

1 **HOUSE OF REPRESENTATIVES - FLOOR VERSION**

2 STATE OF OKLAHOMA

3 2nd Session of the 54th Legislature (2014)

4 COMMITTEE SUBSTITUTE
5 FOR
6 HOUSE BILL NO. 2363

By: Cox

7
8 COMMITTEE SUBSTITUTE

9 An Act relating to cigarette tax; amending 68 O.S.
10 2011, Section 360.9, which relates to the listing of
11 nonparticipating manufacturers in the Oklahoma
12 Tobacco Directory; deleting certain listing
13 requirements; requiring certain nonparticipating
14 manufacturer to post certain bond; listing conditions
15 which if met require the filing of a bond; listing
16 conditions for determining noncompliance; deleting
17 certain bonding requirements; deleting criteria for
18 determining noncompliance with certain laws; deleting
19 certain definition; deleting bonding requirement for
20 certain manufacturer; defining an affiliate; listing
21 conditions a nonparticipating manufacturer shall meet
22 to be included in the Oklahoma Tobacco Directory;
23 establishing criteria and amount of bonds required of
24 certain manufacturers; providing time period for
 posting a bond by certain manufacturers; authorizing
 execution of the bond for a certain amount upon the
 failure of a manufacturer to make a certain deposit;
 stating use of escrow amounts collected; authorizing
 the Attorney General to exclude a manufacturer from
 inclusion in the Directory under certain
 circumstances; authorizing the Attorney General to
 collect certain information and material from
 nonparticipating manufacturers; allowing the Attorney
 General when necessary to require certain wholesalers
 or distributors to file monthly reports; specifying
 reporting date; listing information required to be
 included in the report; requiring electronic filing
 of the report; allowing the Attorney General to
 establish alternative filing procedures and methods;

1 authorizing the Attorney General to use report
2 information to investigate and enforce certain laws
3 and demonstrate certain compliance; providing for
4 limited release of reports; providing for
5 codification; and providing an effective date.

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

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

9 Section 360.9 A. Notwithstanding any other provision of law,
10 ~~if a newly qualified nonparticipating manufacturer is to be listed~~
11 ~~in the Oklahoma Tobacco Directory (the Directory), or if the~~
12 ~~Attorney General reasonably determines that any nonparticipating~~
13 ~~manufacturer who has filed a certification pursuant to Section 360.4~~
14 ~~of Title 68 of the Oklahoma Statutes poses an elevated risk for~~
15 ~~noncompliance with the Master Settlement Agreement or with the~~
16 ~~Prevention of Youth Access to Tobacco Act, neither such~~
17 ~~nonparticipating manufacturer nor any of its brand families shall be~~
18 ~~included in the Directory unless and until such nonparticipating~~
19 ~~manufacturer, or its United States importer that undertakes joint~~
20 ~~and several liability for the performance of the manufacturer in~~
21 ~~accordance with Section 13 of this act, has posted a bond in~~
22 ~~accordance with this section~~ any nonparticipating manufacturer shall
23 post a bond for the exclusive benefit of this state if:

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

5 2. It had been previously listed in the Directory, but was
6 involuntarily removed or denied recertification for noncompliance
7 with the Master Settlement Agreement or the Prevention of Youth
8 Access to Tobacco Act, unless the removal was determined to have
9 been erroneous or illegal; or

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

19 a. any state has removed the manufacturer or its brand or
20 brand families or an affiliate or any of the
21 affiliate's brands or brand families from the tobacco
22 directory of the state or placed the manufacturer or
23 its brand or brand families or an affiliate or any of
24 the affiliate's brands on a list of noncompliant

1 companies, brands or brand families for noncompliance
2 with the state law at any time during the calendar
3 year or within the past five (5) consecutive calendar
4 years, unless it submits proof that its brands, or the
5 brands of an affiliate were erroneously or illegally
6 removed from a tobacco directory of a state,

7 b. any state, or the federal government, has filed
8 litigation against or has an unsatisfied judgment
9 against the manufacturer or any affiliate thereof for
10 escrow or for penalties, costs, or attorney fees
11 related to noncompliance with state escrow laws or
12 complementary legislation, or

13 c. the nonparticipating manufacturer or any affiliate has
14 been charged, entered a plea or has been convicted of
15 violating the Contraband Cigarette Trafficking Act,
16 the Jenkins Act or the PACT Act.

17 ~~B. The bond shall be posted by corporate surety located within~~
18 ~~the United States in an amount equal to the greater of Fifty~~
19 ~~Thousand Dollars (\$50,000.00) or the amount of escrow the~~
20 ~~manufacturer in either its current or predecessor form was required~~
21 ~~to deposit as a result of its sales in the previous calendar year in~~
22 ~~Oklahoma. The bond shall be written in favor of the State of~~
23 ~~Oklahoma and shall be conditioned on the performance by the~~
24 ~~nonparticipating manufacturer, or its United States importer that~~

1 ~~undertakes joint and several liability for the performance of the~~
2 ~~manufacturer in accordance with Section 13 of this act, of all of~~
3 ~~its duties and obligations under the Prevention of Youth Access to~~
4 ~~Tobacco Act and the Master Settlement Agreement Complementary Act~~
5 ~~during the year in which the certification is filed and the next~~
6 ~~succeeding calendar year.~~

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

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

14 ~~a. the manufacturer did not make underpayment knowingly~~
15 ~~or recklessly and the manufacturer promptly cured the~~
16 ~~underpayment within one hundred eighty (180) days'~~
17 ~~notice of it, or~~

18 ~~b. the underpayment or lack of payment is the subject of~~
19 ~~a good faith dispute as documented to the satisfaction~~
20 ~~of the Attorney General and the underpayment is cured~~
21 ~~within one hundred eighty (180) days of entry of a~~
22 ~~final order establishing the amount of the required~~
23 ~~escrow payment;~~

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

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

10 ~~D. As used in this section, "newly qualified nonparticipating~~
11 ~~manufacturer" means a nonparticipating manufacturer that has not~~
12 ~~previously been listed in the Oklahoma Tobacco Directory. Such~~
13 ~~manufacturer may be required to post a bond in accordance with this~~
14 ~~section for the first three (3) years of their listing, or longer if~~
15 ~~they have been determined to pose an elevated risk for~~
16 ~~noncompliance. Any other nonparticipating manufacturer that has~~
17 ~~been determined to pose an elevated risk for noncompliance shall be~~
18 ~~required to post a bond in accordance with this section for three~~
19 ~~(3) years or longer if such nonparticipating manufacturer still~~
20 ~~poses an elevated risk at the end of such three-year period.~~

21 For purposes of this section an affiliate is an entity or
22 individual that either controls or is controlled by the
23 nonparticipating manufacturer, regardless of whether the control
24 being exercised is direct or indirect.

1 C. Neither a nonparticipating manufacturer nor any of its brand
2 families shall be included in the Directory unless and until the
3 nonparticipating manufacturer:

4 1. Undertakes joint and several liability with its importer for
5 the performance of the manufacturer in accordance with Section
6 360.5-1 of this title and, if required, has posted a joint bond in
7 accordance with this section;

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

9 a. registered to do business within the state with the
10 Oklahoma Secretary of State,

11 b. maintained a registered service agent within the State
12 of Oklahoma, and

13 c. agreed that the Oklahoma Secretary of State will act
14 as service agent if the registered service agent dies,
15 resigns or otherwise is unavailable to accept service
16 on behalf of the nonparticipating manufacturer or
17 importer; and

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

23 D. 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 fifty percent (50%) of the required
2 escrow that the manufacturer in either its current or predecessor
3 form was required to deposit as a result of its sales in Oklahoma
4 during the last full calendar year it was listed in the Directory.
5 The bond shall be written in favor of the State of Oklahoma and
6 shall be conditioned on the performance by the nonparticipating
7 manufacturer, or its United States importer that undertakes joint
8 and several liability for the performance of the manufacturer in
9 accordance with Section 360.5-1 of this title, of all of its duties
10 and obligations under the Prevention of Youth Access to Tobacco Act
11 and the Master Settlement Agreement Complementary Act during the
12 year in which the certification is filed and the next succeeding
13 calendar year.

14 E. Any manufacturer or importer required to post a bond in
15 accordance with this section shall do so for three (3) consecutive
16 years, or longer if the Attorney General determines the manufacturer
17 or importer poses an elevated risk at the end of the three-year
18 period.

19 F. If a nonparticipating manufacturer fails to make or have
20 made in its behalf deposits equal to the full amount owed for a
21 quarter within fifteen (15) days of the due date of the quarter, the
22 State of Oklahoma may execute on the bond in the amount of the
23 remaining escrow deposit due. Escrow amounts collected from the
24 bond shall be used to reduce the amount of escrow due from and

1 penalties assessed against that nonparticipating manufacturer and
2 unpaid escrow that exceeds the amount covered by the bond remains
3 due from the nonparticipating manufacturer and any importer that is
4 jointly and severally liable for its cigarette sales into the state.

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

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

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

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

20 H. The Attorney General shall have the authority to require a
21 nonparticipating manufacturer to submit all information and
22 materials the Attorney General deems appropriate to determine
23 compliance of the nonparticipating manufacturer with this section
24 and other related laws including the grounds for retaining or not

1 including a manufacturer or its brands and brand families in the
2 Directory.

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

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

13 B. The wholesaler or distributor shall file a report on or
14 before the twentieth day of each month containing the following
15 information for the sales during the preceding calendar month of
16 cigarettes and roll-your-own tobacco that are subject to this
17 section to each retailer and wholesaler:

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

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

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

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

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

13 6. The monthly sales of individual containers of roll-your-own
14 tobacco products, by brand name and by weight, upon which the state
15 excise or "unity" tax has been paid, the monthly sales of individual
16 containers of roll-your-own tobacco products, by brand name and by
17 weight, made to wholesalers, retailers or consumers located outside
18 the State of Oklahoma on which the state excise tax has not been
19 paid and the monthly sales of individual containers of roll-your-own
20 tobacco products, by brand name and by weight, made to noncompacting
21 Tribes located within the State of Oklahoma; and

22 7. All monthly net sales reports shall include the invoice
23 number and invoice date of cigarettes sold, distributed or shipped
24 into Oklahoma. The reports shall also include the beginning and

1 ending inventory for each type of stamp held during the reporting
2 period.

3 C. Except as provided by this subsection, the wholesaler or
4 distributor shall file the report required by this section with the
5 Attorney General and the Oklahoma Tax Commission electronically.
6 The Attorney General may establish procedures for allowing an
7 alternative method of filing for a wholesaler or distributor who
8 demonstrates to the Attorney General an inability to comply with the
9 electronic reporting requirement. If the Attorney General
10 determines that another technological method of filing the report is
11 more efficient than electronic filing, the Attorney General may
12 establish procedures requiring its use by wholesalers and
13 distributors.

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. The Attorney General may condition the
5 release of the reports received by the Attorney General to only
6 those third parties who have signed and pledged to abide by the
7 terms of any confidentiality agreement that the Attorney General
8 deems necessary to preserve the confidentiality of the records.

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

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11 COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY, dated 02/20/2014 - DO
12 PASS, As Amended.
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