

## **IC 24-3-5.4 Chapter 5.4. Master Settlement Agreement Protection Act**

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### **IC 24-3-5.4-1 "Brand family"**

Sec. 1. As used in this chapter, "brand family" means cigarettes that are:

(1) sold under the same trademark; and

(2) differentiated from one another by means of modifiers such as menthol, lights, kings, or 100s.

The term includes the use of a brand name, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or other indicia of product identification that is identical or similar to or identifiable with a previously known brand of cigarettes.

*As added by P.L.252-2003, SEC.16.*

### **IC 24-3-5.4-2 "Cigarette"**

Sec. 2. As used in this chapter, "cigarette" has the meaning set forth in [IC 24-3-3-5](#).

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-3"Commission"**

Sec. 3. As used in this chapter, "commission" means the alcohol and tobacco commission created by [IC 7.1-2-1-1](#).

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-4"Department"**

Sec. 4. As used in this chapter, "department" means the department of state revenue.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-5"Distributor"**

Sec. 5. As used in this chapter, "distributor" means a person that:

- (1) purchases cigarettes on which the tax under [IC 6-7-1](#) is not paid; and
- (2) stores, sells, or otherwise disposes of the cigarettes.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-5.5"Importer"**

Sec. 5.5. As used in this chapter, "importer" means a person that imports, other than for personal consumption, one (1) or more brand families of a nonparticipating manufacturer.

*As added by P.L.24-2010, SEC.1.*

#### **IC 24-3-5.4-6"Master settlement agreement"**

Sec. 6. As used in this chapter, "master settlement agreement" has the meaning set forth in [IC 24-3-3-6](#).

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-6.5"Newly qualified nonparticipating manufacturer"**

Sec. 6.5. As used in this chapter, "newly qualified nonparticipating manufacturer" means a nonparticipating manufacturer:

- (1) that has filed a certification under section 13 of this chapter; and
- (2) whose brand families are not listed in a directory under section 14 of this chapter.

*As added by P.L.24-2010, SEC.2.*

#### **IC 24-3-5.4-7"Nonparticipating manufacturer"**

Sec. 7. As used in this chapter, "nonparticipating manufacturer" means a tobacco product manufacturer that is not a participating manufacturer.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-8"Participating manufacturer"**

Sec. 8. As used in this chapter, "participating manufacturer" has the meaning set forth in [IC 24-3-3-12\(1\)](#).

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-9"Qualified escrow fund"**

Sec. 9. As used in this chapter, "qualified escrow fund" has the meaning set forth in [IC 24-3-3-7](#).

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-10"Stamping agent"**

Sec. 10. As used in this chapter, "stamping agent" means a person that may affix a stamp to a package of cigarettes under [IC 6-7-1-15](#).

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-11"Tobacco product manufacturer"**

Sec. 11. As used in this chapter, "tobacco product manufacturer" has the meaning set forth in [IC 24-3-3-10](#).

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-12"Units sold"**

Sec. 12. As used in this chapter, "units sold" has the meaning set forth in [IC 24-3-3-11](#).

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-13Tobacco product manufacturer certification; brand family list; maintenance of sales documentation by nonparticipating manufacturer**

Sec. 13. (a) Not later than April 30 of each year, a tobacco product manufacturer whose cigarettes are sold in Indiana, whether directly or through a distributor, retailer, or similar intermediary, shall certify to the department and the attorney general that, as of the date of the certification, the tobacco product manufacturer is:

- (1) a participating manufacturer; or
- (2) in full compliance with [IC 24-3-3](#).

The department shall prescribe the form of the certification.

(b) A participating manufacturer shall include in a certification under subsection (a) a list of the participating manufacturer's brand families. The participating manufacturer shall update the list by filing a supplemental certification with the department and the attorney general not less than thirty (30) days before the participating manufacturer adds a brand family or otherwise modifies the list of brand families.

(c) A nonparticipating manufacturer shall include in a certification under subsection (a) a list of the nonparticipating manufacturer's brand families, including the following:

- (1) A separate listing of each brand family that was sold in Indiana during the calendar year before the year in which the certification is filed.
- (2) A separate listing of the number of units sold for each brand family that was sold in Indiana during the calendar year before the year in which the certification is filed.
- (3) An indication of any brand family that was sold in Indiana during the calendar year before the year in which the certification is filed and that is not sold in Indiana as of the date of the certification.
- (4) The name and address of any other manufacturer of a brand family that was sold in Indiana during the calendar year before the year in which the certification is filed.

(d) A nonparticipating manufacturer shall file a supplemental certification with the attorney general not less than thirty (30) days before the nonparticipating manufacturer adds to or otherwise modifies its list of brand families.

(e) A nonparticipating manufacturer shall certify the following in a certification under subsection (a):

- (1) The nonparticipating manufacturer:
  - (A) is registered to do business in Indiana; or

(B) has appointed an agent for service of process and provided notice under section 16 of this chapter.

(2) The nonparticipating manufacturer has:

(A) established and continues to maintain a qualified escrow fund; and

(B) executed a qualified escrow agreement that:

(i) the attorney general has approved; and

(ii) governs the qualified escrow fund.

(3) The nonparticipating manufacturer is in full compliance with:

(A) this section;

(B) section 13.5 of this chapter, if applicable;

(C) section 13.6 of this chapter, if applicable; and

(D) [IC 24-3-3](#).

(4) The name, address, and telephone number of the financial institution that holds the nonparticipating manufacturer's qualified escrow fund.

(5) The account number and any subaccount numbers of the nonparticipating manufacturer's qualified escrow fund.

(6) The amounts and dates of deposits that the nonparticipating manufacturer placed in the qualified escrow fund for cigarettes sold in Indiana during the calendar year before the year in which the certification is filed, including any verification required by the attorney general.

(7) The amounts and dates of withdrawals or transfers of funds that the nonparticipating manufacturer made from a qualified escrow fund into which the nonparticipating manufacturer made or makes escrow payments under [IC 24-3-3](#).

(f) A tobacco product manufacturer shall not include a brand family in the tobacco product manufacturer's certification under subsection (a) unless:

(1) in the case of a participating manufacturer, the participating manufacturer affirms that the brand family is considered the participating manufacturer's cigarettes for purposes of calculating the participating manufacturer's payments under the master settlement agreement for the year in which the certification is filed in the volume and shares determined under the master settlement agreement; or

(2) in the case of a nonparticipating manufacturer, the nonparticipating manufacturer affirms that the brand family is considered to be the nonparticipating manufacturer's cigarettes for purposes of [IC 24-3-3-12\(2\)](#).

(g) This section does not limit or otherwise affect 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 [IC 24-3-3](#).

(h) A nonparticipating manufacturer shall maintain all invoices and documentation of sales and any other relevant information for a period of five (5) years unless otherwise required by law to maintain the invoices, documentation of sales, or other relevant information for more than five (5) years.

*As added by P.L.252-2003, SEC.16. Amended by P.L.24-2010, SEC.3.*

#### **IC 24-3-5.4-13.5 Importers required to provide information to the attorney general**

Sec. 13.5. (a) This section applies to a nonparticipating manufacturer whose principal place of business is located outside the United States.

(b) Each year, a nonparticipating manufacturer shall provide to the attorney general a declaration from each of the nonparticipating manufacturer's importers that does the following:

(1) States that the importer assumes joint and several liability with the nonparticipating manufacturer for the following payments, penalties, costs, and fees with respect to the importer:

(A) Any escrow payments required under [IC 24-3-3-12\(2\)](#) for deposit in a qualified escrow fund.

(B) Any penalties assessed against the nonparticipating manufacturer under [IC 24-3-3](#) or this chapter.

(C) Payment of all costs and fees recovered by the state against the nonparticipating manufacturer under section 28 of this chapter.

(2) Appoints a registered agent for service of process for the importer and provides notice in accordance with section 16 of this chapter.

The attorney general shall prescribe the form of a declaration under this subsection, including dates for filing the declaration.

*As added by P.L.24-2010, SEC.4.*

#### **IC 24-3-5.4-13.6 Bonds required for certain newly qualified and certain nonparticipating manufacturers**

Sec. 13.6. (a) The attorney general may determine that a nonparticipating manufacturer, including a newly qualified nonparticipating manufacturer, poses an elevated risk for noncompliance with this article if any of the following apply:

(1) The nonparticipating manufacturer or an affiliate of a nonparticipating manufacturer has failed to make required payments into a qualified escrow fund in any state during the three (3) calendar years immediately preceding the date of the determination unless:

(A) the nonparticipating manufacturer or affiliate:

(i) did not knowingly or recklessly fail to make the required payments; and

(ii) makes the required payment not more than one hundred eighty (180) days after receiving notice of the missed or insufficient payment; or

(B) the failure to make the required payment is:

(i) the subject of a good faith dispute that is documented to the satisfaction of the attorney general; and

(ii) cured not more than one hundred eighty (180) days after entry of a final order that resolves the good faith dispute and establishes the amount of the required escrow payment.

(2) A state has removed the nonparticipating manufacturer, an affiliate of the nonparticipating manufacturer, or a brand family of the nonparticipating manufacturer or an affiliate of the nonparticipating manufacturer from the state's tobacco directory for noncompliance with state law during the three (3) calendar years immediately preceding the date of the determination.

(3) A state has:

(A) litigation pending; or

(B) an unsatisfied judgment;

against the nonparticipating manufacturer or an affiliate of the nonparticipating manufacturer for escrow payments or penalties, costs, or fees related to the nonparticipating manufacturer or affiliate's noncompliance with the state's escrow laws.

(b) The attorney general shall require:

(1) a newly qualified nonparticipating manufacturer; or

(2) a nonparticipating manufacturer that:

(A) has filed a certification under section 13 of this chapter; and

(B) poses an elevated risk for noncompliance, as determined by the attorney general under subsection (a);

to post a bond as described in subsection (c).

(c) A bond required under subsection (b) must be:

(1) posted by corporate surety located within the United States;

(2) in an amount equal to the greater of:

(A) fifty thousand dollars (\$50,000); or

(B) the amount that the nonparticipating manufacturer is required to place into a qualified escrow fund under [IC 24-3-3-12\(2\)](#) for the calendar year in which the bond is posted;

(3) written in favor of the state of Indiana; and

(4) for a nonparticipating manufacturer, conditioned on the performance of the nonparticipating manufacturer, or an importer that assumes joint and several liability with the nonparticipating manufacturer under section 13.5 of this chapter, of all of obligations and duties of the nonparticipating manufacturer under this article during the calendar year in which the bond is posted and the immediately succeeding calendar year.

(d) If the attorney general determines under subsection (a) that a newly qualified nonparticipating manufacturer poses an elevated risk of noncompliance, the attorney general may require the newly qualified nonparticipating manufacturer to post a bond under subsection (c) for at least the first three (3) years during which the newly qualified nonparticipating manufacturers brand families are listed in a directory under section 14 of this chapter.

*As added by P.L.24-2010, SEC.5.*

### **IC 24-3-5.4-14 Brand family directory; refunds**

Sec. 14. (a) Not later than July 1 of each year, the attorney general shall make available to the public by publishing on accessIndiana (as operated under [IC 4-13.1-2](#)) a directory listing all brand families listed in certifications filed under section 13 of this chapter.

(b) A directory described in subsection (a) shall not include the name or brand families of a nonparticipating manufacturer:

(1) that fails to comply with section 13 of this chapter;

(2) whose certification fails to comply with section 13(c) or 13(e) of this chapter, unless the attorney general determines that the failure has been remedied; or

(3) that:

(A) has filed a certification under section 13 of this chapter; and

(B) poses an elevated risk for noncompliance, as determined by the attorney general under section 13.6(a) of this chapter;

unless the nonparticipating manufacturer, or an importer that assumes joint and several liability with the nonparticipating manufacturer under section 13.5 of this chapter, posts a bond under section 13.6 of this chapter.

(c) The directory may not include a tobacco product manufacturer or a brand family if the attorney general concludes that:

(1) in the case of a nonparticipating manufacturer, all escrow payments required under [IC 24-3-3-12](#) for any period for any brand family, whether or not listed by the 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

(2) all outstanding final judgments, including interest on the judgments, for violations of [IC 24-3-3](#) have not been fully satisfied for the tobacco product manufacturer or brand family.

(d) The directory may not include a newly qualified nonparticipating manufacturer unless the newly qualified nonparticipating manufacturer posts a bond under section 13.6 of this chapter.



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

(f) The attorney general shall post in the directory and transmit by electronic mail or other means to each distributor or stamping agent notice of any removal from the directory of a tobacco product manufacturer or brand family not later than thirty (30) days before the attorney general removes the tobacco product manufacturer or brand family from the directory.

(g) Unless otherwise provided in an agreement between a tobacco product manufacturer and a distributor or stamping agent, a distributor or stamping agent is entitled to a refund from a tobacco product manufacturer for any money paid by the distributor or stamping agent to the tobacco product manufacturer for any cigarettes of the tobacco product manufacturer or brand family that:

- (1) are in the possession of the distributor or stamping agent on; or
- (2) the distributor or stamping agent receives from a retailer after;

the date on which the tobacco product manufacturer or brand family is removed from the directory.

(h) Unless otherwise provided in an agreement between a retailer and a distributor, stamping agent, or tobacco product manufacturer, a retailer is entitled to a refund from a distributor, stamping agent, or tobacco product manufacturer for any money paid by the retailer to the distributor, stamping agent, or tobacco product manufacturer for any cigarettes of the tobacco product manufacturer or brand family that are in the possession of the retailer on the date on which the tobacco product manufacturer or brand family is removed from the directory.

(i) The attorney general shall not restore a tobacco product manufacturer or brand family to the directory until the tobacco product manufacturer pays a distributor, stamping agent, or retailer any refund due under subsection (g) or (h).

(j) A distributor or stamping agent shall provide and update as necessary an electronic mail address to the attorney general for purposes of receiving a notification required by this chapter.

*As added by P.L.252-2003, SEC.16. Amended by P.L.177-2005, SEC.44; P.L.24-2010, SEC.6.*

#### **IC 24-3-5.4-15Stamping, sale, or importation of unlisted cigarettes prohibited**

Sec. 15. A person may not:

- (1) affix a stamp to a package or other container of cigarettes; or
- (2) sell, offer or possess for sale, or import for personal consumption in Indiana cigarettes;

of a tobacco product manufacturer or brand family that is not listed in a directory under section 14 of this chapter.

*As added by P.L.252-2003, SEC.16. Amended by P.L.160-2005, SEC.13.*

#### **IC 24-3-5.4-16Appointment of agent by foreign nonparticipating manufacturer; termination of agency**

Sec. 16. (a) A foreign nonparticipating manufacturer that has not registered to do business in Indiana shall, as a condition precedent to having the foreign nonparticipating manufacturer's brand families listed in a directory under section 14 of this chapter, appoint and engage without interruption the services of an agent in Indiana to act as the foreign nonparticipating manufacturer's agent for the service of process. Service on an agent under this section constitutes legal and valid service of process on the foreign nonparticipating manufacturer that appointed and engaged the services of the agent. The foreign nonparticipating manufacturer shall provide the following information to the department and the attorney general:

- (1) The name, address, and telephone number of the agent.
- (2) Proof of the appointment of the agent.
- (3) The availability of the agent.
- (4) Any other information required by the department or the attorney general.

(b) A foreign nonparticipating manufacturer shall provide notice to the department and the attorney general not less than thirty (30) days before the foreign nonparticipating manufacturer terminates the authority of an agent appointed under this section. The foreign nonparticipating manufacturer shall provide proof to the satisfaction of the attorney general of the appointment of a new agent not less than five (5) days before the foreign nonparticipating manufacturer terminates an existing agency appointment.

(c) If an agent terminates an agency appointment, the foreign nonparticipating manufacturer shall:

- (1) notify the department and the attorney general of the termination not more than five (5) days after the termination; and
- (2) provide proof to the satisfaction of the attorney general of the appointment of a new agent.

(d) A foreign nonparticipating manufacturer that:

- (1) sells products in Indiana; and
- (2) has not appointed an agent under this section;

is considered to have appointed the secretary of state as the foreign nonparticipating manufacturer's agent. The appointment of the secretary of state under this subsection as the foreign nonparticipating manufacturer's agent does not satisfy the condition precedent to having the foreign nonparticipating manufacturer's brand families listed in a directory under section 14 of this chapter.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-17Distributor or stamping agent required to send information to department, commission, and attorney general**

Sec. 17. (a) This section applies after July 31, 2003.

(b) Not later than January 20, April 20, July 20, and October 20 of a calendar year, or more frequently if ordered by the department, the commission, or the attorney general, a distributor or stamping agent shall submit the following information to the department, the commission, and the attorney general:

- (1) A list by brand family of the total number of cigarettes for which the distributor or stamping agent affixed stamps or otherwise paid taxes during the immediately preceding three (3) months.
- (2) Any other information required by the department or the attorney general.

The distributor or stamping agent shall maintain and make available to the department, the commission, and the attorney general for a period of five (5) years all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information that the distributor or stamping agent relied on in reporting to the department, the commission, and the attorney general.

(c) The attorney general may require a distributor or a tobacco product manufacturer to submit additional information to determine whether a tobacco product manufacturer is in compliance with this chapter. The additional information may include samples of the packaging or labeling of each of the tobacco product manufacturer's brand families.

*As added by P.L.252-2003, SEC.16. Amended by P.L.160-2005, SEC.14.*

#### **IC 24-3-5.4-18 Disclosure of information received**

Sec. 18. (a) The department and the commission shall disclose to the attorney general any information received under this chapter and requested by the attorney general for purposes of determining compliance with and enforcing this chapter. The department, the commission, and the attorney general:

- (1) shall share with each other the information received under this chapter; and
- (2) may share the information received under this chapter with other federal, state, or local agencies only for purposes of enforcing this chapter or a corresponding law in another state.

(b) Notwithstanding any other law:

(1) the department, the commission, or the attorney general may provide information received under section 17 of this chapter to a court, an arbitrator, or a data clearinghouse or similar entity:

(A) for the purposes of making calculations required by the master settlement agreement and related settlement agreements; and

(B) with counsel for the parties;

upon the execution of a protective order approved by the attorney general; and

(2) any tobacco sales data provided from an outside party and received under the master settlement agreement must be treated as confidential under [IC 5-14-3-4\(a\)\(4\)](#) and [IC 5-14-3-4\(a\)\(5\)](#).

*As added by P.L.252-2003, SEC.16. Amended by P.L.231-2015, SEC.12.*

#### **IC 24-3-5.4-19 Proof of qualified escrow fund by nonparticipating manufacturer**

Sec. 19. The attorney general may require a nonparticipating manufacturer to provide from the financial institution that holds the nonparticipating manufacturer's qualified escrow fund for purposes of complying with this chapter proof of:

- (1) the amount of money in the qualified escrow fund being held on behalf of the state;
- (2) the dates of any deposits into the qualified escrow fund; and
- (3) the dates and amounts of any withdrawals from the qualified escrow fund.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-20Rules**

Sec. 20. The department or the attorney general may adopt rules under [IC 4-22-2](#) to implement this chapter, including rules to:

- (1) require a tobacco product manufacturer subject to section 13(c) of this chapter to make required escrow deposits in installments during the calendar year in which the sales covered by the deposits are made; or
- (2) produce information sufficient to enable the attorney general to determine the adequacy of the amount of an installment deposit described in subdivision (1).

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-21Revocation of suspension of distributor's license; penalty**

Sec. 21. (a) This section applies in addition to or instead of any other civil or criminal penalty.

(b) The department may revoke or suspend the license of a distributor, a stamping agent, or any other person that violates section 15 of this chapter.

(c) Each:

- (1) stamp affixed;
- (2) sale of cigarettes; or
- (3) offer or possession of cigarettes for sale;

in violation of section 15 of this chapter constitutes a separate violation.

(d) The department or the commission may impose a civil penalty that does not exceed the greater of:

- (1) five hundred percent (500%) of the retail value of the cigarettes sold; or
- (2) five thousand dollars (\$5,000);

for each violation of section 15 of this chapter.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-22 Seizure and forfeiture of unlisted cigarettes**

Sec. 22. Whenever the department or the commission discovers any cigarettes that have been sold, offered for sale, or possessed for sale in Indiana in violation of section 15 of this chapter, the department or the commission may seize and take possession of the cigarettes. The seized cigarettes shall be forfeited to the state. The department or the commission shall destroy the seized cigarettes.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-23 Injunction**

Sec. 23. The attorney general may seek an injunction to:

- (1) restrain a threatened or an actual violation of section 15 of this chapter by a stamping agent; and
- (2) compel the stamping agent to comply with sections 15, 17(b), and 17(c) of this chapter.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-24 Violation; Class C misdemeanor**

Sec. 24. (a) A person shall not:

- (1) sell or distribute; or
- (2) 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 Indiana in violation of section 15 of this chapter.

(b) A person who violates this section commits a Class C misdemeanor.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-25 Unfair and deceptive business practice**

Sec. 25. A person who violates section 15 of this chapter engages in an unfair and deceptive business practice.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-26Judicial review**

Sec. 26. A determination by the attorney general to not list in or to remove from a directory under section 14 of this chapter a brand family or a tobacco product manufacturer is subject to review only by the Marion County circuit court.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-27Issuance of registration certificate**

Sec. 27. The department shall not issue a registration certificate under [IC 6-7-1-16\(a\)](#) to a distributor unless the distributor certifies in writing that the distributor will comply with this chapter.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-28Recovery of costs**

Sec. 28. In an action brought by the state to enforce this chapter, the state may recover:

- (1) the costs of investigation;
- (2) expert witness fees;
- (3) the costs of the action; and
- (4) attorney's fees.

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-29Disgorged profits**

Sec. 29. If a court determines that a person has violated this chapter, the court shall order any profits, gain, gross receipts, or other benefit from the violation to be disgorged and paid to the treasurer of state for deposit in the Indiana tobacco master settlement agreement fund under [IC 4-12-1-14.3](#).

*As added by P.L.252-2003, SEC.16.*

#### **IC 24-3-5.4-30Penalties deposited in enforcement and administration fund**

Sec. 30. All:

(1) civil penalties imposed under; and

(2) judgments for violations of;

this chapter shall be deposited in the enforcement and administration fund established under [IC 7.1-4-10-1](#).

*As added by P.L.252-2003, SEC.16.*