

1 **SENATE FLOOR VERSION**

2 April 1, 2014

3 **AS AMENDED**

4 ENGROSSED HOUSE

5 BILL NO. 2363

6 By: Cox of the House

7 and

8 Treat of the Senate

9 [cigarette tax - listing of nonparticipating
10 manufacturers in the Oklahoma Tobacco Directory -
11 bond - report information - codification - effective
12 date]

13 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

14 SECTION 1. AMENDATORY 68 O.S. 2011, Section 360.9, is
15 amended to read as follows:

16 Section 360.9 A. Notwithstanding any other provision of law,
17 ~~if a newly qualified nonparticipating manufacturer is to be listed~~
18 ~~in the Oklahoma Tobacco Directory (the Directory), or if the~~
19 ~~Attorney General reasonably determines that any nonparticipating~~
20 ~~manufacturer who has filed a certification pursuant to Section 360.4~~
21 ~~of Title 68 of the Oklahoma Statutes poses an elevated risk for~~
22 ~~noncompliance with the Master Settlement Agreement or with the~~
23 ~~Prevention of Youth Access to Tobacco Act, neither such~~
24 ~~nonparticipating manufacturer nor any of its brand families shall be~~
~~included in the Directory unless and until such nonparticipating~~

1 ~~manufacturer, or its United States importer that undertakes joint~~
2 ~~and several liability for the performance of the manufacturer in~~
3 ~~accordance with Section 13 of this act, has posted a bond in~~
4 ~~accordance with this section~~ any nonparticipating manufacturer shall
5 post a bond for the exclusive benefit of this state if:

6 1. It was not listed in the Oklahoma Tobacco Directory,
7 hereinafter referred to as the Directory, during the four (4)
8 consecutive calendar quarters preceding its application to be on the
9 Directory;

10 2. It had been previously listed in the Directory, but was
11 involuntarily removed or denied recertification for noncompliance
12 with the Master Settlement Agreement or the Prevention of Youth
13 Access to Tobacco Act, unless the removal was determined to have
14 been erroneous or illegal; or

15 3. The Attorney General reasonably determines that the
16 nonparticipating manufacturer who has filed a certification pursuant
17 to Section 360.4 of this title poses an elevated risk for
18 noncompliance with the Master Settlement Agreement or with the
19 Prevention of Youth Access to Tobacco Act. A reasonable risk of
20 noncompliance with this section or the Prevention of Youth Access to
21 Tobacco Act includes, but is not limited to, the following
22 circumstances and a nonparticipating manufacturer shall be deemed to
23 pose an elevated risk for noncompliance if:

- 1 a. any state has removed the manufacturer or its brand or
2 brand families or an affiliate or any of the
3 affiliate's brands or brand families from the tobacco
4 directory of the state or placed the manufacturer or
5 its brand or brand families or an affiliate or any of
6 the affiliate's brands on a list of noncompliant
7 companies, brands or brand families for noncompliance
8 with the state law at any time during the calendar
9 year or within the past five (5) consecutive calendar
10 years, unless it submits proof that its brands, or the
11 brands of an affiliate were erroneously or illegally
12 removed from a tobacco directory of a state,
- 13 b. any state, or the federal government, has filed
14 litigation against or has an unsatisfied judgment
15 against the manufacturer or any affiliate thereof for
16 escrow or for penalties, costs, or attorney fees
17 related to noncompliance with state escrow laws or
18 complementary legislation, or
- 19 c. the nonparticipating manufacturer or any affiliate has
20 been charged, entered a plea or has been convicted of
21 violating the Contraband Cigarette Trafficking Act,
22 the Jenkins Act or the PACT Act.

23 ~~B. The bond shall be posted by corporate surety located within~~
24 ~~the United States in an amount equal to the greater of Fifty~~

1 ~~Thousand Dollars (\$50,000.00) or the amount of escrow the~~
2 ~~manufacturer in either its current or predecessor form was required~~
3 ~~to deposit as a result of its sales in the previous calendar year in~~
4 ~~Oklahoma. The bond shall be written in favor of the State of~~
5 ~~Oklahoma and shall be conditioned on the performance by the~~
6 ~~nonparticipating manufacturer, or its United States importer that~~
7 ~~undertakes joint and several liability for the performance of the~~
8 ~~manufacturer in accordance with Section 13 of this act, of all of~~
9 ~~its duties and obligations under the Prevention of Youth Access to~~
10 ~~Tobacco Act and the Master Settlement Agreement Complementary Act~~
11 ~~during the year in which the certification is filed and the next~~
12 ~~succeeding calendar year.~~

13 ~~C. A nonparticipating manufacturer may be deemed to pose an~~
14 ~~elevated risk for noncompliance with this section or the Prevention~~
15 ~~of Youth Access to Tobacco Act if:~~

16 ~~1. The nonparticipating manufacturer or any affiliate thereof~~
17 ~~has underpaid an escrow obligation with respect to any state at any~~
18 ~~time during the calendar year or within the past three (3) calendar~~
19 ~~years unless:~~

20 ~~a. the manufacturer did not make underpayment knowingly~~
21 ~~or recklessly and the manufacturer promptly cured the~~
22 ~~underpayment within one hundred eighty (180) days'~~
23 ~~notice of it, or~~

24

1 ~~b. the underpayment or lack of payment is the subject of~~
2 ~~a good-faith dispute as documented to the satisfaction~~
3 ~~of the Attorney General and the underpayment is cured~~
4 ~~within one hundred eighty (180) days of entry of a~~
5 ~~final order establishing the amount of the required~~
6 ~~escrow payment;~~

7 ~~2. Any state has removed the manufacturer or its brands or~~
8 ~~brand families or an affiliate or any of the affiliate's brands or~~
9 ~~brand families from the state's tobacco directory for noncompliance~~
10 ~~with the state law at any time during the calendar year or within~~
11 ~~the past three (3) calendar years; or~~

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

16 ~~D. As used in this section, "newly qualified nonparticipating~~
17 ~~manufacturer" means a nonparticipating manufacturer that has not~~
18 ~~previously been listed in the Oklahoma Tobacco Directory. Such~~
19 ~~manufacturer may be required to post a bond in accordance with this~~
20 ~~section for the first three (3) years of their listing, or longer if~~
21 ~~they have been determined to pose an elevated risk for~~
22 ~~noncompliance. Any other nonparticipating manufacturer that has~~
23 ~~been determined to pose an elevated risk for noncompliance shall be~~
24 ~~required to post a bond in accordance with this section for three~~

1 ~~(3) years or longer if such nonparticipating manufacturer still~~
2 ~~poses an elevated risk at the end of such three-year period.~~

3 For purposes of this section an affiliate is an entity or
4 individual that either controls or is controlled by the
5 nonparticipating manufacturer, regardless of whether the control
6 being exercised is direct or indirect.

7 C. Neither a nonparticipating manufacturer nor any of its brand
8 families shall be included in the Directory unless and until the
9 nonparticipating manufacturer:

10 1. Undertakes joint and several liability with its importer for
11 the performance of the manufacturer in accordance with Section
12 360.5-1 of this title and, if required, has posted a joint bond in
13 accordance with this section;

14 2. The manufacturer and importer, if any, have:

15 a. registered to do business within the state with the
16 Oklahoma Secretary of State,

17 b. maintained a registered service agent within the State
18 of Oklahoma, and

19 c. agreed that the Oklahoma Secretary of State will act
20 as service agent if the registered service agent dies,
21 resigns or otherwise is unavailable to accept service
22 on behalf of the nonparticipating manufacturer or
23 importer; and

1 3. The manufacturer and importer, if any, consent to be sued in
2 the district courts of the State of Oklahoma for purposes of the
3 state enforcing any provision of the Prevention of Youth Access to
4 Tobacco Act, the Master Settlement Agreement Complementary Act and
5 Oklahoma cigarette excise tax statutes.

6 D. The bond shall be posted by corporate surety located within
7 the United States in an amount equal to the greater of Fifty
8 Thousand Dollars (\$50,000.00) or fifty percent (50%) of the required
9 escrow that the manufacturer in either its current or predecessor
10 form was required to deposit as a result of its sales in Oklahoma
11 during the last full calendar year it was listed in the Directory.
12 The bond shall be written in favor of the State of Oklahoma and
13 shall be conditioned on the performance by the nonparticipating
14 manufacturer, or its United States importer that undertakes joint
15 and several liability for the performance of the manufacturer in
16 accordance with Section 360.5-1 of this title, of all of its duties
17 and obligations under the Prevention of Youth Access to Tobacco Act
18 and the Master Settlement Agreement Complementary Act during the
19 year in which the certification is filed and the next succeeding
20 calendar year.

21 E. Any manufacturer or importer required to post a bond in
22 accordance with this section shall do so for three (3) consecutive
23 years, or longer if the Attorney General determines the manufacturer
24

1 or importer poses an elevated risk at the end of the three-year
2 period.

3 F. If a nonparticipating manufacturer fails to make or have
4 made in its behalf deposits equal to the full amount owed for a
5 quarter within fifteen (15) days of the due date of the quarter, the
6 State of Oklahoma may execute on the bond in the amount of the
7 remaining escrow deposit due. Escrow amounts collected from the
8 bond shall be used to reduce the amount of escrow due from and
9 penalties assessed against that nonparticipating manufacturer and
10 unpaid escrow that exceeds the amount covered by the bond remains
11 due from the nonparticipating manufacturer and any importer that is
12 jointly and severally liable for its cigarette sales into the state.

13 G. In addition to the grounds contained in paragraph 3 of
14 subsection B of Section 360.4 of this title the Attorney General has
15 the authority to not retain or not to include in the Directory any
16 manufacturer, its brands and brand families if the manufacturer:

17 1. Does not certify it is subject to, without any immunity, the
18 Master Settlement Agreement Complementary Act and the Prevention of
19 Youth Access to Tobacco Act;

20 2. Fails to disclose that a state or the federal government has
21 brought an action in compliance with any state or federal law,
22 regulating the sale and or distribution of tobacco products,
23 including the escrow statute of another state; or

1 3. Fails to sell only through an Oklahoma-licensed wholesaler
2 any tobacco product sold into the state or fails to provide monthly
3 PACT Act reports to the Oklahoma Tax Commission and the Oklahoma
4 Attorney General for sales into the state.

5 H. The Attorney General shall have the authority to require a
6 nonparticipating manufacturer to submit all information and
7 materials the Attorney General deems appropriate to determine
8 compliance of the nonparticipating manufacturer with this section
9 and other related laws including the grounds for retaining or not
10 including a manufacturer or its brands and brand families in the
11 Directory.

12 SECTION 2. NEW LAW A new section of law to be codified
13 in the Oklahoma Statutes as Section 360.10 of Title 68, unless there
14 is created a duplication in numbering, reads as follows:

15 A. The Attorney General may, when considered necessary for the
16 enforcement of any provision of the Prevention of Youth Access to
17 Tobacco Act or the Master Settlement Agreement Complementary Act,
18 require each wholesaler or distributor of cigarettes and roll-your-
19 own tobacco products intended for sale in this state to file with
20 the Attorney General a report each month of its sales, by brand, to
21 retailers and wholesalers located in this state.

22 B. The wholesaler or distributor shall file a report on or
23 before the twentieth day of each month containing the following
24 information for the sales during the preceding calendar month of

1 cigarettes and roll-your-own tobacco that are subject to this
2 section to each retailer and wholesaler:

3 1. The name and address of the outlet location of each retailer
4 and wholesaler to which the wholesaler or distributor delivered
5 cigarettes, including the city and zip code;

6 2. The monthly sales, including the number of individual
7 cigarettes, by brand name, made to other wholesalers and retailers
8 in packages bearing the excise tax stamp of the State of Oklahoma;

9 3. The monthly sales, including the number of individual
10 cigarettes, by brand name, made to tribal retailers of compacting
11 Tribes, in packages bearing the joint "unity rate" tax stamp
12 purchased from the Oklahoma Tax Commission;

13 4. The monthly sales, including the number of individual
14 cigarettes, by brand name, made to wholesalers, retailers or
15 consumers located outside the State of Oklahoma in packages not
16 bearing the excise tax stamp of the State of Oklahoma;

17 5. The monthly sales, including the number of individual
18 cigarettes, by brand name, made to noncompacting Tribes located in
19 the State of Oklahoma that bear the black tax-free stamp for sales
20 to tribal members of a noncompacting Tribe;

21 6. The monthly sales of individual containers of roll-your-own
22 tobacco products, by brand name and by weight, upon which the state
23 excise or "unity" tax has been paid, the monthly sales of individual
24 containers of roll-your-own tobacco products, by brand name and by

1 weight, made to wholesalers, retailers or consumers located outside
2 the State of Oklahoma on which the state excise tax has not been
3 paid and the monthly sales of individual containers of roll-your-own
4 tobacco products, by brand name and by weight, made to noncompacting
5 Tribes located within the State of Oklahoma; and

6 7. All monthly net sales reports shall include the invoice
7 number and invoice date of cigarettes sold, distributed or shipped
8 into Oklahoma. The reports shall also include the beginning and
9 ending inventory for each type of stamp held during the reporting
10 period.

11 C. Except as provided by this subsection, the wholesaler or
12 distributor shall file the report required by this section with the
13 Attorney General and the Oklahoma Tax Commission electronically.

14 D. Notwithstanding any other provision of law the Attorney
15 General, in the sole discretion of the Attorney General, may use the
16 information contained in the reports received under this section and
17 reports received from the Oklahoma Tax Commission to investigate and
18 enforce the provisions of the Prevention of Youth Access to Tobacco
19 Act and the Master Settlement Agreement Complementary Act and to
20 demonstrate compliance of the state with the terms of the Master
21 Settlement Agreement and a subsequent settlement agreement entered
22 into with the participating manufacturers to the Master Settlement
23 Agreement in April 2013 and to provide information to any data
24 clearinghouse or similar entity established as required by the terms

1 of the Master Settlement Agreement and any subsequent settlement
2 agreement. The Attorney General may use the information to enforce
3 statutes related to contraband tobacco sales, including the seizure
4 of contraband products. **For the purpose of enabling the Attorney
5 General to determine compliance with the provisions of this act and
6 statutes related to contraband tobacco sales, the Attorney General
7 shall have the right to inspect all premises and records related to
8 the manufacture, production, storage, transportation, sale or
9 exchange of cigarettes and tobacco products located in the State of
10 Oklahoma, or located out of state and licensed by the Oklahoma Tax
11 Commission or are on the Attorney General's Directory of Tobacco
12 Product Manufacturers.** The Attorney General may condition the
13 release of the reports received by the Attorney General to only
14 those third parties who have signed and pledged to abide by the
15 terms of any confidentiality agreement that the Attorney General
16 deems necessary to preserve the confidentiality of the records.

17 SECTION 3. This act shall become effective November 1, 2014.

18 COMMITTEE REPORT BY: COMMITTEE ON FINANCE
19 April 1, 2014 - DO PASS AS AMENDED
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