, costs of the action, and reasonable attorneys' fees.

42 (e) Disgorgement of Profits for Violations. – If a court determines that a person  
43 has violated this Part, the court shall order any profits, gain, gross receipts, or other  
44 benefit from the violation to be forfeited and paid to the State for deposit in the General

1 Fund. Unless otherwise expressly provided, the remedies or penalties provided by this  
2 Part are cumulative to each other and to the remedies or penalties available under all  
3 other laws of this State.

4 (f) Construction and Severability. – If a court of competent jurisdiction finds that  
5 the provisions of this Part and of Part 1 of this Article conflict and cannot be  
6 harmonized, then the provisions of Part 1 of this Article shall control. If any of this Part  
7 causes the Tobacco Reserve Fund Act to no longer constitute a Qualifying or Model  
8 Statute, as those terms are defined in the Master Settlement Agreement, then that  
9 portion of this Part shall not be valid. If any of this Part is held to be invalid, unlawful,  
10 or unconstitutional, such decision shall not affect the validity of the remaining portions  
11 of this Part or any portion thereof."

12 **SECTION 4.** For the year 2005, the first report of distributors required by  
13 G.S. 66-294.6(a), as enacted by this act, shall be due 30 calendar days following the end  
14 of the calendar quarter on September 30, 2005. The certifications by a tobacco product  
15 manufacturer described in G.S. 66-294.2, as enacted by this act, shall be due 45  
16 calendar days following the end of the calendar quarter on September 30, 2005. The  
17 directory described in G.S. 66-294.3, as enacted by this act, shall be published or made  
18 available beginning January 1, 2006.

19 **SECTION 5.** This act becomes effective July 1, 2005.