CHAPTER 453D

TOBACCO PRODUCT MANUFACTURERS — ENFORCEMENT OF FINANCIAL OBLIGATIONS

Referred to in §453A.6

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453D.1 Findings and purpose.

The general assembly finds that violations of chapter 453C threaten the integrity of the tobacco master settlement agreement, the fiscal soundness of the state, and the public health and that establishing procedural enforcement enhancements will aid in the enforcement of chapter 453C and thereby safeguard the master settlement agreement, the fiscal soundness of the state, and the public health.

2003 Acts, ch 97, §1, 13

453D.2 Definitions.

As used in this chapter, unless the context otherwise requires:

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 including 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.
2. *"Cigarette"* means cigarette as defined in section 453C.1.
3. *"Department"* means the department of revenue.
4. *"Director"* means the director of revenue.
5. *"Distributor"* means a person, notwithstanding established residency or location, who purchases non-tax-paid cigarettes and stores, sells, or otherwise disposes of the cigarettes.
6. *"Master settlement agreement"* means master settlement agreement as defined in section 453C.1.
7. *"Nonparticipating manufacturer"* means any tobacco product manufacturer that is not a participating manufacturer.
8. *"Participating manufacturer"* means participating manufacturer as defined in section II(jj) of the master settlement agreement and all amendments to the master settlement agreement.
9. *"Qualified escrow fund"* means qualified escrow fund as defined in section 453C.1.
10. *"Stamping agent"* means a person authorized to affix tax stamps to packages or other containers of cigarettes pursuant to chapter 453A or any person that is required to pay the tax imposed pursuant to chapter 453A on cigarettes.
11. *"Tobacco product manufacturer"* means tobacco product manufacturer as defined in section 453C.1.
12. *"Units sold"* means units sold as defined in section 453C.1.

2003 Acts, ch 97, §2, 13; 2003 Acts, ch 145, §286

453D.3 Certifications, directory, tax stamps.

1. *Certification.* A tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a stamping agent, distributor, retailer, or similar intermediary or intermediaries, shall execute and deliver on a form and in the manner prescribed by the attorney general, a certification to the director 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 is either a participating manufacturer or is in full compliance with chapter 453C, including all quarterly installment payments required by rule.

a. A participating manufacturer shall include in the participating manufacturer's certification a list of the participating manufacturer's brand families. The participating manufacturer shall update the list thirty calendar days prior to any addition to or modification of the participating manufacturer's brand families by executing and delivering a supplemental certification to the attorney general and the director.

b. (1) A nonparticipating manufacturer shall include in its certification all of the following:

(a) A list of all of the nonparticipating manufacturer's brand families and the number of units sold for each brand family that was sold in the state during the preceding calendar year.

(b) A list of all of the nonparticipating manufacturer's brand families that have been sold in the state at any time during the current calendar year.

(c) An indication, by an asterisk, of 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 such certification.

(d) Identification by name and address of any other manufacturer of such brand families in the preceding or current calendar year.

(2) The nonparticipating manufacturer shall update the list thirty calendar days prior to any addition to or modification of the nonparticipating manufacturer's brand families by executing and delivering a supplemental certification to the attorney general and the director.

c. A nonparticipating manufacturer shall also certify all of the following:

(1) That the nonparticipating manufacturer is registered to do business in the state or has appointed a resident agent for service of process and provided notice as required in section 453D.4.

(2) That the nonparticipating manufacturer has established and continues to maintain a qualified escrow fund and has executed a qualified escrow agreement that has been reviewed and approved by the attorney general and that governs the qualified escrow fund.

(3) That the nonparticipating manufacturer is in full compliance with chapter 453C and this chapter and any rules adopted pursuant to chapter 453C or this chapter.

(4) All of the following:

(a) The name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established the qualified escrow fund required pursuant to chapter 453C and all rules adopted pursuant to chapter 453C.

(b) The account number of the qualified escrow fund and any subaccount number for Iowa.

(c) The amount the nonparticipating manufacturer deposited 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 deemed necessary by the attorney general to confirm this information.

(d) The amount and date of any withdrawal or transfer made at any time by the nonparticipating manufacturer from the qualified escrow fund or from any other qualified escrow fund into which the nonparticipating manufacturer made escrow payments at any time pursuant to chapter 453C and any rules adopted pursuant to chapter 453C.

d. (1) A tobacco product manufacturer shall not include a brand family in the tobacco product manufacturer's certification unless one of the following applies, as applicable:

(a) In the case of a participating manufacturer, the participating manufacturer affirms that the brand family is to be deemed to be the participating manufacturer's cigarettes for purposes of calculating the participating manufacturer's payments under the master settlement agreement for the relevant year, in the volume and shares determined pursuant to the master settlement agreement.

(b) In the case of a nonparticipating manufacturer, the nonparticipating manufacturer affirms that the brand family is to be deemed to be the nonparticipating manufacturer's cigarettes for the purposes of chapter 453C.

(2) This section shall not 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 453C.

e. Tobacco product manufacturers shall maintain all invoices and documentation of sales and other information relied upon for certification for a period of five years, unless otherwise required by law to maintain invoices and documentation for a greater period of time.

2. *Directory of cigarettes approved for stamping and sale.* The director shall develop and publish on the department's internet site a directory listing all tobacco product manufacturers that have provided current and accurate certification conforming to the requirements of subsection 1 and all brand families that are listed in the certification, with the following exceptions:

a. The director shall 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 subsection 1, paragraphs "*b*" and "*c*", unless the attorney general has determined that the violation has been cured to the satisfaction of the attorney general.

b. A tobacco product manufacturer and a brand family shall not be included or retained in the directory if the attorney general concludes, in the case of a nonparticipating manufacturer, that either of the following applies:

(1) Any escrow payment required pursuant to chapter 453C 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.

(2) Any outstanding final judgment, including interest on the judgment, for a violation of chapter 453C has not been fully satisfied for the brand family or the nonparticipating manufacturer.

c. The director 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 this chapter.

d. Stamping agents and distributors shall provide and update as necessary an electronic mail address to the director for the purpose of receiving any notifications as may be required by this chapter.

3. *Prohibition against stamping, sale, or import of cigarettes not included in the directory.* It shall be unlawful for any person to do any of the following:

a. Affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory.

b. Sell, offer, or possess for sale in this state, or import for personal consumption in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory.

2003 Acts, ch 97, §3, 13; 2011 Acts, ch 25, §143; 2013 Acts, ch 90, §257
Referred to in §453D.5, 453D.6

453D.4 Agent for service of process.

1. A nonresident or foreign nonparticipating manufacturer that has not registered to do business in the state as a foreign corporation or business entity shall, as a condition precedent to having the nonparticipating manufacturer's brand family 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 service of process on whom all process, and any action or proceeding against the nonparticipating manufacturer concerning or arising out of the enforcement of this chapter or chapter 453C, may be served in any manner authorized by law. The service shall constitute legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, telephone number, and proof of the appointment and availability of the agent to, and to the satisfaction of, the director and the attorney general.

2. The nonparticipating manufacturer shall provide notice to the director and the attorney general thirty calendar days prior to termination of the authority of an agent and shall further provide proof to the satisfaction of the attorney general of the appointment of a new agent

at least five calendar days prior to the termination of the existing agent appointment. In the event an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the director and the attorney general of the termination within five calendar days and shall include proof to the satisfaction of the attorney general of the appointment of a new agent.

3. A nonparticipating manufacturer whose products are sold in this state, who has not appointed or designated an agent as required, shall be deemed to have appointed the secretary of state as agent and may be proceeded against in the courts of this state by service of process upon the secretary of state. However, the appointment of the secretary of state as agent shall not satisfy the condition precedent for having the brand families of the nonparticipating manufacturer included or retained in the directory.

2003 Acts, ch 97, §4, 13
Referred to in §453D.3

453D.5 Reporting of information — escrow installments.

1. No later than twenty calendar days after the end of each calendar quarter, and more frequently if so directed by the director, each stamping agent and distributor shall submit information as the director requires to facilitate compliance with this chapter, including but not limited to a list by brand family of the total number of cigarettes, or, in the case of roll-your-own tobacco, the equivalent stick count, for which the stamping agent or distributor affixed stamps during the previous calendar quarter or otherwise paid the tax due for the cigarettes. The stamping agent and distributor shall maintain, and make available to the director, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the director for a period of five years. Violations of this subsection are subject to civil penalties as established in section 453A.31, subsection 1, paragraph *"b"*.

2. The director may 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 director and attorney general shall share with each other the information received under this chapter, and may share the information with other federal, state, or local agencies only for purposes of enforcement of this chapter, chapter 453C, or corresponding laws of other states.

3. The attorney general may require at any time from a nonparticipating manufacturer proof from the financial institution in which the nonparticipating manufacturer has established a qualified escrow fund for the purpose of compliance with chapter 453C, of the amount of money in the qualified escrow fund, exclusive of interest, the amount and date of each deposit into the qualified escrow fund, and the amount and date of each withdrawal from the qualified escrow fund.

4. In addition to the information required to be submitted pursuant to chapter 453C or this chapter, the director or the attorney general may require a stamping agent, distributor, or tobacco product manufacturer to submit any additional information, including but not limited to samples of the packaging or labeling of each brand family, as necessary to enable the attorney general to determine compliance by the tobacco product manufacturer with this chapter.

5. To promote compliance with this chapter, the attorney general may adopt rules requiring a tobacco product manufacturer subject to the requirements of section 453D.3, subsection 1, paragraph *"b"*, to make the escrow deposits required in quarterly installments during the year in which the sales covered by the deposits are made. The director or 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.

2003 Acts, ch 97, §5, 13; 2004 Acts, ch 1086, §73
Referred to in §453D.6

453D.6 Penalties and other remedies.

1. In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that any person has violated section 453D.3, subsection 3, or any rule adopted

pursuant to that subsection, the director may revoke or suspend the permit or license of any stamping agent or distributor in the manner provided in chapter 453A. Each stamp affixed and each sale or offer to sell cigarettes in violation of section 453D.3, subsection 3, shall constitute a separate violation. For each violation, the director may also impose a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars upon a determination of violation of section 453D.3, subsection 3, or any rules adopted pursuant to section 453D.3, subsection 3. A penalty shall be imposed in the manner provided in chapter 453A.

2. Cigarettes that have been sold, offered for sale, or possessed for sale in this state, or imported for personal consumption in this state in violation of section 453D.3, subsection 3, shall be deemed contraband under section 453A.32 and the cigarettes shall be subject to seizure and forfeiture as provided in that section, and all cigarettes so seized and forfeited shall be destroyed and not resold.

3. The attorney general, on behalf of the director, may seek an injunction to restrain a threatened or actual violation of section 453D.3, subsection 3, or section 453D.5, subsection 1 or 4, by a stamping agent or distributor and to compel the stamping agent or distributor to comply with these sections. In any action brought pursuant to this section, the state shall be entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney fees.

4. It shall be unlawful for a person to sell or distribute cigarettes or 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 453D.3, subsection 3. A violation of this subsection is a serious misdemeanor.

2003 Acts, ch 97, §6, 13

453D.7 Miscellaneous provisions.

1. A determination of the attorney general not to include or to remove from the directory a brand family or tobacco product manufacturer shall be subject to review in a manner prescribed in rules adopted by the director.

2. A person shall not be issued a permit or license or be granted a renewal of a permit or license to act as a stamping agent or distributor unless the person has certified in writing, under penalty of perjury, that the person will comply fully with this chapter.

3. The director and the attorney general shall adopt rules as necessary to effect the purposes of this chapter.

4. In any action brought by the state to enforce this chapter, the state shall be entitled to recover the costs of the investigation, expert witness fees, costs of the action, and reasonable attorney fees.

5. 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.

6. Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative relative to each other and relative to any other remedies or penalties available under any other law of this state.

2003 Acts, ch 97, §7, 13

453D.8 Standing appropriation.

There is appropriated from the general fund of the state to the department of revenue each fiscal year beginning July 1, 2004, and thereafter, the sum of twenty-five thousand dollars for enforcement of this chapter.

2003 Acts, ch 97, §8, 13; 2003 Acts, ch 145, §286

See Iowa Acts for special provisions relating to appropriations in a given year

453D.9 Construction and severability.

1. If a court of competent jurisdiction finds that the provisions of this chapter and of chapter 453C conflict and cannot be harmonized, the provisions of chapter 453C shall prevail.

2. If any portion of this chapter causes chapter 453C to no longer constitute a qualifying

or model statute, as defined in the master settlement agreement, that portion of this chapter shall be void.

3. If any portion of this chapter is for any reason held to be invalid, unlawful, or unconstitutional, the determination shall not affect the validity of the remaining provisions of this chapter or any part of this chapter.

2003 Acts, ch 97, §9, 13