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HOUSE BILL 1930

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State of Washington                      58th Legislature                      2003 Regular Session

By Representatives Morris, Cairnes, Gombosky and Ericksen

Read first time 02/17/2003. Referred to Committee on Finance.

1            AN ACT Relating to restricting the ability of tobacco product  
2 manufacturers, wholesalers, and distributors and other persons to  
3 violate or to facilitate the violation of chapter 70.157 RCW; amending  
4 RCW 82.24.130 and 82.24.145; adding a new chapter to Title 70 RCW;  
5 prescribing penalties; providing an effective date; and declaring an  
6 emergency.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8            NEW SECTION.    **Sec. 1.** The legislature finds that violations of RCW  
9 70.157.020 threaten the integrity of the tobacco master settlement  
10 agreement, the fiscal soundness of the state, and the public health.  
11 The legislature finds the enacting procedural enhancements will help  
12 prevent violations and aid the enforcement of RCW 70.157.020 and  
13 thereby safeguard the master settlement agreement, the fiscal soundness  
14 of the state, and the public health. The provisions of this act are  
15 not intended to and shall not be interpreted to amend chapter 70.157  
16 RCW.

17            NEW SECTION.    **Sec. 2.** The following definitions apply to this  
18 chapter unless the context clearly requires otherwise.

1 (1) "Brand family" means all styles of cigarettes sold under the  
2 same trademark and differentiated from one another by means of  
3 additional modifiers or descriptors, including, but not limited to,  
4 "menthol," "lights," "kings," and "100s," and includes any brand name  
5 alone or in conjunction with any other word, trademark, logo, symbol,  
6 motto, selling message, recognizable pattern of colors, or any other  
7 indicia of product identification identical or similar to, or  
8 identifiable with, a previously known brand of cigarettes.

9 (2) "Board" means the liquor control board.

10 (3) "Cigarette" has the same meaning as in RCW 70.157.010(d).

11 (4) "Director" means the director of the department of revenue  
12 except as otherwise noted.

13 (5) "Directory" means the directory to be created and published on  
14 a web site by the attorney general pursuant to section 3(2) of this  
15 act.

16 (6) "Distributor" has the same meaning as in RCW 82.26.010(3),  
17 except that for purposes of this chapter, no person is a distributor if  
18 that person does not deal with cigarettes as defined in this section.

19 (7) "Master settlement agreement" has the same meaning as in RCW  
20 70.157.010(e).

21 (8) "Nonparticipating manufacturer" means any tobacco product  
22 manufacturer that is not a participating manufacturer.

23 (9) "Participating manufacturer" has the meaning given that term in  
24 section II(jj) of the master settlement agreement.

25 (10) "Qualified escrow fund" has the same meaning as in RCW  
26 70.157.010(f).

27 (11) "Stamp" means "stamp" as defined in RCW 82.24.010(7) or as  
28 referred to in RCW 43.06.455(4).

29 (12) "Tobacco product manufacturer" has the same meaning as in RCW  
30 70.157.010(i).

31 (13) "Units sold" has the same meaning as in RCW 70.157.010(j).

32 (14) "Wholesaler" has the same meaning as in RCW 82.24.010.

33 NEW SECTION. **Sec. 3.** (1) Every tobacco product manufacturer whose  
34 cigarettes are sold in this state, whether directly or through a  
35 wholesaler, distributor, retailer, or similar intermediary or  
36 intermediaries, shall execute and deliver on a form prescribed by the  
37 attorney general a certification to the attorney general, no later than

1 the thirtieth day of April each year, certifying under penalty of  
2 perjury that, as of the date of such certification, the tobacco product  
3 manufacturer is either a participating manufacturer; or is in full  
4 compliance with RCW 70.157.020(b)(1), including all payments required  
5 by that section or this act.

6 (a) A participating manufacturer shall include in its certification  
7 a list of its brand families. The participating manufacturer shall  
8 update the list thirty calendar days prior to any addition to or  
9 modification of its brand families by executing and delivering a  
10 supplemental certification to the attorney general.

11 (b) A nonparticipating manufacturer shall include in its  
12 certification: (i) A list of all of its brand families and the number  
13 of units sold for each brand family that were sold in the state during  
14 the preceding calendar year; (ii) a list of all of its brand families  
15 that have been sold in the state at anytime during the current calendar  
16 year; (iii) indicating, by an asterisk, any brand family sold in the  
17 state during the preceding calendar year that is no longer being sold  
18 in the state as of the date of such certification; and (iv) identifying  
19 by name and address any other manufacturer of brand families in the  
20 preceding or current calendar year. The nonparticipating manufacturer  
21 shall update the list thirty calendar days prior to any addition to or  
22 modification of its brand families by executing and delivering a  
23 supplemental certification to the attorney general.

24 (c) In the case of a nonparticipating manufacturer, the  
25 certification shall further certify:

26 (i) That the nonparticipating manufacturer is registered to do  
27 business in the state or has appointed a resident agent for service of  
28 process and provided notice as required by section 4 of this act;

29 (ii) That the nonparticipating manufacturer: (A) Has established  
30 and continues to maintain a qualified escrow fund; and (B) has executed  
31 a qualified escrow agreement that has been reviewed and approved by the  
32 attorney general and that governs the qualified escrow fund;

33 (iii) That the nonparticipating manufacturer is in full compliance  
34 with RCW 70.157.020(b)(1) and this chapter, and any rules adopted  
35 pursuant thereto; and

36 (iv)(A) The name, address, and telephone number of the financial  
37 institution where the nonparticipating manufacturer has established a  
38 qualified escrow fund required pursuant to RCW 70.157.020(b)(1) and all

1 rules adopted thereunder; (B) the account number of the qualified  
2 escrow fund and any subaccount number for the state of Washington; (C)  
3 the amount the nonparticipating manufacturer placed in the fund for  
4 cigarettes sold in the state during the preceding calendar year, the  
5 date and amount of each deposit, and evidence or verification as may be  
6 deemed necessary by the attorney general to confirm the foregoing; and  
7 (D) the amount and date of any withdrawal or transfer of funds the  
8 nonparticipating manufacturer made at any time from the fund or from  
9 any other qualified escrow fund into which it ever made escrow payments  
10 pursuant to RCW 70.157.020(b)(1) and all rules adopted thereunder.

11 (d) A tobacco product manufacturer may not include a brand family  
12 in its certification unless: (i) In the case of a participating  
13 manufacturer, the participating manufacturer affirms that the brand  
14 family is to be deemed to be its cigarettes for purposes of calculating  
15 its payments under the master settlement agreement for the relevant  
16 year, in the volume and shares determined pursuant to the master  
17 settlement agreement; and (ii) in the case of a nonparticipating  
18 manufacturer, the nonparticipating manufacturer affirms that the brand  
19 family is to be deemed to be its cigarettes for purposes of RCW  
20 70.157.020(b)(1). Nothing in this section limits or otherwise affects  
21 the state's right to maintain that a brand family constitutes  
22 cigarettes of a different tobacco product manufacturer for purposes of  
23 calculating payments under the master settlement agreement or for  
24 purposes of RCW 70.157.020.

25 (e) A tobacco product manufacturer shall maintain all invoices and  
26 documentation of sales and other information relied upon for such  
27 certification for a period of five years, unless otherwise required by  
28 law to maintain them for a greater period of time.

29 (2) Not later than November 1, 2003, the attorney general shall  
30 develop and publish on its web site a directory listing all tobacco  
31 product manufacturers that have provided current and accurate  
32 certifications conforming to the requirements of this section and all  
33 brand families that are listed in these certifications, except as noted  
34 below:

35 (a) The attorney general shall not include or retain in the  
36 directory the name or brand families of any nonparticipating  
37 manufacturer that has failed to provide the required certification or  
38 whose certification the attorney general determines is not in

1 compliance with subsection (1)(b) and (c) of this section, unless the  
2 attorney general has determined that the violation has been cured to  
3 the satisfaction of the attorney general.

4 (b) Neither a tobacco product manufacturer nor brand family shall  
5 be included or retained in the directory if the attorney general  
6 concludes, in the case of a nonparticipating manufacturer, that: (i)  
7 Any escrow payment required pursuant to RCW 70.157.020(b)(1) for any  
8 period for any brand family, whether or not listed by the  
9 nonparticipating manufacturer, has not been fully paid into a qualified  
10 escrow fund governed by a qualified escrow agreement that has been  
11 approved by the attorney general; or (ii) any outstanding final  
12 judgment, including interest, for a violation of RCW 70.157.020(b)(1)  
13 that has not been fully satisfied for the brand family or manufacturer.

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

18 (d) Every wholesaler and distributor shall provide and update as  
19 necessary an electronic mail address to the attorney general for the  
20 purpose of receiving any notifications as may be required by this  
21 chapter.

22 (3) It is unlawful for any person (a) to affix a stamp to a package  
23 or other container of cigarettes of a tobacco product manufacturer or  
24 brand family not included in the directory, or to pay or cause to be  
25 paid the tobacco products tax on any package or container; or (b) to  
26 sell, offer, or possess for sale in this state or import for sale in  
27 this state, any cigarettes of a tobacco product manufacturer or brand  
28 family not included in the directory.

29 NEW SECTION. **Sec. 4.** (1) Any nonresident or foreign  
30 nonparticipating manufacturer that has not registered to do business in  
31 the state as a foreign corporation or business entity shall, as a  
32 condition precedent to having its brand families included or retained  
33 in the directory, appoint and continually engage without interruption  
34 the services of an agent in this state to act as agent for the service  
35 of process on whom all process, and any action or proceeding against it  
36 concerning or arising out of the enforcement of this chapter and RCW  
37 70.157.020(b)(1), may be served in any manner authorized by law. The

1 service shall constitute legal and valid service of process on the  
2 nonparticipating manufacturer. The nonparticipating manufacturer shall  
3 provide the name, address, phone number, and proof of the appointment  
4 and availability of the agent to the satisfaction of the attorney  
5 general.

6 (2) The nonparticipating manufacturer shall provide notice to the  
7 attorney general thirty calendar days prior to termination of the  
8 authority of an agent and shall further provide proof to the  
9 satisfaction of the attorney general of the appointment of a new agent  
10 no less than five calendar days prior to the termination of an existing  
11 agent appointment. In the event an agent terminates an agency  
12 appointment, the nonparticipating manufacturer shall notify the  
13 attorney general of the termination within five calendar days and  
14 include proof to the satisfaction of the attorney general of the  
15 appointment of a new agent.

16 (3) Any nonparticipating manufacturer whose cigarettes are sold in  
17 this state, who has not appointed and engaged an agent as required in  
18 this section, shall be deemed to have appointed the secretary of state  
19 as the agent and may be proceeded against in courts of this state by  
20 service of process upon the secretary of state. However, the  
21 appointment of the secretary of state as agent shall not satisfy the  
22 condition precedent for having the brand families of the  
23 nonparticipating manufacturer included or retained in the directory.

24 NEW SECTION. **Sec. 5.** (1) In addition to the reporting  
25 requirements under RCW 70.157.010(j) and the rules adopted thereunder,  
26 not later than twenty-five calendar days after the end of each calendar  
27 month, and more frequently if directed by the director, each wholesaler  
28 and distributor shall submit information the director requires to  
29 facilitate compliance with this chapter, including, but not limited to,  
30 a list by brand family of the total number of cigarettes, or, in the  
31 case of roll-your-own, the equivalent stick count for which the  
32 wholesaler or distributor affixed stamps during the previous calendar  
33 month or otherwise paid the tax due for the cigarettes. Each  
34 wholesaler and distributor shall maintain and make available to the  
35 director, all invoices and documentation of sales of all  
36 nonparticipating manufacturer cigarettes and any other information

1 relied upon in reporting to the attorney general or the director for a  
2 period of five years.

3 (2) Information or records required to be furnished to the  
4 department, the board, or the attorney general are confidential and  
5 shall not be disclosed. However, the director and the board are  
6 authorized to disclose to the attorney general any information received  
7 under this chapter and requested by the attorney general for purposes  
8 of determining compliance with and enforcing the provisions of this  
9 chapter. The director, the board, and the attorney general may share  
10 with each other the information received under this chapter, and may  
11 share information with other federal, state, or local agencies,  
12 including without limitation the board, only for purposes of  
13 enforcement of this chapter, RCW 70.157.020, or corresponding laws of  
14 other states.

15 (3) The attorney general may require at any time from the  
16 nonparticipating manufacturer proof, from the financial institution in  
17 which the manufacturer has established a qualified escrow fund for the  
18 purpose of compliance with RCW 70.157.020(b)(1), of the amount of money  
19 in the fund, exclusive of interest, the amount and date of each deposit  
20 to the fund, and the amount and date of each withdrawal from the fund.

21 (4) In addition to the information required to be submitted  
22 pursuant to section 3 of this act, this section, and chapters 82.24 and  
23 82.26 RCW, the director, the board, or the attorney general may require  
24 a wholesaler, distributor, or tobacco product manufacturer to submit  
25 any additional information including, but not limited to, samples of  
26 the packaging or labeling of each brand family, as is necessary to  
27 enable the attorney general to determine whether a tobacco product  
28 manufacturer is in compliance with this chapter. If the director, the  
29 board, or the attorney general makes a request for information pursuant  
30 to this subsection (4), the tobacco product manufacturer, distributor,  
31 or wholesaler shall comply promptly.

32 (5) A nonparticipating manufacturer that either: (a) Has not  
33 previously made escrow payments to the state of Washington pursuant to  
34 RCW 70.157.020; or (b) has not actually made any escrow payments for  
35 more than one year, shall make the required escrow deposits in  
36 quarterly installments during the first year in which the sales covered  
37 by the deposits are made or in the first year in which the payments are

1 made. The director or the attorney general may require production of  
2 information sufficient to enable the attorney general to determine the  
3 adequacy of the amount of the installment deposit.

4 NEW SECTION. **Sec. 6.** (1) In addition to or in lieu of any other  
5 civil or criminal remedy provided by law, upon a determination that a  
6 wholesaler has violated section 3(3) of this act or any rule adopted  
7 pursuant to this chapter, the director or the board may revoke or  
8 suspend the license of the wholesaler in the manner provided by chapter  
9 82.24 or 82.32 RCW. Each stamp affixed and each sale or offer to sell  
10 cigarettes in violation of section 3(3) of this act shall constitute a  
11 separate violation. For each violation of this chapter, the director  
12 or the board may also impose a civil penalty in an amount not to exceed  
13 the greater of five hundred percent of the retail value of the  
14 cigarettes or five thousand dollars upon a determination of violation  
15 of section 3(3) of this act or any rules adopted pursuant thereto. The  
16 penalty shall be imposed in the manner provided by chapter 82.24 RCW.

17 (2) The attorney general may seek an injunction in superior court  
18 to restrain a threatened or actual violation of section 3(3) or 5 (1)  
19 or (4) of this act by a person and to compel the person to comply with  
20 these sections. In any action brought pursuant to this section, the  
21 state shall be entitled to recover the costs of investigation, costs of  
22 the action, and reasonable attorney fees.

23 (3) It is unlawful for a person to: (a) Sell or distribute  
24 cigarettes or (b) acquire, hold, own, possess, transport, import, or  
25 cause to be imported cigarettes, that the person knows or should know  
26 are intended for distribution or sale in the state in violation of  
27 section 3(3) of this act. A violation of this subsection (3) is a  
28 gross misdemeanor.

29 (4) The legislature finds that the practices governed by this  
30 chapter are matters vitally affecting the public interest for the  
31 purpose of applying the consumer protection act, chapter 19.86 RCW.  
32 Any violation of this chapter is not reasonable in relation to the  
33 development and preservation of business and is an unfair or deceptive  
34 act or practice and an unfair method of competition in the conduct of  
35 trade or commerce in violation of RCW 19.86.020. Remedies provided by  
36 chapter 19.86 RCW are cumulative and not exclusive.

1        NEW SECTION.    **Sec. 7.**    (1) A determination of the attorney general  
2 not to include or to remove from the directory a brand family or  
3 tobacco product manufacturer shall be final agency action for purposes  
4 of review under RCW 34.05.570(4).

5        (2) No person shall be issued a license or granted a renewal of a  
6 license to act as a wholesaler unless the person has certified in  
7 writing under penalty of perjury, that the person will comply fully  
8 with this section.

9        (3) The first reports of wholesalers and distributors are due  
10 August 25, 2003. The certifications by a tobacco product manufacturer  
11 described in section 3(1) of this act are due September 15, 2003. The  
12 directory described in section 3(2) of this act shall be published or  
13 made available by November 1, 2003.

14        (4) The attorney general, the board, and the director may adopt  
15 rules as necessary to effect the administration of this chapter.

16        (5) In any action brought by the state to enforce this chapter, the  
17 state is entitled to recover the costs of investigation, expert witness  
18 fees, costs of the action, and reasonable attorney fees.

19        (6) If a court determines that a person has violated this chapter,  
20 the court shall order any profits, gain, gross receipts, or other  
21 benefit from the violation to be disgorged and paid to the general  
22 fund. Unless otherwise expressly provided, the remedies or penalties  
23 provided by this chapter are cumulative to each other and to the  
24 remedies or penalties available under all other laws of this state.

25        NEW SECTION.    **Sec. 8.**    If a court of competent jurisdiction finds  
26 that the provisions of this act and chapter 70.157 RCW conflict and  
27 cannot be harmonized, then the provisions of chapter 70.157 RCW shall  
28 control. If any section, subsection, subdivision, paragraph, sentence,  
29 clause, or phrase of this act causes chapter 70.157 RCW no longer to  
30 constitute a qualifying or model statute, as those terms are defined in  
31 the master settlement agreement, then that portion of this act shall  
32 not be valid. If any section, subsection, subdivision, paragraph,  
33 sentence, clause, or phrase of this act is for any reason held to be  
34 invalid, unlawful, or unconstitutional, the decision shall not affect  
35 the validity of the remaining portions of this act or any part thereof.

1       **Sec. 9.** RCW 82.24.130 and 1999 c 193 s 3 are each amended to read  
2 as follows:

3       (1) The following are subject to seizure and forfeiture:

4       (a) Subject to RCW 82.24.250, any articles taxed in this chapter  
5 that are found at any point within this state, which articles are held,  
6 owned, or possessed by any person, and that do not have the stamps  
7 affixed to the packages or containers; and any container or package of  
8 cigarettes possessed or held for sale that does not comply with this  
9 chapter.

10       (b) All conveyances, including aircraft, vehicles, or vessels,  
11 which are used, or intended for use, to transport, or in any manner to  
12 facilitate the transportation, for the purpose of sale or receipt of  
13 property described in (a) of this subsection, except:

14       (i) A conveyance used by any person as a common or contract carrier  
15 having in actual possession invoices or delivery tickets showing the  
16 true name and address of the consignor or seller, the true name of the  
17 consignee or purchaser, and the quantity and brands of the cigarettes  
18 transported, unless it appears that the owner or other person in charge  
19 of the conveyance is a consenting party or privy to a violation of this  
20 chapter;

21       (ii) A conveyance subject to forfeiture under this section by  
22 reason of any act or omission of which the owner thereof establishes to  
23 have been committed or omitted without his or her knowledge or consent;

24       (iii) A conveyance encumbered by a bona fide security interest if  
25 the secured party neither had knowledge of nor consented to the act or  
26 omission.

27       (c) Any vending machine used for the purpose of violating the  
28 provisions of this chapter.

29       (d) Any cigarettes that are stamped, sold, imported, or offered or  
30 possessed for sale in this state in violation of section 3(3) of this  
31 act. For the purposes of this subsection (1)(d), "cigarettes" has the  
32 meaning as provided in section 2(3) of this act.

33       (2) Property subject to forfeiture under this chapter may be seized  
34 by any agent of the department authorized to collect taxes, any  
35 enforcement officer of the board, or law enforcement officer of this  
36 state upon process issued by any superior court or district court  
37 having jurisdiction over the property. Seizure without process may be  
38 made if:

1 (a) The seizure is incident to an arrest or a search under a search  
2 warrant or an inspection under an administrative inspection warrant; or

3 (b) The department, the board, or the law enforcement officer has  
4 probable cause to believe that the property was used or is intended to  
5 be used in violation of this chapter and exigent circumstances exist  
6 making procurement of a search warrant impracticable.

7 (3) Notwithstanding the foregoing provisions of this section,  
8 articles taxed in this chapter which are in the possession of a  
9 wholesaler or retailer, licensed under Washington state law, for a  
10 period of time necessary to affix the stamps after receipt of the  
11 articles, shall not be considered contraband.

12 **Sec. 10.** RCW 82.24.145 and 1999 c 193 s 4 are each amended to read  
13 as follows:

14 When property is forfeited under this chapter the department may:

15 (1) Retain the property or any part thereof for official use or  
16 upon application by any law enforcement agency of this state, another  
17 state, or the District of Columbia, or of the United States for the  
18 exclusive use of enforcing the provisions of this chapter or the laws  
19 of any other state or the District of Columbia or of the United States.

20 (2) Sell the property at public auction to the highest bidder after  
21 due advertisement, but the department before delivering any of the  
22 goods so seized shall require the person to whom the property is sold  
23 to affix the proper amount of stamps. The proceeds of the sale and all  
24 moneys forfeited under this chapter shall be first applied to the  
25 payment of all proper expenses of any investigation leading to the  
26 seizure and of the proceedings for forfeiture and sale, including  
27 expenses of seizure, maintenance of custody, advertising, and court  
28 costs. The balance of the proceeds and all moneys shall be deposited  
29 in the general fund of the state. Proper expenses of investigation  
30 includes costs incurred by any law enforcement agency or any federal,  
31 state, or local agency.

32 (3) Notwithstanding the provisions of subsections (1) and (2) of  
33 this section, cigarettes seized for a violation of RCW 82.24.035 or  
34 section 3(3) of this act shall be destroyed. For the purposes of this  
35 subsection (3) "cigarettes" has the same meaning as provided in section  
36 2(3) of this act.

1        NEW SECTION.   **Sec. 11.**   Sections 1 through 8 of this act constitute  
2   a new chapter in Title 70 RCW.

3        NEW SECTION.   **Sec. 12.**   This act is necessary for the immediate  
4   preservation of the public peace, health, or safety, or support of the  
5   state government and its existing public institutions, and takes effect  
6   July 1, 2003.

--- END ---