

HOUSE BILL NO. 663
INTRODUCED BY J. LASLOVICH

A BILL FOR AN ACT ENTITLED: "AN ACT ENHANCING ENFORCEMENT OF THE TOBACCO PRODUCTS RESERVE FUND LAW; REQUIRING TOBACCO PRODUCT MANUFACTURERS, AS A CONDITION TO THE ABILITY TO SELL THEIR PRODUCTS IN THIS STATE, TO CERTIFY COMPLIANCE WITH SECTION 16-11-403, MCA, TO IDENTIFY THE BRAND FAMILIES OF THEIR PRODUCTS, TO REGISTER TO DO BUSINESS IN THIS STATE, AND TO APPOINT AN AGENT FOR SERVICE OF PROCESS, IF NOT DOMICILED IN THIS STATE; REQUIRING THE ATTORNEY GENERAL TO ESTABLISH AND PUBLISH ON THE ATTORNEY GENERAL'S WEBSITE A DIRECTORY OF TOBACCO PRODUCT MANUFACTURERS AND BRAND FAMILIES THAT ARE IN COMPLIANCE WITH THE TOBACCO PRODUCTS RESERVE FUND LAW; PROHIBITING WHOLESALERS FROM AFFIXING TAX INSIGNIA TO CIGARETTES OR BRAND FAMILIES MANUFACTURED BY TOBACCO PRODUCT MANUFACTURERS NOT INCLUDED IN THE ATTORNEY GENERAL'S DIRECTORY; REQUIRING WHOLESALERS TO REPORT INFORMATION REGARDING SALES OF NONPARTICIPATING MANUFACTURER CIGARETTES AND BRAND FAMILIES IN THIS STATE; ALLOWING THE ATTORNEY GENERAL TO PROVIDE BY RULE FOR THE MAKING OF ESCROW PAYMENTS IN INSTALLMENTS; ALLOWING THE ATTORNEY GENERAL TO RECOVER INVESTIGATION EXPENSES, ATTORNEY FEES, AND COSTS IN ACTIONS TO ENFORCE THE TOBACCO PRODUCTS RESERVE FUND LAW; STATUTORILY APPROPRIATING TO THE DEPARTMENT OF JUSTICE ANY EXPENSES, COSTS, OR ATTORNEY FEES AWARDED; PROVIDING PENALTIES; PROVIDING FOR JUDICIAL REVIEW OF DECISIONS BY THE ATTORNEY GENERAL REGARDING THE DIRECTORY; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTION 17-7-502, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE, A RETROACTIVE APPLICABILITY DATE, AND A CONTINGENT VOIDNESS PROVISION."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Findings and purpose.** The legislature finds that violations of 16-11-401 through 16-11-403 threaten the integrity of the tobacco master settlement agreement, the fiscal soundness of the state, and the public health. The legislature finds that enacting procedural enhancements will help prevent violations of 16-11-401 through 16-11-403 and will safeguard the master settlement agreement, the fiscal

soundness of the state, and the public health.

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 12], the following definitions apply:

(1) "Brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including but not limited to "menthol", "lights", "kings", and "100s", and includes any use of a 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.

(2) "Cigarette" has the meaning provided in 16-11-402(4).

(3) "Department" means the department of revenue.

(4) "Master settlement agreement" has the meaning provided in 16-11-402(5).

(5) "Nonparticipating manufacturer" means any tobacco product manufacturer that is not a participating manufacturer.

(6) "Participating manufacturer" has the meaning provided in section II(jj) of the master settlement agreement defined in 16-11-402(5) and all amendments thereto.

(7) "Qualified escrow fund" has the meaning provided in 16-11-402(6).

(8) "Tobacco product manufacturer" has the meaning provided in 16-11-402(9).

(9) "Units sold" has the meaning provided in 16-11-402(10).

(10) "Wholesaler" means a person that is authorized to affix tax insignia to packages or other containers of cigarettes under 16-11-113 or any person that is required to remit the tobacco tax imposed on cigarettes pursuant to 16-11-111.

NEW SECTION. Section 3. Certifications. (1) Every tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a wholesaler, distributor, retailer, or similar intermediary or intermediaries, shall execute and deliver, on a form prescribed by the attorney general, a certification to the director of the department and the attorney general, no later than April 30 of each year, certifying under penalty of perjury that, as of the date of the certification, the tobacco product manufacturer either is a participating manufacturer or is in full compliance with 16-11-403.

(2) A participating manufacturer must include in its certification a list of its brand families.

(3) (a) A nonparticipating manufacturer must include in its certification a list of all of its brand families,

the number of units sold in the state during the preceding calendar year for each brand family, and a list of all of its brand families that have been sold in the state at any time during the current calendar year.

(b) The certification must indicate by an asterisk any brand family sold in the state during the preceding calendar year that is no longer being sold in the state as of the date of the certification.

(c) The certification must identify by name and address any other manufacturer of the brand families in the preceding or current calendar year.

(4) A tobacco product manufacturer must update its list of brand families 30 calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the attorney general and the director of the department.

(5) A nonparticipating manufacturer shall further certify:

(a) that the nonparticipating manufacturer is registered to do business in the state and has appointed an agent for service of process and has provided notice as required by [section 6];

(b) that the nonparticipating manufacturer has:

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

(ii) executed a qualified escrow agreement that has been reviewed and approved by the attorney general and that governs the qualified escrow fund;

(c) that the nonparticipating manufacturer is in full compliance with 16-11-403 and this section and any rules adopted pursuant to 16-11-403 and this section;

(d) (i) the name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established the qualified escrow fund required by 16-11-403 and all rules adopted pursuant to 16-11-403;

(ii) the account number of the qualified escrow fund and any subaccount number for the state of Montana;

(iii) the amount the nonparticipating manufacturer placed in the qualified escrow fund for cigarettes sold in the state during the preceding calendar year, the date and amount of each deposit, and any evidence or verification considered necessary by the attorney general to confirm the provisions of this subsection (5)(d)(iii); and

(iv) the amounts and dates of any withdrawal or transfer of funds that the nonparticipating manufacturer made at any time from the qualified escrow fund or from any other qualified escrow fund into which the nonparticipating manufacturer ever made escrow payments pursuant to 16-11-403 and all rules adopted pursuant to 16-11-403.

(6) A tobacco product manufacturer may not include a brand family in its certification unless:

(a) in the case of a participating manufacturer, the participating manufacturer affirms that the brand family is to be considered 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

(b) in the case of a nonparticipating manufacturer, the nonparticipating manufacturer affirms that the brand family is to be considered to be its cigarettes for purposes of 16-11-403.

(7) [Sections 1 through 12] may not be construed to 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 payment under the master settlement agreement or for purposes of 16-11-401 through 16-11-403.

(8) A tobacco product manufacturer shall maintain all invoices and documentation of sales and other similar information relied upon for its certifications for a period of 5 years unless otherwise required by law to maintain them for a longer period of time.

NEW SECTION. Section 4. Directory of cigarettes approved for stamping and sale. (1) Not later than [90 days after the effective date of this section], the attorney general shall develop and publish on the attorney general's website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of [section 3] and all brand families that are listed in the certifications, except as otherwise provided in this section.

(2) The attorney general may not include or retain in the directory the name or brand families of any nonparticipating manufacturer that has failed to provide the required certification or whose certification the attorney general determines is not in compliance with [section 3], unless the attorney general has determined that the violation has been cured to the satisfaction of the attorney general.

(3) Neither a tobacco product manufacturer nor a brand family may be included or retained in the directory if the attorney general concludes, in the case of a nonparticipating manufacturer that:

(a) an escrow payment required pursuant to 16-11-403 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) an outstanding final judgment, including interest on the judgment, for a violation of 16-11-403 has not been fully satisfied for the brand family or the manufacturer.

(4) The attorney general shall update the directory as necessary in order 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 [sections 1 through 12]. The attorney general shall transmit by electronic mail and certified mail,

return receipt requested, to each wholesaler notice of any addition to or removal from the directory of any tobacco product manufacturer or brand family. Unless otherwise provided by an agreement between the wholesaler and a tobacco product manufacturer, the wholesaler is entitled to a refund from a tobacco product manufacturer for any money paid by the wholesaler to the tobacco product manufacturer for any cigarettes or roll-your-own tobacco of the tobacco product manufacturer still held by the wholesaler on the date of notice of the removal from the directory of that tobacco product manufacturer or brand family. A wholesaler seeking a refund under this subsection (4) shall, as promptly as is reasonably practicable, return the cigarettes or roll-your-own tobacco for which a refund is sought to the tobacco product manufacturer or otherwise dispose of the cigarettes or tobacco by a means other than by delivery for sale in the state. The attorney general may not restore to the directory the tobacco product manufacturer or the brand family until the tobacco product manufacturer has paid any refund due to the wholesaler.

(5) Every wholesaler must provide and update as necessary an electronic mail address to the attorney general for the purpose of receiving any notifications required by [sections 1 through 12].

NEW SECTION. Section 5. Prohibition against stamping or sale of cigarettes not in directory. (1)

It is unlawful for any person to:

(a) affix a tax insignia to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory; or

(b) sell, offer for sale, or possess for sale in this state cigarettes of a tobacco product manufacturer or brand family not included in the directory.

(2) A tobacco product is not possessed for sale under [section 9(2)] and subsection (1)(b) of this section if it is not offered for sale in this state and is held only for the period of time reasonably necessary to dispose of it pursuant to the refund procedure set forth in [section 4(4)].

NEW SECTION. Section 6. Agent for service of process. (1) Any nonresident or foreign nonparticipating manufacturer that has not registered to do business in the state as a foreign corporation or business entity must, as a condition precedent to having its brand families included or retained in the directory, appoint and continually engage without interruption the services of an agent in this state to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of [sections 1 through 12] and 16-11-403, may be served in any manner authorized by law. The service constitutes legal and valid service of process on the nonparticipating manufacturer. The nonparticipating

manufacturer must provide the name, address, phone number, and proof of the appointment and availability of the agent to the satisfaction of the attorney general.

(2) The nonparticipating manufacturer must provide notice to the attorney general at least 30 calendar days prior to termination of the authority of an agent and must further provide proof to the satisfaction of the attorney general of the appointment of a new agent no less than 5 calendar days prior to the termination of an existing agent appointment. If an agent terminates an agency appointment, the nonparticipating manufacturer must notify the attorney general of the termination within 5 calendar days and include proof to the satisfaction of the attorney general of the appointment of a new agent.

NEW SECTION. Section 7. Reporting of information. (1) Not later than 20 calendar days after the end of each calendar quarter and more frequently if directed by the attorney general, each wholesaler shall submit information that the attorney general requires to facilitate compliance with this section by nonparticipating manufacturers, including but not limited to a list by brand family of the total number of nonparticipating manufacturer cigarettes or, in the case of nonparticipating manufacturer roll-your-own tobacco, the equivalent amount of tobacco, calculated as provided in 16-11-402(4), on which the wholesaler precollected tax as provided in 16-11-113 or 16-11-203 and that the wholesaler sold during the period covered by the report. The wholesaler shall 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 5 years.

(2) The department is authorized to disclose to the attorney general any information received by it and requested by the attorney general for purposes of determining compliance with and enforcing the provisions of [sections 1 through 12]. The department and attorney general shall share the information received under [sections 1 through 12] with each other and may share the information with other federal, state, or local agencies only for the purposes of enforcement of [sections 1 through 12], 16-11-403, or the corresponding laws of other states.

(3) The attorney general may require at any time from the nonparticipating manufacturer proof from the financial institution in which the manufacturer has established a qualified escrow fund for the purpose of compliance with 16-11-403 of:

- (a) the amount of money in the fund, exclusive of interest;
- (b) the amount and dates of each deposit to the fund; and
- (c) the amount and dates of each withdrawal from the fund.

(4) In addition to the information required to be submitted pursuant to subsections (1) through (3), the

attorney general may require a wholesaler or tobacco product manufacturer to submit any additional information, including but not limited to samples of the packaging or labeling of each brand family, to enable the attorney general to determine whether a tobacco product manufacturer or wholesaler is in compliance with [sections 1 through 12].

NEW SECTION. Section 8. Escrow installments. To promote compliance with the provisions of [sections 1 through 12], the attorney general may adopt rules requiring a tobacco product manufacturer to make the escrow deposits required in 16-11-403 in installments during the year in which the sales covered by the deposits are made. The attorney general may require production of information sufficient to enable the attorney general to determine the adequacy of the amount of the installment deposit.

NEW SECTION. Section 9. Penalties and other remedies. (1) In addition to any other civil or criminal remedy provided by law, upon a determination that a wholesaler has violated [section 5] or any rule adopted pursuant to that section, the license of the wholesaler may be revoked or suspended in the manner provided by 16-11-144, in a proceeding brought by the department or by the attorney general. For each violation of [section 5], a civil penalty in the amount of \$250 for the first full or partial pack and \$10 for each additional full or partial pack to which a tax insignia is affixed or that is sold, offered for sale, or possessed for sale in violation of [section 5] may be imposed. Each tax insignia affixed and each offer to sell cigarettes in violation of [section 5] constitutes a separate violation. The penalty may be imposed in the manner provided by 16-11-143(2) in a proceeding brought by the department or the attorney general.

(2) Any cigarettes that have been sold, offered for sale, or possessed for sale in this state in violation of [section 5] may be considered contraband under 16-11-147. The cigarettes are subject to seizure and forfeiture as provided in 16-11-147, and all cigarettes seized and forfeited must be destroyed and not resold.

(3) The attorney general may seek an injunction to restrain a threatened or actual violation of [section 5 or 7(1) or (4)] by a wholesaler and to compel the wholesaler to comply with those sections.

(4) In any action brought pursuant to [sections 1 through 12], the prevailing party is entitled to recover the costs of the action and reasonable attorney fees calculated as provided in [section 13]. If the state is the prevailing party, its recoverable costs must include the state's costs of investigation of the violation.

(5) (a) It is unlawful for a person to:

(i) sell or distribute cigarettes; or

(ii) 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 the state in violation of [section 5].

(b) A violation of this section is a misdemeanor punishable as provided in 16-11-148.

(6) If a court determines that a person has violated [sections 1 through 12], the court shall order any profits, gain, gross receipts, or other benefit from the violation to be paid to the state treasurer for deposit in the trust fund created by Article XII, section 4, of the Montana constitution.

(7) Unless otherwise expressly provided, the remedies or penalties provided by [sections 1 through 12] are cumulative to each other and to the remedies or penalties available under all other laws of this state.

NEW SECTION. Section 10. Contested case and judicial review of attorney general determinations. A determination of the attorney general not to include or to remove from the directory a brand family or tobacco product manufacturer is subject to review by the attorney general or an employee of the department of justice designated by the attorney general to issue final decisions under [sections 1 through 12] in the manner prescribed by Title 2, chapter 4, part 6. The decision of the attorney general or designated employee constitutes the final agency decision, and judicial review may be sought from the final decision as provided in Title 2, chapter 4, part 7.

NEW SECTION. Section 11. Rules. The attorney general may adopt rules necessary to implement [sections 1 through 12].

NEW SECTION. Section 12. Construction. If a court of competent jurisdiction finds that the provisions of [sections 1 through 12] and of 16-11-401 through 16-11-403 conflict and cannot be harmonized, then the legislature intends the provisions of 16-11-401 through 16-11-403 to control.

NEW SECTION. Section 13. Attorney fees and costs. (1) In an action under 16-11-403(2)(c), the court, upon a finding that a tobacco product manufacturer has failed to comply with its obligations under 16-11-403(1) or (2)(a), must award the attorney general the expenses incurred in investigating the claim, the costs of suit, and reasonable attorney fees. In cases in which outside counsel represents the attorney general, the attorney fees awarded must equal the outside counsel charges reasonably incurred by the attorney general for attorney fees and expenses in prosecuting the action. In all other cases, the attorney fees must be calculated by reference to the hourly rate charged by the agency legal services bureau for the provision of legal services to state agencies, multiplied by the number of attorney hours devoted to the prosecution of the action, plus the

actual cost of any expenses reasonably incurred in the prosecution of the action.

(2) Investigation expenses, attorney fees, and costs recovered under this section are allocated to the department of justice for deposit in the attorney general's major litigation account and may be used by the attorney general for any purpose for which funds appropriated to that account may be used. The funds are statutorily appropriated as provided in 17-7-502.

Section 14. Section 17-7-502, MCA, is amended to read:

"17-7-502. Statutory appropriations -- definition -- requisites for validity. (1) A statutory appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the need for a biennial legislative appropriation or budget amendment.

(2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both of the following provisions:

(a) The law containing the statutory authority must be listed in subsection (3).

(b) The law or portion of the law making a statutory appropriation must specifically state that a statutory appropriation is made as provided in this section.

(3) The following laws are the only laws containing statutory appropriations: 2-15-151; 2-17-105; 5-13-403; 10-3-203; 10-3-310; 10-3-312; 10-3-314; 10-4-301; 15-1-111; 15-1-113; 15-1-121; 15-23-706; 15-35-108; 15-36-324; 15-37-117; 15-38-202; 15-65-121; 15-70-101; [section 13]; 17-3-106; 17-3-212; 17-3-222; 17-3-241; 17-6-101; 17-7-304; 18-11-112; 19-3-319; 19-9-702; 19-13-604; 19-17-301; 19-18-512; 19-19-305; 19-19-506; 19-20-604; 20-8-107; 20-9-534; 20-9-622; 20-26-1503; 22-3-1004; 23-5-306; 23-5-409; 23-5-612; 23-5-631; 23-7-301; 23-7-402; 37-43-204; 37-51-501; 39-71-503; 42-2-105; 44-12-206; 44-13-102; 50-4-623; 53-6-703; 53-24-206; 75-1-1101; 75-5-1108; 75-6-214; 75-11-313; 80-2-222; 80-4-416; 80-5-510; 80-11-518; 82-11-161; 87-1-513; 90-3-1003; 90-6-710; and 90-9-306.

(4) There is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing, paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued pursuant to the laws of Montana. Agencies that have entered into agreements authorized by the laws of Montana to pay the state treasurer, for deposit in accordance with 17-2-101 through 17-2-107, as determined by the state treasurer, an amount sufficient to pay the principal and interest as due on the bonds or notes have statutory appropriation authority for the payments. (In subsection (3): pursuant to Ch. 422, L. 1997, the inclusion of 15-1-111 terminates on July 1, 2008, which is the date that section is repealed; pursuant to sec. 10, Ch. 360, L. 1999, the inclusion of 19-20-604 terminates when the amortization period for the teachers' retirement system's

unfunded liability is 10 years or less; pursuant to sec. 4, Ch. 497, L. 1999, the inclusion of 15-38-202 terminates July 1, 2014; pursuant to sec. 10(2), Ch. 10, Sp. L. May 2000, the inclusion of 15-35-108 and 90-6-710 terminates June 30, 2005; pursuant to sec. 17, Ch. 414, L. 2001, the inclusion of 2-15-151 terminates December 31, 2006; and pursuant to sec. 2, Ch. 594, L. 2001, the inclusion of 17-3-241 becomes effective July 1, 2003.)"

NEW SECTION. Section 15. Contingent voidness. If any provision of [this act] causes 16-11-401 through 16-11-403 to no longer constitute a qualifying statute, as defined in section IX(d)(2)(E) of the master settlement agreement, then that provision of [this act] is void.

NEW SECTION. Section 16. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 17. Transition. For the year 2003, if [the effective date of this act] is later than March 16, 2003, the first report of wholesalers required by [section 7] is due 30 calendar days after the publication of the directory described in [section 4], the certifications by a tobacco product manufacturer described in [section 3] are due 45 calendar days after [the effective date of this act], and the directory described in [section 4] must be published or made available within 90 calendar days after [the effective date of this act].

NEW SECTION. Section 18. Codification instruction. (1) [Sections 1 through 12] are intended to be codified as an integral part of Title 16, chapter 11, and the provisions of Title 16, chapter 11, apply to [sections 1 through 12].

(2) [Section 13] is intended to be codified as an integral part of Title 16, chapter 11, part 4, and the provisions of Title 16, chapter 11, part 4, apply to [section 13].

NEW SECTION. Section 19. Effective date. [This act] is effective on passage and approval.

NEW SECTION. Section 20. Retroactive applicability. The legislature intends that [sections 13 and 14] apply to all pending actions in which a final judgment has not been entered prior to [the effective date of this act].

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