

House Bill 774

By: Representatives Lane of the 101<sup>st</sup>, Westmoreland of the 86<sup>th</sup>, Keen of the 146<sup>th</sup>, and Noel of the 44<sup>th</sup>

A BILL TO BE ENTITLED  
AN ACT

1 To amend Title 10 of the Official Code of Georgia Annotated, relating to commerce and  
2 trade, so as to provide for legislative findings; to provide for definitions; to provide for  
3 certain certifications by tobacco manufacturers; to provide for a directory data base of  
4 certifying tobacco manufacturers; to establish a prohibition against sales by tobacco  
5 manufacturers not included in the directory data base; to require an in state agent for service  
6 of process; to provide for reporting requirements; to provide for penalties; to provide for  
7 administrative review; to require compliance with law prior to issuance of a license; to  
8 provide for promulgation of rules and regulations; to provide for attorney fees and costs; to  
9 amend Chapter 11 of Title 48 of the Official Code of Georgia Annotated, relating to cigar  
10 and cigarette taxes, so as to prohibit the sale of certain cigarettes; to prohibit affixing tax  
11 stamps to certain cigarettes; to deem certain cigarettes as contraband; to provide for related  
12 matters; to repeal conflicting laws; and for other purposes.

13 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

14 **SECTION 1.**

15 Title 10 of the Official Code of Georgia Annotated, relating to commerce and trade, is  
16 amended by adding a new Chapter 13A to read as follows:

17 "CHAPTER 13A

18 10-13A-1.

19 The General Assembly finds that violations of Chapter 13 of this title threaten the integrity  
20 of the tobacco Master Settlement Agreement, the fiscal soundness of the state, and the  
21 public health. The General Assembly finds that enacting procedural enhancements will aid  
22 the enforcement of such chapter and thereby safeguard the Master Settlement Agreement,  
23 the fiscal soundness of the state, and the public health.

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1 10-13A-2.

2 As used in this chapter, the term:

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

10 (2) 'Cigarette' means any product that contains nicotine, is intended to be burned or  
11 heated under ordinary conditions of use, and consists of or contains (A) any roll of  
12 tobacco wrapped in paper or in any substance not containing tobacco; or (B) tobacco, in  
13 any form, that is functional in the product, which, because of its appearance, the type of  
14 tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or  
15 purchased by, consumers as a cigarette; or (C) any roll of tobacco wrapped in any  
16 substance containing tobacco which, because of its appearance, the type of tobacco used  
17 in the filler, or its packaging and labeling, is likely to be offered to, or purchased by,  
18 consumers as a cigarette described in clause (A) of this definition. The term 'cigarette'  
19 includes 'roll-your-own' (i.e., any tobacco which, because of its appearance, type,  
20 packaging, or labeling is suitable for use and likely to be offered to, or purchased by,  
21 consumers as tobacco for making cigarettes). For purposes of this definition of 'cigarette,'  
22 0.09 ounces of 'roll-your-own' tobacco shall constitute one individual 'cigarette.'

23 (3) 'Commissioner' means the state revenue commissioner.

24 (4) 'Directory' means the directory listing all tobacco product manufacturers that have  
25 provided current and accurate certifications conforming to the requirements of Code  
26 Section 10-13A-3 and all brand families that are listed in such certifications developed  
27 by the Attorney General pursuant to Code Section 10-13A-4.

28 (5) 'Distributor' means any person who:

29 (A) Maintains a warehouse, warehouse personnel, and salespersons who regularly  
30 contact and call on dealers; and

31 (B) Is engaged in the business of:

32 (i) Manufacturing cigars or cigarettes in this state, importing cigars or cigarettes into  
33 this state, or purchasing cigars or cigarettes from other manufacturers or distributors;  
34 and

35 (ii) Selling the cigars or cigarettes to dealers in this state for resale but is not in the  
36 business of selling the cigars or cigarettes directly to the ultimate consumer of the  
37 cigars or cigarettes.

1 (6) 'Master Settlement Agreement' means the settlement agreement (and related  
2 documents) entered into on November 23, 1998, by the state and leading United States  
3 tobacco product manufacturers.

4 (7) 'Nonparticipating manufacturer' means any tobacco product manufacturer that is not  
5 a participating manufacturer.

6 (8) 'Participating manufacturer' has the meaning given that term in subsection II(jj) of  
7 the Master Settlement Agreement and all amendments thereto.

8 (9) 'Qualified escrow fund' means an escrow arrangement with a federally or state  
9 chartered financial institution having no affiliation with any tobacco product  
10 manufacturer and having assets of at least \$1 billion where such arrangement requires  
11 that such financial institution hold the escrowed funds' principal for the benefit of  
12 releasing parties and prohibits the tobacco product manufacturer placing the funds into  
13 escrow from using, accessing, or directing the use of the funds' principal except as  
14 consistent with subparagraph (B) of paragraph (2) of Code Section 10-13-3.

15 (10) 'Tobacco product manufacturer' means an entity that after April 28, 1999:

16 (A) Manufactures cigarettes anywhere that such manufacturer intends to be sold in the  
17 United States, including cigarettes intended to be sold in the United States through an  
18 importer (except where such importer is an original participating manufacturer (as that  
19 term is defined in the Master Settlement Agreement) that will be responsible for the  
20 payments under the Master Settlement Agreement with respect to such cigarettes as a  
21 result of the provisions of subsection II(mm) of the Master Settlement Agreement and  
22 that pays the taxes specified in subsection II(z) of the Master Settlement Agreement,  
23 and provided that the manufacturer of such cigarettes does not market or advertise such  
24 cigarettes in the United States);

25 (B) Is the first purchaser anywhere for resale in the United States of cigarettes  
26 manufactured anywhere that the manufacturer does not intend to be sold in the United  
27 States; or

28 (C) Becomes a successor of an entity described in subparagraph (A) or (B) of this  
29 paragraph.

30 The term tobacco product manufacturer shall not include an affiliate of a tobacco product  
31 manufacturer unless such affiliate itself falls within subparagraphs (A) through (C) of this  
32 paragraph.

33 (11) 'Units sold' means the number of individual cigarettes sold in the state by the  
34 applicable tobacco product manufacturer (whether directly or through a distributor,  
35 retailer, or similar intermediary or intermediaries) during the year in question, as  
36 measured by excise taxes collected by the state on packs (or 'roll-your-own' tobacco  
37 containers) bearing the excise tax stamp of the state. The state revenue commissioner

1 shall promulgate such regulations as are necessary to ascertain the amount of state excise  
2 tax paid on the cigarettes of such tobacco product manufacturer for each year.

3 10-13A-3.

4 (a) Every tobacco product manufacturer whose cigarettes are sold in this state, whether  
5 directly or through a distributor, retailer, or similar intermediary or intermediaries, shall  
6 execute and deliver in the manner prescribed by the Attorney General a certification to the  
7 commissioner and Attorney General, no later than the thirtieth day of April each year,  
8 certifying that, as of the date of such certification, such tobacco product manufacturer  
9 either is a participating manufacturer or is in full compliance with Chapter 13 of this title  
10 including all annual deposits required by paragraph (2) of Code Section 10-13-3.

11 (b) A participating manufacturer shall include in its certification a list of its brand families.  
12 A participating manufacturer shall update such list 30 calendar days prior to any addition  
13 to or modification of its brand families by executing and delivering a supplemental  
14 certification to the Attorney General and commissioner. A participating manufacturer may  
15 not include a brand family in its certification unless the participating manufacturer affirms  
16 that the brand family is to be deemed to be its cigarettes for purposes of calculating its  
17 payments under the Master Settlement Agreement for the relevant year, in the volume and  
18 shares determined pursuant to the Master Settlement Agreement.

19 (c) A nonparticipating manufacturer shall include in its certification a list of all of its brand  
20 families and the number of units sold for each brand family that were sold in this state  
21 during the preceding calendar year and a list of all of its brand families that have been sold  
22 in this state at any time during the current calendar year. Such lists must indicate by an  
23 asterisk any brand family sold in this state during the preceding calendar year that is no  
24 longer being sold in this state as of the date of such certification, and identification by name  
25 and address of any other manufacturer of such brand families in the preceding or current  
26 calendar year. The nonparticipating manufacturer shall update such list 30 calendar days  
27 prior to any addition to or modification of its brand families by executing and delivering  
28 a supplemental certification to the Attorney General and commissioner. A nonparticipating  
29 manufacturer may not include a brand family in its certification unless such  
30 nonparticipating manufacturer affirms that the brand family is to be deemed to be its  
31 cigarettes for purposes of Chapter 13 of this title. Such certification must also certify:

32 (1) That such nonparticipating manufacturer is registered to do business in this state and  
33 has appointed a resident agent for service of process and provided notice thereof as  
34 required by Code Section 10-13A-6;

35 (2) That such nonparticipating manufacturer has established and continues to maintain  
36 a qualified escrow fund as required by Code Section 10-13-3 and has executed a qualified

1 escrow agreement that has been reviewed and approved by the Attorney General and that  
2 governs the qualified escrow fund;

3 (3) That such nonparticipating manufacturer is in full compliance with Chapter 13 of this  
4 title and with this chapter and any regulations promulgated pursuant to either such  
5 chapter; and

6 (4) The name, address, and telephone number of the financial institution where the  
7 nonparticipating manufacturer has established such qualified escrow fund required  
8 pursuant to Chapter 13 of this title and all regulations promulgated pursuant to such  
9 chapter; the account number of such qualified escrow fund and any subaccount number  
10 for this state; the amount such nonparticipating manufacturer placed in such fund for  
11 cigarettes sold in this state during the preceding calendar year, the date and amount of  
12 each such deposit, and such evidence or verification as may be deemed necessary by the  
13 Attorney General to confirm the foregoing; and the amount and date of any withdrawal  
14 or transfer of funds the nonparticipating manufacturer made at any time from such fund  
15 or from any other qualified escrow fund into which it ever made escrow payments  
16 pursuant to Chapter 13 of this title and all regulations promulgated pursuant to such  
17 chapter.

18 Certification in accordance with this subsection shall be deemed to be compliance with  
19 subparagraph (C) of paragraph (2) of Code Section 10-13-3.

20 (d) Nothing in this Code section shall be construed as limiting or otherwise affecting the  
21 state's right to maintain that a brand family constitutes cigarettes of a different tobacco  
22 product manufacturer for purposes of calculating payments under the Master Settlement  
23 Agreement or for purposes of Chapter 13 of this title.

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

27 10-13A-4.

28 (a) Not later than August 1, 2004, the Attorney General shall develop and make available  
29 for public inspection on its website a directory, as defined in paragraph (3) of Code Section  
30 10-13A-2.

31 (b) The Attorney General shall not include or retain in such directory the name or brand  
32 families of any nonparticipating manufacturer that has failed to provide the required  
33 certification or whose certification the Attorney General determines is not in compliance  
34 with subsection (c) of Code Section 10-13A-3, unless the Attorney General has determined  
35 that such violation has been cured to the satisfaction of the Attorney General.

1 (c) Neither a tobacco product manufacturer nor brand family shall be included or retained  
2 in the directory if the Attorney General concludes, in the case of a nonparticipating  
3 manufacturer, that:

4 (1) Any escrow payment required pursuant to Chapter 13 of this title for any period for  
5 any brand family, whether or not listed by such nonparticipating manufacturer, has not  
6 been fully paid into a qualified escrow fund governed by a qualified escrow agreement  
7 that has been approved by the Attorney General; or

8 (2) Any outstanding final judgment, including interest thereon, for a violation of Chapter  
9 13 of this title has not been fully satisfied for such brand family or such manufacturer.

10 (d) The Attorney General shall update the directory as necessary in order to correct  
11 mistakes and to add or remove tobacco product manufacturers or brand families to keep the  
12 directory in conformity with the requirements of this chapter.

13 (e) Every distributor shall provide and update as necessary an e-mail address to the  
14 Attorney General for the purpose of receiving any notifications as may be required by this  
15 chapter.

16 10-13A-5.

17 It shall be unlawful for any person to affix a tax stamp to a package or other container of  
18 cigarettes of a tobacco product manufacturer or brand family not included in the directory  
19 or to sell, offer for sale, or possess with intent to sell, in this state, cigarettes of a tobacco  
20 product manufacturer or brand family not included in the directory.

21 10-13A-6.

22 (a) Any nonresident or foreign nonparticipating manufacturer that has not registered to do  
23 business in this state as a foreign corporation or business entity shall, as a condition  
24 precedent to having its brand families included or retained in the directory, appoint and  
25 continually engage without interruption the services of an agent in this state as required by  
26 Code Section 48-11-5 to act as agent for the service of process on whom all process and  
27 any action or proceeding against it concerning or arising out of the enforcement of this  
28 chapter may be served in any manner authorized by law. Such service shall constitute legal  
29 and valid service of process on the nonparticipating manufacturer. The nonparticipating  
30 manufacturer shall provide the name, address, phone number, and proof of the appointment  
31 and availability of such agent to the satisfaction of the commissioner and Attorney General.

32 (b) The nonparticipating manufacturer shall provide notice to the commissioner and  
33 Attorney General 30 calendar days prior to termination of the authority of an agent and  
34 shall further provide proof to the satisfaction of the Attorney General of the appointment  
35 of a new agent no less than five calendar days prior to the termination of an existing agent

1 appointment. In the event an agent terminates an agency appointment, the nonparticipating  
2 manufacturer shall notify the commissioner and Attorney General of said termination  
3 within five calendar days and shall include proof to the satisfaction of the Attorney General  
4 of the appointment of a new agent.

5 (c) Any nonparticipating manufacturer whose cigarettes are sold in this state who has not  
6 appointed and engaged an agent as required in this Code section shall be deemed to have  
7 appointed the Secretary of State as such agent and may be proceeded against in courts of  
8 this state by service of process upon the Secretary of State; provided, however, that the  
9 appointment of the Secretary of State as such agent shall not satisfy the condition precedent  
10 for having the brand families of the nonparticipating manufacturer included or retained in  
11 the directory.

12 (d) The Attorney General shall update the directory as necessary in order to correct  
13 mistakes and to add or remove a tobacco product manufacturer or brand family to keep the  
14 directory in conformity with the requirements of this chapter. The Attorney General shall  
15 post in the directory and transmit by e-mail or other practicable means to each notice of any  
16 removal from the directory of a tobacco product manufacturer or brand family at least 33  
17 days prior to removal from the directory of such tobacco product manufacturer or brand  
18 family. Unless otherwise provided by agreement between the commissioner and a tobacco  
19 product manufacturer, the commissioner shall be entitled to a refund from a tobacco  
20 product manufacturer for any money paid by the commissioner to the tobacco product  
21 manufacturer for any cigarettes of the tobacco product manufacturer in the possession of  
22 the commissioner on the effective date of removal from the directory, or as subsequently  
23 received from a retail dealer as provided in this chapter, of products of that tobacco product  
24 manufacturer or brand family of cigarettes. Unless otherwise provided by agreement  
25 between a retail dealer and the commissioner or a tobacco product manufacturer, a retail  
26 dealer shall be entitled to a refund from the commissioner or a tobacco product  
27 manufacturer for any money paid by the retail dealer to the commissioner or such tobacco  
28 product manufacturer for any cigarettes of the tobacco product manufacturer still in the  
29 possession of the retail dealer on the effective date of removal from the directory of that  
30 tobacco product manufacturer or brand family. The Attorney General shall not restore to  
31 the directory the tobacco product manufacturer or the brand family until the tobacco  
32 product manufacturer has paid the commissioner or retail dealer any refund due.

33 10-13A-7.

34 (a) Not later than 20 calendar days after the end of each calendar quarter, and more  
35 frequently if so directed by the Attorney General, each distributor shall submit such  
36 information as the Attorney General requires to facilitate compliance with this chapter,

1 including, but not limited to, a list by brand family of the total number of cigarettes, or, in  
2 the case of 'roll-your-own,' the equivalent count, for which the distributor affixed tax  
3 stamps during the previous calendar quarter or otherwise paid the tax due for such  
4 cigarettes. The distributor shall maintain and make available to the Attorney General all  
5 invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any  
6 other information relied upon in reporting to the Attorney General for a period of five  
7 years.

8 (b) The commissioner is authorized to disclose to the Attorney General any information  
9 received under this chapter and requested by the Attorney General for purposes of  
10 determining compliance with and enforcing the provisions of this chapter. The  
11 commissioner and Attorney General shall share with each other the information received  
12 under this chapter and may share such information with other federal, state, or local  
13 agencies only for purposes of enforcement of this chapter or the corresponding laws of  
14 other states.

15 (c) The Attorney General may require at any time from the nonparticipating manufacturer  
16 proof from the financial institution in which such manufacturer has established a qualified  
17 escrow fund for the purpose of compliance with Chapter 13 of this title of the amount of  
18 money in such fund, exclusive of interest, the amount and date of each deposit to such  
19 fund, and the amount and date of each withdrawal from such fund.

20 (d) In addition to the information required to be submitted pursuant to this chapter, the  
21 Attorney General may require a distributor or tobacco product manufacturer to submit any  
22 additional information including, but not limited to, samples of the packaging or labeling  
23 of each brand family, as is necessary to enable the Attorney General to determine whether  
24 a tobacco product manufacturer is in compliance with this chapter.

25 (e) To promote compliance with this chapter, the Attorney General may promulgate  
26 regulations requiring a tobacco product manufacturer subject to the requirements of  
27 subsection (c) of Code Section 10-13A-3 to make the annual escrow deposits required  
28 during the year in which the sales covered by such deposits are made. The Attorney  
29 General may require production of information sufficient to enable the Attorney General  
30 to determine the adequacy of the amount of the installment deposit.

31 10-13A-8.

32 (a) In addition to or in lieu of any other civil or criminal remedy provided by law, upon a  
33 determination that a distributor has violated Code Section 10-13A-5 or any regulation  
34 adopted pursuant to this chapter, the commissioner may revoke or suspend the license of  
35 the distributor in the manner provided by Code Section 48-11-6. Each tax stamp affixed  
36 and each sale or offer to sell cigarettes in violation of Code Section 10-13A-5 shall

1 constitute a separate violation. For each violation, the commissioner may also impose a  
2 civil penalty in an amount not to exceed the greater of 500 percent of the retail value of the  
3 cigarettes or \$5,000.00 upon a determination of a violation of Code Section 10-13A-5 or  
4 any regulations adopted pursuant thereto. Such penalty shall be imposed in the manner  
5 provided in subsection (c) of Code Section 48-11-24.

6 (b) Any cigarettes that have been sold, offered for sale, or possessed for sale in this state  
7 in violation of Code Section 10-13A-5 shall be deemed contraband under Code Section  
8 48-11-9 and such cigarettes shall be subject to seizure and forfeiture as provided in such  
9 Code section.

10 (c) The Attorney General, on behalf of the commissioner, may seek an injunction to  
11 restrain a threatened or actual violation of Code Section 10-13A-5 or of subsection (a)  
12 or (d) of Code Section 10-13A-7 by a distributor and to compel the distributor to comply  
13 with said Code section or either such subsection. In any action brought pursuant to this  
14 Code section, the state shall be entitled to recover the costs of investigation, costs of the  
15 action, and reasonable attorney fees.

16 (d) It shall be unlawful for a person to sell or distribute cigarettes or to acquire, hold, own,  
17 possess, transport, import, or cause to be imported cigarettes that the person knows or  
18 should know are intended for distribution or sale in this state in violation of Code Section  
19 10-13A-5. Any person who violates this subsection shall be guilty of a misdemeanor.

20 (e) A violation of Code Section 10-13A-5 shall constitute an unfair and deceptive act or  
21 practice under Part 2 of Article 15 of Chapter 1 of this title, the 'Fair Business Practices Act  
22 of 1975.'

23 10-13A-9.

24 (a) A determination of the Attorney General to not include or to remove from the directory  
25 a brand family or tobacco product manufacturer shall be subject to review in the manner  
26 prescribed by Article 1 of Chapter 13 of Title 50, known as the 'Georgia Administrative  
27 Procedure Act.'

28 (b) No person shall be issued a license or granted a renewal of a license under Chapter 11  
29 of Title 48 to act as a distributor unless such person has certified in writing that such person  
30 will comply fully with this chapter.

31 (c) The first report of distributors required by subsection (a) of Code Section 10-13A-7  
32 shall be due 30 calendar days after July 1, 2003, the certifications by a tobacco product  
33 manufacturer described in subsection (a) of Code Section 10-13A-3 shall be due 45  
34 calendar days after such date, and the directory described in Code Section 10-13A-4 shall  
35 be published or made available within 90 calendar days after such date.

1 (d) The Attorney General may promulgate rules and regulations necessary to effect the  
2 purposes of this chapter.

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

6 (f) If a court of competent jurisdiction finds that the provisions of this chapter and of  
7 Chapter 13 of this title conflict and cannot be harmonized, then such provisions of Chapter  
8 13 of this title shall control. If any section, subsection, subdivision, paragraph, sentence,  
9 clause, or phrase of this chapter causes Chapter 13 of this title to no longer constitute a  
10 qualifying or model statute, as those terms are defined in the Master Settlement Agreement,  
11 then that portion of this chapter shall not be valid. If any section, subsection, subdivision,  
12 paragraph, sentence, clause or phrase of this chapter is for any reason held to be invalid,  
13 unlawful, or unconstitutional, such decision shall not affect the validity of the remaining  
14 portions of this chapter or any part thereof."

## 15 SECTION 2.

16 Chapter 11 of Title 48 of the Official Code of Georgia Annotated, relating to cigar and  
17 cigarette taxes, is amended by striking subsections (a) and (b) of Code Section 48-11-8,  
18 relating to prohibition of sale of unstamped cigarettes, in its entirety and inserting in lieu  
19 thereof the following:

20 "(a)(1) No person shall sell, offer for sale, or possess with intent to sell any cigarettes in  
21 this state when the cigarette container does not bear the tax stamps required by Code  
22 Section 48-11-3.

23 (2) No person shall sell, offer for sale, or possess with intent to sell in this state any  
24 cigars or little cigars upon which the tax has not been paid under the alternate method of  
25 collecting the taxes provided in Code Section 48-11-3 or which do not bear tax stamps.

26 (3) No person shall sell, offer for sale, or possess with intent to sell cigarettes as  
27 prohibited by Code Section 10-13A-5.

28 (b) Each distributor at the location for which his or her license is issued and in the manner  
29 specified by the commissioner shall affix the stamps required by this Code section to each  
30 individual package of cigarettes sold or distributed by him or her, except as prohibited by  
31 Code Section 10-13A-5. Each distributor shall comply with the commissioner's  
32 regulations for the payment of the tax on cigars as provided in Code Section 48-11-3 or  
33 shall affix to each container of cigars sold by him or her or from which he or she sells  
34 cigars the stamps required by this chapter. The stamps may be affixed or the tax under the  
35 alternate method may be paid by a distributor at any time before the cigars or cigarettes are  
36 transferred out of his or her possession."

