

VIRGINIA ACTS OF ASSEMBLY -- 2003 SESSION

CHAPTER 798

An Act to amend the Code of Virginia by adding in Chapter 18 of Title 3.1 an article numbered 6, consisting of sections numbered 3.1-336.3 through 3.1-336.16, relating to enforcement of tobacco product manufacturer requirements; penalty.

[H 2536]

Approved March 20, 2003

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 18 of Title 3.1 an article numbered 6, consisting of sections numbered 3.1-336.3 through 3.1-336.16, as follows:

Article 6.

Enforcement of Requirements for Tobacco Product Manufacturers.

§ 3.1-336.3. Definitions.

As used in this article:

"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 any brand name alone or in conjunction with any other 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.

"Commissioner" means the Tax Commissioner of the Department of Taxation.

"Nonparticipating manufacturer" means any tobacco product manufacturer that is not a participating manufacturer.

"Stamping agent" means (i) a person who is authorized to affix tax stamps to packages or other containers or cigarettes under Article 1 (§ 58.1-1000 et seq.) of Chapter 10 of Title 58.1 or any regulations promulgated or guidelines issued thereto; or (ii) any person who is required to pay the excise tax imposed on cigarettes pursuant to § 58.1-1001.

Terms defined in § 3.1-336.1 shall have the same meaning when used in this article.

§ 3.1-336.4. Certifications.

A. Every tobacco product manufacturer whose cigarettes are sold in the Commonwealth whether directly or through a distributor, retailer or similar intermediary or intermediaries shall execute and deliver on a form prescribed by the Commissioner a certification to the Commissioner and Attorney General no later than the thirtieth day of April each year, certifying under penalty of perjury that, as of the date of such certification, such tobacco product manufacturer either: is a participating manufacturer or is in full compliance with Article 5 (§ 3.1-336.1 et seq.) of this chapter.

B. A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update such list 30 days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General and the Commissioner.

C. A nonparticipating manufacturer shall include in its certification a complete list of all of its brand families (i) separately listing brand families of cigarettes and the number of units sold for each brand family that were sold in the Commonwealth during the preceding calendar year, (ii) that have been sold in the Commonwealth at any time during the current calendar year, (iii) indicating by an asterisk, any brand family sold in the Commonwealth during the preceding calendar year that is no longer being sold in the Commonwealth as of the date of such certification, and (iv) identifying by name and address, any other manufacturer of such brand families in the preceding calendar year. The nonparticipating manufacturer shall update such list 30 days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General and the Commissioner.

D. In the case of a nonparticipating manufacturer, such certification shall further certify:

1. That such nonparticipating manufacturer is registered to do business in the Commonwealth or has appointed a resident agent for service of process and provided notice thereof as required by § 3.1-336.7;

2. That such nonparticipating manufacturer has (i) established and continues to maintain a qualified escrow fund as that term is defined in Article 5 (§ 3.1-336.1 et seq.) of this chapter and (ii) executed a qualified escrow agreement that conforms to the requirements in Article 5 of this chapter;

3. That such nonparticipating manufacturer is in full compliance with Article 5 (§ 3.1-336.1 et seq.) of this chapter and this article, and any regulations promulgated pursuant thereto; and

4. The (i) name, address and telephone number of the financial institution where the nonparticipating

manufacturer has established such qualified escrow fund required pursuant to Article 5 (§ 3.1-336.1 et seq.) of this chapter; (ii) account number of such qualified escrow fund and subaccount number for the Commonwealth; (iii) amount such nonparticipating manufacturer placed in such fund for cigarettes sold in the Commonwealth during the preceding calendar year, the date or dates and amount of each such deposit, and verification of those dates and amounts of deposits as may be deemed necessary by the Attorney General; and (iv) amounts of and dates of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from such fund or from any other qualified escrow fund into which it has at any time made escrow payments pursuant to Article 5 of this chapter.

E. A tobacco product manufacturer may not include a brand family in its certification unless (i) in the case of a participating manufacturer, such participating manufacturer affirms that the brand family is to be deemed to be 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, said nonparticipating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of Article 5 (§ 3.1-336.1 et seq.) of this chapter. Nothing in this section shall be construed as limiting or otherwise affecting the Commonwealth'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 Article 5 of this chapter.

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

§ 3.1-336.5. Directory of cigarettes approved for stamping and sale.

A. Not later than October 1, 2003, the Attorney General shall develop and publish on its website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of § 3.1-336.4 and all brand families that are listed in such certifications (the Directory), except as noted below.

1. The Attorney General shall not include or retain in such Directory the name or brand families of any nonparticipating manufacturer that fails to provide the required certification or whose certification the Attorney General determines is not in compliance with subsections C and D of § 3.1-336.4, unless the Attorney General has determined that such violation has been cured to his satisfaction.

2. Neither a tobacco product manufacturer nor brand family shall be included or retained in the Directory if the Attorney General concludes that (i) in the case of a nonparticipating manufacturer all escrow payments required pursuant to Article 5 (§ 3.1-336.1 et seq.) of this chapter for any period for any brand family, whether or not listed by such nonparticipating manufacturer, have not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the Attorney General, or (ii) all outstanding final judgments, including interest thereon, for violations of Article 5 of this chapter have not been fully satisfied for such brand family and such manufacturer.

B. The Attorney General shall update the Directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand families to keep the Directory in conformity with the requirements of this article.

C. Notwithstanding the provisions of subsection A, in the case of any nonparticipating manufacturer who has established a qualified escrow account pursuant to Article 5 (§ 3.1-336.1 et seq.) of this chapter that has been approved by the Attorney General, the Attorney General may not remove such manufacturer or its brand families from the Directory unless the manufacturer has been given at least 30 days' notice of such intended action. For purposes of this section, notice shall be deemed sufficient if it is sent either electronically or by first-class mail to an electronic mail address or postal mailing address, as the case may be, provided by the manufacturer in its most recent certification filed pursuant to § 3.1-336.4. The notified nonparticipating manufacturer shall have 30 days from receipt of the notice to either come into compliance with the applicable requirements or, in the alternative, secure a temporary injunction against removal from the Directory. For purposes of a temporary injunction sought pursuant to this subsection, loss of the ability to sell tobacco products as a result of removal from the Directory may be deemed to constitute irreparable harm.

D. Every stamping agent shall provide and update as necessary an electronic mail address to the Attorney General for the purpose of receiving any notifications as may be required by this article.

§ 3.1-336.6. Prohibition against stamping or sale or import of cigarettes not in the Directory.

It shall be unlawful for any person (i) to affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the Directory, or (ii) to sell, offer or possess for sale in the Commonwealth, ship or otherwise distribute into or within the Commonwealth, or import for personal consumption into the Commonwealth, cigarettes of a tobacco product manufacturer or brand family not included in the Directory. For purposes of this article a person shall be deemed to have received notice that cigarettes of a tobacco product manufacturer or brand family are not included in the Directory at the time the Attorney General's website fails to list any such cigarettes in the Directory or at the time any such cigarettes are removed from the Directory. A person purchasing cigarettes for resale shall not be in violation of this section (i) if at the time of such purchase the

manufacturer and brand families of the cigarettes are included in the Directory and the cigarettes are otherwise lawfully stamped and sold within 14 days of the date such manufacturer and brand families were removed from the Directory or (ii) if, in the case of a retailer, the cigarettes are sold or delivered to consumers within 14 days after receipt of delivery of such cigarettes from a wholesaler, which cigarettes otherwise have been lawfully purchased from the same wholesaler. Any manufacturer, wholesaler or retail dealer selling cigarettes for resale of a manufacturer or brand family that has been removed from the Directory shall notify the purchaser of such cigarettes of that fact at the time of delivery of such cigarettes. Unless otherwise provided by contract or purchase agreement, a purchaser shall be entitled to a refund from the manufacturer, wholesaler or retail dealer from whom the cigarettes were purchased of the purchase price of any cigarettes that are the product of a manufacturer or brand family removed from the Directory. The Commissioner shall, by regulation or guidelines, provide for the refund of the purchase price of tax stamps that have been lawfully affixed to cigarettes that may not be sold pursuant to the provisions of this section.

§ 3.1-336.7. Agent for service of process.

A. Any nonresident or foreign nonparticipating manufacturer that has not registered to do business in the Commonwealth as a foreign corporation or business entity shall, as a condition precedent to having its brand families listed or retained in the Directory, appoint and continually engage without interruption the services of an agent in the Commonwealth to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of this article or Article 5 (§ 3.1-336.1 et seq.) of this chapter may be served in any manner authorized by law. Such service shall constitute 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 the satisfaction of the Commissioner and Attorney General.

B. The nonparticipating manufacturer shall provide notice to the Commissioner and Attorney General 30 calendar days prior to termination of the authority of an agent and shall further provide proof to the satisfaction of the Attorney General of the appointment of a new agent no less than five calendar days prior to the termination of an existing agency appointment. In the event an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the Commissioner and Attorney General of said termination within five calendar days and shall include proof to the satisfaction of the Attorney General of the appointment of a new agent.

C. Any nonparticipating manufacturer whose products are sold in this state, without appointing or designating an agent as herein required, shall be deemed to have appointed the Secretary of the Commonwealth as such agent and may be proceeded against in courts of the Commonwealth by service of process upon the Secretary of the Commonwealth; however, the appointment of the Secretary of the Commonwealth as such agent shall not satisfy the condition precedent to having its brand families listed or retained in the Directory.

§ 3.1-336.8. Reporting of information.

A. Not later than 20 days after the end of each calendar quarter, and more frequently if so directed by the Commissioner, each stamping agent shall submit to the Commissioner such information as the Commissioner and Attorney General require to facilitate compliance with this article, including, but not limited to, a list by brand family of the total number of cigarettes for which the stamping agent affixed stamps during the previous calendar quarter or otherwise paid the tax due for such cigarettes. The stamping agent shall maintain, and make available to the Commissioner and Attorney General, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the Commissioner and Attorney General for a period of five years.

B. In addition to the information required to be submitted pursuant to subsection A or any other provision of law, the Commissioner or Attorney General may require a stamping agent, distributor or tobacco product manufacturer to submit any 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 whether a tobacco product manufacturer is in compliance with this article.

§ 3.1-336.9. Escrow fund information.

The Attorney General at any time may require a nonparticipating manufacturer to provide proof from the financial institution in which such manufacturer has established a qualified escrow fund for the purpose of compliance with Article 5 (§ 3.1-336.1 et seq.) of this chapter of the amount of money in and the dates of deposits to such fund being held on behalf of the Commonwealth and listing the amounts and dates of all withdrawals from such fund.

§ 3.1-336.10. Penalties and other remedies.

A. In addition to any other civil or criminal penalty or remedy provided by law, upon a determination that any person has violated § 3.1-336.6 or any regulation adopted pursuant thereto, the Commissioner may revoke or suspend such person's privilege to purchase tax stamps at a discounted rate. Each stamp affixed and each offer to sell cigarettes in violation of § 3.1-336.6 shall constitute a separate violation. Upon a determination of a violation of § 3.1-336.6 or any regulations adopted

pursuant thereto, the Commissioner may also impose a civil penalty in an amount not to exceed the greater of (i) 500 percent of the retail value of the cigarettes sold or (ii) \$5,000.

B. Any cigarettes that have been sold, offered for sale or possessed for sale in the Commonwealth, or imported for personal consumption in the Commonwealth, in violation of § 3.1-336.6, shall be deemed contraband and may not be sold or offered for sale unless such cigarettes are listed in the Directory. Any such cigarettes that are sold or offered for sale when not included in the Directory shall be subject to confiscation and forfeiture. Any such confiscation and forfeiture shall be governed by the procedures contained in § 4.1-338, which shall apply *mutatis mutandis*; except that all such cigarettes so confiscated and forfeited shall be destroyed and not resold.

C. The Attorney General, on behalf of the Commissioner, may seek an injunction to restrain a threatened or actual violation of § 3.1-336.6, subsection A of § 3.1-336.8 or subsection B of § 3.1-336.8 by a stamping agent and to compel the stamping agent to comply with such provisions. In any action brought pursuant to this subsection in which the Commonwealth prevails, the Commonwealth shall be entitled to recover the reasonable costs of investigation, costs of the action and reasonable attorneys' fees.

D. It shall be unlawful for a person to (i) sell or distribute cigarettes or (ii) acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the Commonwealth in violation of § 3.1-336.6. A violation of this section is a Class 2 misdemeanor.

§ 3.1-336.11. Notice and review of determination.

A determination of the Attorney General to not list or to remove from the Directory a brand family or tobacco product manufacturer shall be subject to review in the manner prescribed by the Administrative Process Act (§ 2.2-4000 et seq.).

§ 3.1-336.12. Promulgation of regulations.

The Commissioner may promulgate regulations necessary to assist him in performing his duties prescribed by this article.

§ 3.1-336.13. Submission to jurisdiction of the Commonwealth; pleadings in English sufficient.

A. Any tobacco product manufacturer that produces cigarettes sold or offered for sale into or within the Commonwealth shall be deemed to have submitted to and agreed to the jurisdiction of the courts of the Commonwealth for the purpose of trying any action brought by the Commonwealth to enforce provisions of this article or Article 5 (§ 3.1-336.1 et seq.) of this chapter.

B. In any action brought by the Commonwealth to enforce the provisions of this article or Article 5 (§ 3.1-336.1 et seq.) of this chapter, sufficient notice of the action to the alleged violator shall be given by a complaint written in the English language. The Commonwealth shall not be required to bear any expense of translating such complaint into another language.

§ 3.1-336.14. Recovery of costs and fees by Attorney General.

In any action brought by the Commonwealth to enforce this article or Article 5 (§ 3.1-336.1 et seq.) of this chapter in which the Commonwealth prevails, or as part of the settlement of any matter arising from an investigation prior to the filing of such action, and in addition to any civil or criminal penalty or other amount which the court may determine, the Attorney General shall be entitled to recover the reasonable costs of investigation, expert witness fees, costs of the action and reasonable attorneys' fees.

§ 3.1-336.15. Disgorgement of profits for violations.

If a court determines that a person has violated this article, the court shall order any profits, gain, gross receipts or other benefit from the violation to be disgorged and paid to the Treasurer of the Commonwealth. Unless otherwise expressly provided, the remedies or penalties provided by this article are cumulative to each other and to the remedies or penalties available under all other laws of the Commonwealth.

§ 3.1-336.16. Conflicts.

If a court of competent jurisdiction finds that the provisions of this article and of Article 5 (§ 3.1-336.1 et seq.) of this chapter conflict and cannot be harmonized, then the provisions of Article 5 shall control. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this article causes Article 5 to no longer constitute a qualifying or model statute, as those terms are defined in the Master Settlement Agreement, then that portion of this article shall not be valid. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this article is for any reason held to be invalid, unlawful or unconstitutional, such decision shall not affect the validity of the remaining portions of this article or any part thereof.

2. That for the year 2003, the first report of stamping agents required by subsection A of § 3.1-336.8 shall be due August 1, 2003, and the certifications by a tobacco product manufacturer described in subsection A of § 3.1-336.4 shall be due September 15, 2003.