

House Bill 893 (AS PASSED HOUSE AND SENATE)

By: Representative Lane of the 101st

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 style="text-align:center">**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 style="text-align:center">"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.

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 in 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 (4) 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 30
17 days prior to removal from the directory of such tobacco product manufacturer or brand
18 family. Unless otherwise provided by agreement between the wholesaler and a tobacco
19 product manufacturer, the wholesaler shall be entitled to a refund from a tobacco product
20 manufacturer for any money paid by the wholesaler to the tobacco product manufacturer
21 for any cigarettes of the tobacco product manufacturer in the possession of the wholesaler
22 on the effective date of removal from the directory, or as subsequently received from a
23 retail dealer as provided in this chapter, of products of that tobacco product manufacturer
24 or brand family of cigarettes. Unless otherwise provided by agreement between a retail
25 dealer and the wholesaler or a tobacco product manufacturer, a retail dealer shall be entitled
26 to a refund from the wholesaler or a tobacco product manufacturer for any money paid by
27 the retail dealer to the wholesaler or such tobacco product manufacturer for any cigarettes
28 of the tobacco product manufacturer still in the possession of the retail dealer on the
29 effective date of removal from the directory of that tobacco product manufacturer or brand
30 family.

31 10-13A-7.

32 (a) Not later than 20 calendar days after the end of each calendar quarter, and more
33 frequently if so directed by the Attorney General, each distributor shall submit such
34 information as the Attorney General requires to facilitate compliance with this chapter,
35 including, but not limited to, a list by brand family of the total number of cigarettes, or, in
36 the case of 'roll-your-own,' the equivalent count, for which the distributor affixed tax

1 stamps during the previous calendar quarter or otherwise paid the tax due for such
2 cigarettes. The distributor shall maintain and make available to the Attorney General all
3 invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any
4 other information relied upon in reporting to the Attorney General for a period of five
5 years.

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

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

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

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

29 10-13A-8.

30 (a) In addition to or in lieu of any other civil or criminal remedy provided by law, upon a
31 determination that a distributor has violated Code Section 10-13A-5 or any regulation
32 adopted pursuant to this chapter, the commissioner may revoke or suspend the license of
33 the distributor in the manner provided by Code Section 48-11-6. Each tax stamp affixed
34 and each sale or offer to sell cigarettes in violation of Code Section 10-13A-5 shall
35 constitute a separate violation. For each violation, the commissioner may also impose a
36 civil penalty in an amount not to exceed the greater of 500 percent of the retail value of the

1 cigarettes or \$5,000.00 upon a determination of a violation of Code Section 10-13A-5 or
2 any regulations adopted pursuant thereto. Such penalty shall be imposed in the manner
3 provided in subsection (c) of Code Section 48-11-24.

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

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

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

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

21 10-13A-9.

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

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

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

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

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

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

13 SECTION 2.

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

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

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

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

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

