

# VIRGINIA ACTS OF ASSEMBLY -- 2011 SESSION

## CHAPTER 297

*An Act to amend and reenact §§ 3.2-4206.1 and 3.2-4211 of the Code of Virginia, relating to the Tobacco Master Settlement Agreement; bond requirements; escrow payments by certain manufacturers.*

[S 1268]

Approved March 18, 2011

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 3.2-4206.1 and 3.2-4211 of the Code of Virginia are amended and reenacted as follows:**

§ 3.2-4206.1. Bond requirement for newly qualified and elevated-risk nonparticipating manufacturers.

A. Notwithstanding any other provision of law, if a newly qualified nonparticipating manufacturer is to be listed in the Virginia Tobacco Directory (the Directory), or if the Attorney General reasonably determines that any nonparticipating manufacturer who has filed a certification pursuant to § 3.2-4205 poses an elevated risk for noncompliance with this article or with Article 1 (§ 3.2-4200 et seq.) of ~~this chapter~~, 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 performance in accordance with § 3.2-4208.1, has posted a bond in accordance with this section.

B. The bond shall be posted by corporate surety located within the United States in an amount equal to the greater of \$50,000 or the amount of escrow the manufacturer in either its current or predecessor form was required to deposit as a result of its ~~previous~~ highest calendar year's sales in Virginia. The bond shall be written in favor of the Commonwealth of Virginia 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 subsection A of § 3.2-4201, of all of its duties and obligations under this article and Article 1 (§ 3.2-4200 et seq.) of ~~this chapter~~ during the year in which the certification is filed and the next succeeding calendar year.

C. A nonparticipating manufacturer may be deemed to pose an elevated risk for noncompliance with this article or Article 1 (§ 3.2-4200 et seq.) of ~~this chapter~~ if:

1. The nonparticipating manufacturer or any affiliate thereof has underpaid an escrow obligation with respect to any state at any time during the calendar year or within the past three calendar years unless (i) the manufacturer did not make underpayment knowingly or recklessly and the manufacturer promptly cured the underpayment within 180 days of notice of it, or (ii) the underpayment or lack of payment is the subject of a good faith dispute as documented to the satisfaction of the Attorney General and the underpayment is cured within 180 days of entry of a final order establishing the amount of the required escrow payment;

2. Any state has removed the manufacturer or its brands or brand families or an affiliate or any of the affiliate's brands or brand families 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

3. Any state has litigation pending against, or an unsatisfied judgment against, the manufacturer or any affiliate thereof for escrow or for penalties, costs, or attorney fees related to noncompliance with state escrow laws.

D. As used in this section "newly qualified nonparticipating manufacturer" means a nonparticipating manufacturer that has not previously been listed in the Virginia Tobacco Directory. Such manufacturers may be required to post a bond in accordance with this section for the first three years of their listing, or longer if they have been determined to pose an elevated risk for noncompliance.

§ 3.2-4211. Quarterly escrow payments by certain nonparticipating manufacturers.

A. Notwithstanding the provisions of § 3.2-4201, on and after January 1, 2007, the Attorney General may require a nonparticipating manufacturer that is a new market entrant *or that has been designated by the Attorney General as an elevated risk pursuant to subsection C of § 3.2-4206.1* to make the escrow payments required by § 3.2-4201 on a quarterly, rather than annual basis. For the purposes of this section, a "new market entrant" shall mean a tobacco product manufacturer that first seeks certification pursuant to § 3.2-4205 on or after January 1, 2007.

B. A nonparticipating manufacturer required to make quarterly payments pursuant to this section shall place into a qualified escrow account the amounts required pursuant to subdivision A 2 of § 3.2-4201 by the fifteenth of the second month following the end of each calendar quarter, except the payment for the last quarter of a calendar year shall be made by April 15 of the year following the year in question. Any adjustments for inflation to the amounts placed into a qualified escrow pursuant to this section shall be reflected in the payments for the last quarter of a calendar year.

C. A nonparticipating manufacturer required to make payments pursuant to this section shall also

provide the certification required by subsection C of § 3.2-4201 on a quarterly basis. Any such nonparticipating manufacturer that fails in any quarter to place into escrow the funds required under this section shall be subject to the penalty provisions of § 3.2-4201.

D. The Attorney General is authorized to create any forms and require any nonparticipating manufacturer required to make quarterly payments pursuant to this section to submit any additional information as is necessary to enable the Attorney General to determine whether the nonparticipating manufacturer is in compliance with the provisions of this section. At the time the nonparticipating manufacturer is first certified by the Attorney General pursuant to § 3.2-4205 *or at any time that the nonparticipating manufacturer is designated by the Attorney General as an elevated risk pursuant to subsection C of § 3.2-4206.1*, the Attorney General will notify the nonparticipating manufacturer as to whether it will be required to make quarterly payments pursuant to this section. The Attorney General may seek an injunction to compel compliance with the reporting requirements. 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 attorney fees.

E. A nonparticipating manufacturer required to make quarterly payments pursuant to this section who fails to properly do so shall be deemed to have failed to make required payments pursuant to § 3.2-4201 and shall be subject to all enforcement actions available for a violation of § 3.2-4201.

F. A nonparticipating manufacturer required to make quarterly payments pursuant to this section who, to the satisfaction of the Attorney General, has complied with the provisions of Article 1 (§ 3.2-4200 et seq.) of this chapter and the provisions of this article for a period of at least three calendar years may, upon request and upon the concurrence of the Attorney General, be permitted to make annual payments pursuant to Article 1 (§ 3.2-4200 et seq.) of this chapter and be relieved of further obligation to make quarterly payments.