

ASSEMBLY BILL NO. 436—COMMITTEE ON COMMERCE AND LABOR

(ON BEHALF OF THE ATTORNEY GENERAL)

MARCH 25, 2005

Referred to Committee on Commerce and Labor

SUMMARY—Makes various changes regarding manufacturers of tobacco products. (BDR 32-120)

FISCAL NOTE: Effect on Local Government: Increases or Newly Provides for Term of Imprisonment in County or City Jail or Detention Facility.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to manufacturers of tobacco products; providing additional procedures to aid in the enforcement of certain requirements for such manufacturers; revising the provisions governing the release from escrow of certain deposits by such manufacturers; providing civil and criminal penalties; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 370 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 23, inclusive, of this act.

Sec. 2. *The Legislature finds that:*

1. Violations of the provisions of chapter 370A of NRS threaten the integrity of the Master Settlement Agreement, the fiscal soundness of the State and public health.

2. The enactment of the procedural enhancements set forth in sections 2 to 23, inclusive, of this act will aid in the enforcement of the provisions of chapter 370A of NRS and thereby safeguard the



1 *Master Settlement Agreement, the fiscal soundness of the State*
2 *and public health.*

3 **Sec. 3.** *As used in sections 2 to 23, inclusive, of this act,*
4 *unless the context otherwise requires, the words and terms defined*
5 *in sections 4 to 14, inclusive, of this act have the meanings*
6 *ascribed to them in those sections.*

7 **Sec. 4.** *“Brand family” means all styles of cigarettes sold*
8 *under the same trademark and differentiated from one another by*
9 *means of additional modifiers or descriptors, including, but not*
10 *limited to, “menthol,” “lights,” “kings” and “100s,” and includes*
11 *any brand name, whether or not occurring alone or in*
12 *conjunction with any other word, any trademark, logo, symbol,*
13 *motto, selling message or recognizable pattern of colors, or any*
14 *other indicia of product identification identical or similar to, or*
15 *identifiable with, a previously known brand of cigarettes.*

16 **Sec. 5.** *“Cigarette” has the meaning ascribed to it in*
17 *NRS 370A.050.*

18 **Sec. 6.** *“Directory” means the directory created pursuant to*
19 *section 17 of this act.*

20 **Sec. 7.** *“Distributor” means a person that is authorized to*
21 *affix stamps to cigarette packages pursuant to this chapter or any*
22 *person that is required to pay the taxes on cigarettes imposed*
23 *pursuant to this chapter.*

24 **Sec. 8.** *“Manufacturer of tobacco products” has the meaning*
25 *ascribed to it in NRS 370A.060.*

26 **Sec. 9.** *“Master Settlement Agreement” has the meaning*
27 *ascribed to it in NRS 370A.070.*

28 **Sec. 10.** *“Nonparticipating manufacturer” means any*
29 *manufacturer of tobacco products that is not a participating*
30 *manufacturer.*

31 **Sec. 11.** *“Participating manufacturer” has the meaning*
32 *ascribed to it in NRS 370A.080.*

33 **Sec. 12.** *“Qualified escrow fund” has the meaning ascribed*
34 *to it in NRS 370A.090.*

35 **Sec. 13.** *“Stamp” means the indicia required to be placed on*
36 *a cigarette package that evidences payment of the taxes on*
37 *cigarettes imposed pursuant to this chapter.*

38 **Sec. 14.** *“Units sold” has the meaning ascribed to it in*
39 *NRS 370A.120.*

40 **Sec. 15.** *1. A manufacturer of tobacco products whose*
41 *cigarettes are sold in this State, whether or not directly or through*
42 *a distributor, retailer or similar intermediary or intermediaries*
43 *shall, not later than April 30 of each year, execute and deliver to*
44 *the Attorney General and the Department, on a form provided by*
45 *the Department, a certification which certifies under penalty of*



1 *perjury that, as of the date of that certification, the manufacturer*
2 *of tobacco products is either:*

3 *(a) A participating manufacturer; or*

4 *(b) In full compliance with subsection 2 of NRS 370A.140,*
5 *including any quarterly installment payments required pursuant to*
6 *section 20 of this act.*

7 *2. Except as otherwise provided in section 16 of this act:*

8 *(a) A participating manufacturer shall include in its*
9 *certification pursuant to this section a list of its brand families.*
10 *The participating manufacturer shall update that list at least 30*
11 *calendar days before it adds to or modifies its brand families by*
12 *executing and delivering a supplemental certification to the*
13 *Attorney General and the Department.*

14 *(b) A nonparticipating manufacturer shall, in its certification*
15 *pursuant to this section:*

16 *(1) Include:*

17 *(I) A list of all of its brand families and the number of*
18 *units sold for each brand family that were sold in the State during*
19 *the preceding calendar year; and*

20 *(II) A list of all of its brand families that have been sold*
21 *in the State at any time during the current calendar year;*

22 *(2) Indicate, by an asterisk, any brand family sold in the*
23 *State during the preceding calendar year that is no longer being*
24 *sold in the State as of the date of the certification; and*

25 *(3) Identify, by name and address, any other manufacturer*
26 *of those brand families in the preceding or current calendar year.*

27 *↪ A nonparticipating manufacturer shall update the information*
28 *required by this paragraph at least 30 calendar days before it adds*
29 *to or modifies its brand families by executing and delivering a*
30 *supplemental certification to the Attorney General and the*
31 *Department.*

32 *3. In addition to the requirements of subsection 2, the*
33 *certification of a nonparticipating manufacturer pursuant to this*
34 *section must certify:*

35 *(a) That the nonparticipating manufacturer is registered to do*
36 *business in the State or has appointed a resident agent for service*
37 *of process and provided notice thereof as required by section 18 of*
38 *this act;*

39 *(b) That the nonparticipating manufacturer has:*

40 *(1) Established and continues to maintain a qualified*
41 *escrow fund; and*

42 *(2) Executed a qualified escrow agreement governing the*
43 *qualified escrow fund that has been reviewed and approved by the*
44 *Attorney General;*



1 (c) That the nonparticipating manufacturer is in full
2 compliance with chapter 370A of NRS and any regulations
3 adopted pursuant thereto;

4 (d) The name, address and telephone number of the financial
5 institution where the nonparticipating manufacturer has
6 established the qualified escrow fund required pursuant to chapter
7 370A of NRS and any regulations adopted pursuant thereto;

8 (e) The account number of that qualified escrow fund and any
9 subaccount number for this State;

10 (f) The amount the nonparticipating manufacturer placed in
11 that qualified escrow fund for cigarettes sold in the State during
12 the preceding calendar year, the date and amount of each such
13 deposit, and such evidence or verification as may be deemed
14 necessary by the Department to confirm the information required
15 by this paragraph; and

16 (g) The amount and date of any withdrawal or transfer of
17 money the nonparticipating manufacturer made at any time from
18 that qualified escrow fund or from any other qualified escrow
19 fund into which it ever made escrow payments pursuant to chapter
20 370A of NRS and any regulations adopted pursuant thereto.

21 **Sec. 16.** A manufacturer of tobacco products:

22 1. Shall not include a brand family in its certification
23 pursuant to section 15 of this act unless, if the manufacturer is:

24 (a) A participating manufacturer, the manufacturer affirms
25 that the brand family is to be deemed to be its cigarettes for the
26 purposes of calculating its payments under the Master Settlement
27 Agreement for the relevant year, in the volume and shares
28 determined pursuant to the Master Settlement Agreement; or

29 (b) A nonparticipating manufacturer, the manufacturer
30 affirms that the brand family is to be deemed to be its cigarettes
31 for the purposes of chapter 370A of NRS.

32 ➤ This subsection must not be construed as limiting or otherwise
33 affecting the right of the State to maintain that a brand family
34 constitutes cigarettes of a different manufacturer of tobacco
35 products for the purposes of calculating payments under the
36 Master Settlement Agreement or for the purposes of chapter 370A
37 of NRS.

38 2. Shall maintain all invoices and documentation of sales,
39 and any other information relied upon by the manufacturer for its
40 certification pursuant to section 15 of this act, for at least 5 years,
41 unless the manufacturer is otherwise required by law to maintain
42 them for a greater period.

43 **Sec. 17.** 1. The Department shall create and maintain on
44 its Internet website and otherwise make available for public
45 inspection a directory that lists, except as otherwise provided in



sections 2 to 23, inclusive, of this act, all manufacturers of tobacco products that have provided current and accurate certifications conforming to the requirements of sections 2 to 23, inclusive, of this act and all brand families that are listed in those certifications. The Department:

(a) Shall not include or retain in the directory the name or brand families of any nonparticipating manufacturer that has failed to provide the required certification or whose certification the Department determines is not in compliance with sections 2 to 23, inclusive, of this act, unless the Department has determined that the violation has been cured to its satisfaction.

(b) Shall not include or retain in the directory a manufacturer of tobacco products or brand family if the Department concludes, for a nonparticipating manufacturer, that:

(1) Any escrow payment required pursuant to chapter 370A of NRS for any period for any brand family, whether or not listed by the nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement which has been approved by the Attorney General; or

(2) Any outstanding final judgment, including any interest thereon, for a violation of chapter 370A of NRS has not been fully satisfied for that manufacturer or brand family.

2. The Department shall update the directory as necessary to correct mistakes and to add or remove a manufacturer of tobacco products or brand family to keep the directory in conformity with the requirements of sections 2 to 23, inclusive, of this act.

3. Any determination of the Department not to include in or to remove from the directory a manufacturer of tobacco products or brand family is a final decision for the purposes of judicial review.

Sec. 18. 1. Any nonresident or foreign nonparticipating manufacturer that has not registered to do business in the State as a foreign corporation or other business entity must, as a condition precedent to having its brand families included or retained in the directory, appoint and continually engage without interruption the services of an agent in this State to act as its agent for the service of process on whom all process, in any action or proceeding against it concerning or arising out of the enforcement of this chapter, may be served in any manner authorized by law. Such service constitutes 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 such agent to, and to the satisfaction of, the Attorney General and the Department.



2. A nonparticipating manufacturer shall provide notice to the Attorney General and the Department at least 30 calendar days before the termination of the authority of an agent appointed pursuant to this section and shall provide proof to the satisfaction of the Attorney General and the Department of the appointment of a new agent not less than 5 calendar days before the termination of appointment of an existing agent. If an agent terminates his appointment as an agent, the nonparticipating manufacturer shall notify the Attorney General and the Department of that termination within 5 calendar days and include with that notification proof to the satisfaction of the Attorney General and the Department of the appointment of a new agent.

3. Any nonparticipating manufacturer whose cigarettes are sold in this State and who has not appointed and engaged an agent as required by this section shall be deemed to have appointed the Secretary of State as an agent and may be proceeded against in courts of this State by service of process upon the Secretary of State, except that the appointment of the Secretary of State as an agent does not satisfy the condition precedent for having the brand families of the nonparticipating manufacturer included or retained in the directory.

Sec. 19. 1. Not later than 20 calendar days after the end of each calendar quarter, and more frequently if so directed by the Department, each distributor shall submit such information as the Department requires to facilitate compliance with the provisions of sections 2 to 23, inclusive, of this act, including, without limitation, a list by brand family of the total number of cigarettes or, in the case of "roll-your-own" tobacco, the equivalent unit count, for which the distributor affixed stamps during the previous calendar quarter or otherwise paid the tax due for those cigarettes. The distributor shall maintain for at least 5 years, and make available to the Department, all invoices and documentation of sales of all cigarettes of nonparticipating manufacturers and any other information relied upon in reporting to the Department.

2. The Department may disclose to the Attorney General any information received pursuant to sections 2 to 23, inclusive, of this act and requested by the Attorney General for purposes of determining compliance with and enforcing the provisions of sections 2 to 23, inclusive, of this act. The Department and Attorney General shall share with each other the information received pursuant to the provisions of sections 2 to 23, inclusive, of this act, and may share such information with other federal, state or local agencies only for purposes of enforcement of those provisions, the provisions of chapter 370A of NRS or the corresponding laws of other states.



1 3. The Department may require at any time from a
2 nonparticipating manufacturer proof, from the financial
3 institution in which that manufacturer has established a qualified
4 escrow fund for the purpose of compliance with chapter 370A of
5 NRS, of the amount of money in that fund, exclusive of interest,
6 the amount and date of each deposit to that fund, and the amount
7 and date of each withdrawal from that fund.

8 4. In addition to the information otherwise required to be
9 submitted pursuant to sections 2 to 23, inclusive, of this act, the
10 Department may require a distributor or manufacturer of tobacco
11 products to submit any additional information, including, without
12 limitation, samples of the packaging or labeling of each brand
13 family, as is necessary to enable the Department to determine
14 whether a manufacturer of tobacco products is in compliance with
15 the provisions of sections 2 to 23, inclusive, of this act.

16 5. Every distributor shall provide to the Department and
17 update as necessary an electronic mail address for receiving any
18 notifications required to carry out sections 2 to 23, inclusive, of
19 this act.

20 **Sec. 20.** 1. To promote compliance with the provisions of
21 NRS 370A.140, the Department may adopt regulations requiring a
22 manufacturer of tobacco products to make the escrow deposits
23 required by NRS 370A.140 in quarterly installments during the
24 year in which the sales covered by those deposits are made. The
25 Department may require the production of information sufficient
26 to enable the Department to determine the adequacy of the amount
27 of each quarterly installment.

28 2. The Department may adopt such regulations as it deems
29 necessary to carry out the provisions of sections 2 to 23, inclusive,
30 of this act.

31 **Sec. 21.** 1. It is unlawful for any person to:

32 (a) Affix a stamp to a package or other container of cigarettes
33 of a manufacturer of tobacco products or brand family which is
34 not included in the directory; or

35 (b) Sell, or offer or possess for sale, in this State cigarettes of a
36 manufacturer of tobacco products or brand family not included in
37 the directory.

38 2. A person who violates any provision of subsection 1 is
39 guilty of a gross misdemeanor.

40 3. In addition to any other penalty authorized by law, the
41 Department may impose on each person who violates any
42 provision of subsection 1 a civil penalty for each such violation of
43 not more than \$5,000 or 500 percent of the retail value of the
44 cigarettes involved in the violation, whichever is greater.



1 4. Any violation of subsection 1 constitutes a deceptive trade
2 practice for the purposes of NRS 598.0903 to 598.0999, inclusive.

3 5. For the purposes of this section, each stamp affixed to and
4 each sale or offer to sell cigarettes in violation of subsection 1
5 constitutes a separate violation.

6 **Sec. 22.** 1. The Attorney General, on behalf of the
7 Department, may bring an action in the district court of this State
8 to:

9 (a) Enjoin any threatened or actual violation of the provisions
10 of sections 2 to 23, inclusive, of this act by a distributor and to
11 compel the distributor to comply with those provisions; or

12 (b) Enforce any of the provisions of sections 2 to 23, inclusive,
13 of this act.

14 2. In any action brought by the State to enforce the provisions
15 of sections 2 to 23, inclusive, of this act, the State is entitled to
16 recover any costs of investigation, expert witness fees, costs of the
17 action and reasonable attorney's fees.

18 3. If a court determines that a person has violated any
19 provision of sections 2 to 23, inclusive, of this act, the court shall
20 order any profits, gain, gross receipts or other benefit from the
21 violation to be disgorged and paid to the State Treasurer for
22 deposit in the State General Fund.

23 4. The remedies and penalties provided in sections 2 to 23,
24 inclusive, of this act are cumulative to each other and to the
25 remedies and penalties available under any other law of this State.

26 **Sec. 23.** 1. If a court of competent jurisdiction finds that
27 the provisions of sections 2 to 23, inclusive, of this act conflict and
28 cannot be harmonized with the provisions of chapter 370A of
29 NRS, then the provisions of chapter 370A of NRS shall be deemed
30 to control.

31 2. If any section, subsection, subdivision, paragraph,
32 sentence, clause or phrase of sections 2 to 23, inclusive, of this act
33 causes chapter 370A of NRS to no longer constitute a qualifying
34 or model statute, as those terms are defined in the Master
35 Settlement Agreement, then that portion of sections 2 to 23,
36 inclusive, of this act shall be deemed to be invalid.

37 3. If any section, subsection, subdivision, paragraph,
38 sentence, clause or phrase of sections 2 to 23, inclusive, of this act
39 is for any reason held to be invalid, unlawful or unconstitutional,
40 that decision shall be deemed not to affect the validity of the
41 remaining portions of sections 2 to 23, inclusive, of this act or any
42 part thereof.

43 **Sec. 24.** NRS 370A.150 is hereby amended to read as follows:
44 370A.150 A manufacturer of tobacco products that deposits
45 money into escrow pursuant to subsection 2 of NRS 370A.140 shall



1 receive the interest or other appreciation on the deposit as earned.
2 The principal of the deposit may be released from escrow only
3 under the following circumstances:

4 1. To pay a judgment or settlement on a released claim brought
5 against that manufacturer by this State or by a releasing party
6 located or residing in this State. Money may be released from
7 escrow under this subsection only in the order in which it was
8 deposited into escrow and only to the extent and at the time
9 necessary to make payments required under the judgment or
10 settlement.

11 2. To the extent that the manufacturer establishes that the
12 amount it was required to deposit into escrow *on account of units*
13 *sold in the State* in a particular year was greater than ~~this State's~~
14 ~~allocable share of the total payments that the manufacturer would~~
15 ~~have been required to make in that year under~~ the Master
16 Settlement Agreement *payments, as determined pursuant to section*
17 *IX(i) of that Agreement including after final determination of all*
18 *adjustments, that such manufacturer would have been required to*
19 *make on account of such units sold* if the manufacturer had been a
20 participating manufacturer, ~~as such payments are determined~~
21 ~~pursuant to section IX(i)(2) of that Agreement and before any of the~~
22 ~~adjustments or offsets described in section IX(i)(3) of that~~
23 ~~Agreement other than the inflation adjustment,~~ the excess must be
24 released from escrow and revert to the manufacturer.

25 3. To the extent not released from escrow under subsection 1 or
26 2, deposits must be released from escrow and revert to the
27 manufacturer 25 years after the date on which they were deposited.

28 **Sec. 25.** NRS 370A.150 is hereby amended to read as follows:

29 370A.150 A manufacturer of tobacco products that deposits
30 money into escrow pursuant to subsection 2 of NRS 370A.140 shall
31 receive the interest or other appreciation on the deposit as earned.
32 The principal of the deposit may be released from escrow only
33 under the following circumstances:

34 1. To pay a judgment or settlement on a released claim brought
35 against that manufacturer by this State or by a releasing party
36 located or residing in this State. Money may be released from
37 escrow under this subsection only in the order in which it was
38 deposited into escrow and only to the extent and at the time
39 necessary to make payments required under the judgment or
40 settlement.

41 2. ~~To the extent that the manufacturer establishes that the~~
42 ~~amount it was required to deposit into escrow on account of units~~
43 ~~sold in the State in a particular year was greater than the Master~~
44 ~~Settlement Agreement payments, as determined pursuant to section~~
45 ~~IX(i) of that Agreement including after final determination of all~~



~~adjustments, that such manufacturer would have been required to make on account of such units sold if the manufacturer had been a participating manufacturer, the excess must be released from escrow and revert to the manufacturer.~~

~~3.]~~ To the extent not released from escrow under subsection 1, ~~for 2,]~~ deposits must be released from escrow and revert to the manufacturer 25 years after the date on which they were deposited.

Sec. 26. NRS 370A.150 is hereby amended to read as follows:

370A.150 A manufacturer of tobacco products that deposits money into escrow pursuant to subsection 2 of NRS 370A.140 shall receive the interest or other appreciation on the deposit as earned. The principal of the deposit may be released from escrow only under the following circumstances:

1. To pay a judgment or settlement on a released claim brought against that manufacturer by this State or by a releasing party located or residing in this State. Money may be released from escrow under this subsection only in the order in which it was deposited into escrow and only to the extent and at the time necessary to make payments required under the judgment or settlement.

2. *To the extent that the manufacturer establishes that the amount it was required to deposit into escrow in a particular year was greater than this State's allocable share of the total payments that the manufacturer would have been required to make in that year under the Master Settlement Agreement if the manufacturer had been a participating manufacturer, as such payments are determined pursuant to section IX(i)(2) of that Agreement and before any of the adjustments or offsets described in section IX(i)(3) of that Agreement other than the inflation adjustment, the excess must be released from escrow and revert to the manufacturer.*

3. To the extent not released from escrow under subsection 1 ~~or~~ **or** 2, deposits must be released from escrow and revert to the manufacturer 25 years after the date on which they were deposited.

Sec. 27. 1. The first report required by section 19 of this act is due on or before October 20, 2005.

2. Notwithstanding the provisions of section 15 of this act, the initial certifications required by that section are due on or before November 15, 2005.

3. The Department of Taxation shall create and make available for public inspection the directory required pursuant to section 17 of this act on or before December 31, 2005.

Sec. 28. 1. This section and sections 1 to 20, inclusive, 22, 23, 24 and 27 of this act become effective:



- 1 (a) Upon passage and approval for the purposes of adopting
- 2 regulations and taking such other actions as are necessary to carry
- 3 out the provisions of this act; and
- 4 (b) On October 1, 2005, for all other purposes.
- 5 2. Section 21 of this act becomes effective on January 1, 2006.
- 6 3. Section 25 of this act becomes effective on the date a court
- 7 of competent jurisdiction enters a judgment determining that the
- 8 amendatory provisions of section 24 of this act are unconstitutional.
- 9 4. Section 26 of this act becomes effective on the date a court
- 10 of competent jurisdiction enters a judgment determining that the
- 11 amendatory provisions of section 25 of this act are unconstitutional.



