

ACT 77

S.B. NO. 1267

A Bill for an Act Relating to Tobacco.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 245, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§245- Prohibition against stamping or sale of cigarettes not listed in the directory pursuant to chapter 486P. (a) Beginning December 1, 2003, it shall be unlawful for an entity to:

- (1) 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
- (2) Import, sell, offer, keep, store, acquire, transport, distribute, receive, or possess for sale or distribution cigarettes of a tobacco product manufacturer or brand family not included in the directory.

(b) Any entity that knowingly violates subsection (a) shall be guilty of a class C felony.

(c) Any cigarettes that are unlawfully imported, possessed, offered, kept, stored, acquired, transported, stamped, distributed, received, or sold in violation of this section may be seized and forfeited as contraband pursuant to chapter 712A and all such cigarettes seized and forfeited shall be destroyed.

(d) This section shall not apply to cigarettes that are exempt from taxes as provided by section 245-3(b).

(e) For purposes of this section:

“Brand family”, “cigarette”, and “tobacco product manufacturer” shall have the same meaning as in section 486P-1.

“Directory” means the “directory” established pursuant to section 486P-C.

“Entity” means one or more individuals, a company, corporation, a partnership, an association, licensee, or any other type of legal entity.”

SECTION 2. Chapter 486P, Hawaii Revised Statutes, is amended by adding four new sections to be appropriately designated and to read as follows:

“§486P-A Unregistered nonresident or foreign nonparticipating manufacturers; agent; notice. (a) A nonresident or foreign nonparticipating manufacturer that has not registered to do business in this State as a foreign corporation or business entity shall, as a condition precedent to having its brand families listed or retained in the directory established under 486P-C, appoint and continually engage without interruption the services of an agent in the United States to act as an agent for the service of process on whom all process, and any action or proceeding against the manufacturer concerning or arising out of the enforcement of this chapter or chapter 675, may be served in any manner authorized by law. Service pursuant to this section shall constitute legal and valid service of process on the nonparticipating manufacturer.

(b) The nonparticipating manufacturer shall provide to the satisfaction of the attorney general, notice of:

- (1) The name, address, phone number, and proof of the appointment and availability of the manufacturer’s agent;
- (2) Termination of the authority of an agent by the manufacturer, thirty calendar days prior to termination, and proof of the appointment of a new agent to the satisfaction of the attorney general no less than five calendar days prior to the termination of an existing agent appointment; and
- (3) The termination of the authority of an agent by the agent, within five calendar days of the termination, and at the same time, proof of the appointment of a new agent to the satisfaction of the attorney general.

§486P-B Certification; participating manufacturers; nonparticipating manufacturers. (a) Every tobacco product manufacturer whose cigarettes are sold in this State, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, shall execute and deliver in the manner prescribed by the attorney general, a certification to the attorney general no later than September 30, 2003, and no later than the thirtieth day of April each year thereafter, certifying that as of the date of the certification the tobacco product manufacturer is either a participating manufacturer or is in full compliance with section 675-3(b).

(b) A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update the list thirty days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the attorney general.

(c) A nonparticipating manufacturer shall include in its certification:

- (1) A complete list of all of its brand families that identifies by name and address any other manufacturer of the brand families, and that includes:
 - (A) A list of all of its brand families of cigarettes and of the number of units sold for each brand family that was sold in the State during the preceding calendar year, indicating by an asterisk any brand family that is no longer being sold in the State as of the date of the certification; and
 - (B) A list of its brand families that have been sold in the State at any time during the current calendar year.

The nonparticipating manufacturer shall update the list thirty days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the attorney general;

- (2) A statement that such nonparticipating manufacturer is registered to do business in the State, or that such nonparticipating manufacturer is a nonresident or foreign nonparticipating manufacturer that has not registered to do business in this State as a foreign corporation or business entity and has appointed an agent for service of process and provided notice thereof pursuant to section 486P-A;
 - (3) A statement that the nonparticipating manufacturer has established and continues to maintain a qualified escrow fund required pursuant to section 675-3(b)(1), including:
 - (A) The name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established such qualified escrow fund;
 - (B) The account number of the qualified escrow fund or any sub-account number for the State;
 - (C) The amount the nonparticipating manufacturer placed in such fund for cigarettes sold in the State during the preceding calendar year, the date and amount of each such deposit, and such evidence or verification as may be deemed necessary by the attorney general to confirm the foregoing; and
 - (D) The amount and date of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from the fund or from any other qualified escrow fund into which the nonparticipating manufacturer made escrow payments pursuant to section 675-3(b)(1);
 - (4) A statement that the nonparticipating manufacturer has executed a qualified escrow agreement that has been reviewed and approved by the attorney general and that governs the qualified escrow fund; and
 - (5) A statement that the nonparticipating manufacturer is in full compliance with this chapter, chapter 675, and any rules adopted to implement this chapter or chapter 675.
- (d) A tobacco product manufacturer may not include a brand family in its certification unless:
- (1) In the case of a participating manufacturer, the 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
 - (2) In the case of a nonparticipating manufacturer, the nonparticipating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of chapter 675.

Nothing in this section shall be construed as limiting or otherwise affecting the State'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 chapter 675.

(e) The attorney general may require at any time from the nonparticipating manufacturer proof, from the financial institution in which a tobacco product manufacturer has established a qualified escrow fund for the purpose of compliance with section 675-3(b)(1), of the amount of money in such fund, exclusive of interest, the amount and date of each deposit to such fund, and the amount and date of each withdrawal from such fund.

(f) A tobacco product manufacturer shall maintain and make available to the attorney general, pursuant to this chapter, all invoices and documentation of sale and other such information relied upon for certification for a period of five years unless otherwise required by law.

§486P-C Directory; updates; information to be maintained and provided. (a) Not later than November 1, 2003, the attorney general shall develop and make available for public inspection, a directory that includes a list of all tobacco product manufacturers that have provided a current and accurate certification conforming to the requirements of section 486P-B, and a list of all brand families that are listed in the certification; provided that:

- (1) The attorney general shall not include or retain in the 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 section 486P-B unless the attorney general has determined that such violation has been cured to the satisfaction of the attorney general;
- (2) Neither a tobacco product manufacturer nor a brand family shall be included or retained in the directory if the attorney general concludes, in the case of a nonparticipating manufacturer, that:
 - (A) Any escrow payment required pursuant to section 675-3(b)(1) 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 that has been approved by the attorney general; or
 - (B) Any outstanding final judgment, including interest thereon, for a violation of section 675-3(b) has not been fully satisfied by the manufacturer or brand family.

(b) The attorney general shall update the directory as necessary to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements of this chapter.

(c) Every entity licensed under chapter 245 shall:

- (1) Provide to the attorney general and update as necessary an electronic mail address for the purpose of receiving any notifications hereunder; and
- (2) Not later than thirty days after the end of each month, and more frequently if so directed by the attorney general, submit to the attorney general such information as the attorney general requires to facilitate compliance with this chapter, including but not limited to:
 - (A) A list by brand family of the total number of cigarettes, or in the case of roll-your-own, the equivalent stick count for which the licensee affixed stamps during the previous calendar month or otherwise paid the tax due for such cigarettes; and
 - (B) Samples of each brand family, as may be necessary to enable the attorney general to determine whether a tobacco product manufacturer or licensed entity is in compliance with this chapter.
- (3) Maintain, and make available to the attorney general, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the attorney general for a period of five years.

§486P-D Use and disclosure of information. The information received by the attorney general under this chapter shall be used only for purposes of enforcement of this chapter, chapter 245, and chapter 675; provided that the attorney general

may share any information with authorities of other states or the federal government for the purpose of enforcement of similar state statutes upon receipt of adequate assurance from those authorities that the information will be used only for that purpose.

Information received by the attorney general under this chapter that tends to identify customers of tobacco product manufacturers, terms of sale, including price, and nonaggregated sales volume data, shall be exempt from disclosure under section 92F-11.”

SECTION 3. Section 486P-1, Hawaii Revised Statutes, is amended by adding six new definitions to be appropriately inserted and to read as follows:

““Brand family” means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers, 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.

“Master Settlement Agreement” shall have the same meaning as in section 675-2.

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

“Participating manufacturer” has the meaning given that term in section II(j) of the Master Settlement Agreement and all amendments thereto.

“Qualified escrow fund” shall have the same meaning as in section 675-2.

“Units sold” shall have the same meaning as in section 675-2.”

SECTION 4. Section 245-51, Hawaii Revised Statutes, is amended to read as follows:

“**§245-51 [Sale of export] Export and foreign cigarettes prohibited.** It shall be unlawful for ~~a person to sell or distribute in the State; to~~ an entity to possess, keep, store, retain, transport, sell, or offer to sell, distribute, acquire, hold, own, [possess, or transport for sale or distribution in the State, or to] import, or cause to be imported into the State [for sale or distribution in the State] any of the following cigarettes:

- (1) The package of which bears any statement, label, stamp, sticker, or notice indicating that the manufacturer did not intend the cigarettes to be sold, distributed, or used in the United States, including but not limited to labels stating “for export only”, “U.S. tax-exempt”, “for use outside U.S.”, or similar wording;
- (2) The package of which does not comply with all requirements imposed by federal law regarding warnings and other information on packages of cigarettes manufactured, packaged, or imported for sale, distribution, or use in the United States, including but not limited to the specific warning labels specified in the federal Cigarette Labeling and Advertising Act, Title 15 U.S.C. section 1333;
- (3) The package of which does not comply with all federal trademark and copyright laws;
- (4) Imported into the United States on or after January 1, 2000, in violation of Title 26 U.S.C. section 5754 or any other federal law or regulation;
- (5) For which the person otherwise knows or has reason to know the manufacturer did not intend to be sold, distributed, or used in the United States;

- (6) For which there has not been submitted to the Secretary of the United States Department of Health and Human Services the list of the ingredients added to tobacco in the manufacture of such cigarettes required by the federal Cigarette Labeling and Advertising Act, Title 15 U.S.C. section 1335a; or
- (7) The package of which bears a cigarette brand name that is a registered United States trademark of a participating manufacturer and the package was imported by anyone other than the participating manufacturer of that cigarette brand. "Participating manufacturer" means any signatory to the "Master Settlement Agreement", as the latter term is defined in section 675-2."

SECTION 5. Section 245-52, Hawaii Revised Statutes, is amended to read as follows:

"[H]§245-52[H] Alteration of packaging prohibited. It shall be unlawful for ~~[any person]~~ an entity to alter the package of any cigarettes, prior to sale or distribution to remove, conceal, or obscure:

- (1) Any statement, label, stamp, sticker, or notice indicating that the manufacturer did not intend the cigarettes to be sold, distributed, or used in the United States, including but not limited to labels stating "for export only", "U.S. tax-exempt", "for use outside U.S.", or similar wording; or
- (2) Any health warning that is not specified in or does not conform with the requirements of the federal Cigarette Labeling and Advertising Act, Title 15 U.S.C. section 1333."

SECTION 6. Section 245-54, Hawaii Revised Statutes, is amended to read as follows:

"[H]§245-54[H] Confiscation and seizure of illegal ~~[sale or export of] export or foreign cigarettes.~~ The attorney general and the police departments of each of the counties may seize and confiscate any cigarette, package of cigarettes, or carton of cigarettes that is possessed, kept, stored, ~~[or] retained~~ [for the purpose of sale, or], held, owned, received, transported, imported, or caused to be imported, acquired, distributed, sold, or offered for sale in violation of this part."

SECTION 7. Section 245-55, Hawaii Revised Statutes, is amended to read as follows:

"[H]§245-55[H] Forfeiture. ~~[The forfeiture of any]~~ Any cigarette, package of cigarettes, or carton of cigarettes unlawfully possessed, ~~[or] kept, stored, [or retained for the purpose of sale, or]~~ received, held, owned, acquired, retained, transported, imported, or caused to be imported, distributed, sold, or offered for sale, in violation of this part, [may be enforced] shall be forfeited as contraband pursuant to chapter 712A ~~[by an appropriate administrative or judicial proceeding]~~. Any cigarette, package of cigarettes, or carton of cigarettes forfeited as provided in this section shall be ordered destroyed."

SECTION 8. Section 486P-3, Hawaii Revised Statutes, is amended to read as follows:

"§486P-3 Penalties. (a) The attorney general may bring a civil action against any entity that fails to file the reports required under this chapter.

(b) The attorney general may bring a civil action against any entity engaged in the business of manufacturing, wholesaling, distributing, ~~[or dealing]~~ importing, or dealing in cigarettes or tobacco products who fails to provide the information that the department of the attorney general may deem necessary, for the proper administration of this chapter or chapter 675.

(c) Notwithstanding the existence of other remedies at law, the attorney general may apply for a temporary or permanent injunction restraining any entity from the sale, use, possession, acquisition, receipt, transportation, or distribution of cigarettes manufactured by a tobacco product manufacturer who knowingly fails to report, provide information, or meet the certification requirements of this chapter. The injunction shall be issued without bond.

~~[(e)]~~ (d) The State shall be awarded its attorney's fees and expenses incurred in prosecuting violations of this chapter."

SECTION 9. In codifying the new sections added by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 10. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 11. This Act shall take effect upon its approval.

(Approved May 20, 2003.)

Note

1. Edited pursuant to HRS §23G-16.5.