

## Chapter 9

### Other Department of Revenue Responsibilities Concerning Cigarettes and Tobacco Products

The Department's primary responsibilities with respect to cigarettes concern the administration and collection of the cigarette tax. However, the General Assembly has entrusted the Department with certain other responsibilities involving cigarettes. The following will briefly outline these other responsibilities:

#### A. Reduced Cigarette Ignition Propensity Standards

In 2008, the General Assembly enacted the "Reduced Cigarette Ignition Propensity Standards and Firefighter Protection Act"<sup>1</sup> ("Act"). The purpose of this Act is to provide that cigarettes may not be sold or offered for sale in South Carolina unless the cigarettes have been tested in accordance with certain test methods, met certain performance standards, and received certain certifications. In addition, the cigarettes must be properly marked to indicate compliance with this Act.

While the State Fire Marshal administers this law, and is responsible for promulgating regulations necessary to administer it, the following provisions apply to the Department:

1. The Department, in the regular course of conducting cigarette tax inspections of wholesalers, retailers and anyone liable for the tax, may inspect the cigarettes to determine if they are marked as required under the Act. If the cigarettes are not marked as required, the Department shall notify the State Fire Marshal.<sup>2</sup>
2. The Department, as well as the Attorney General, the State Fire Marshal and other law enforcement personnel, may examine the books, papers, invoices, and other records of any person in possession, control, or occupancy of any premises where cigarettes are placed, stored, sold, or offered for sale, as well as the stock of cigarettes on the premises. A person in the possession, control, or occupancy of any premises where cigarettes are placed, sold, or offered for sale, is directed and required to give the Department, as well as the Attorney General, State Fire Marshal, and other law enforcement personnel, the means, facilities, and opportunity for these examinations.<sup>3</sup>
3. Cigarettes seized by the State Fire Marshal or any law enforcement personnel for not being marked as required under the Act must be turned over to the Department. These cigarettes are forfeited to the State. Cigarettes seized must be destroyed; however, prior to their destruction the true holder of the trademark rights in the cigarette brand must be permitted to inspect the cigarettes.<sup>4</sup>

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<sup>1</sup> Chapter 51 of Title 23 (Act No. 331 of 2008).

<sup>2</sup> South Carolina Code §23-51-70(B).

<sup>3</sup> South Carolina Code §23-51-80.

<sup>4</sup> South Carolina Code §23-51-60(G).

4. Each manufacturer must certify to the State Fire Marshal that each cigarette has been tested and met the requirements of the Act. This certification must contain certain information about each cigarette, such as brand or trade name, style, length, and the marking required under the Act. Each cigarette must be recertified every three years. The certifications must be made available to the Department, as well as the Attorney General.<sup>5</sup>

Note: The Act also contains an uncodified provision that became effective June 5, 2008, that prohibits local governments from enacting any ordinance in conflict with, or preempting, the provisions of the Act.

This law becomes effective on January 1, 2010.

## **B. Distribution of Tobacco Products to Persons Under 18 Years of Age**

It is unlawful for a person to sell, furnish, give, or provide tobacco products, including tobacco product samples, cigarette paper, or a substitute for them, to a person under the age of eighteen years.<sup>6</sup> In addition, a person engaged in sampling must demand proof of age from a prospective recipient if an ordinary person would conclude on the basis of appearance that the prospective recipient may be under the age of 18 years.<sup>7</sup>

For violating these laws, the following penalties may be imposed:<sup>8</sup>

- (1) a penalty of not more than \$25.00 may be imposed for a first violation,
- (2) a penalty of not more than \$50.00 may be imposed for a second violation, and
- (3) a penalty of not less than \$100.00 may be imposed for a third or subsequent violation.

Proof that the defendant demanded, was shown, and reasonably relied upon proof of age is a defense to an action brought under this statute.

The Department must enforce this law in a manner that reasonably may be expected to reduce the extent to which tobacco products are sold or distributed to persons under the age of 18 years. The Department must annually conduct random, unannounced inspections at locations where tobacco products are sold or distributed to ensure compliance and the Department must designate an enforcement officer to conduct the annual inspections.<sup>9</sup>

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<sup>5</sup> South Carolina Code §23-51-40.

<sup>6</sup> South Carolina Code §§16-17-502(A) and 16-17-501(1).

<sup>7</sup> South Carolina Code §16-17-502(B).

<sup>8</sup> South Carolina Code §16-17-502(C).

<sup>9</sup> South Carolina Code §16-17-503(A). See also the “Note” at the end of this section and footnote #13.

In addition, the Department must prepare and submit annually to the Secretary of the United States Department of Health and Human Services the report required by Section 1926 of the Federal Public Health Service Act (42 U.S.C. 300x-26).<sup>10</sup> The Department is also responsible for ensuring the State's compliance with this federal law and applicable regulations promulgated by the United States Department of Health and Human Services.<sup>11</sup>

Note: Currently, the South Carolina Department of Alcohol and Other Drug Abuse Services (“DAODAS”) conducts routine inspections, gathers information and annually submits to the Secretary of the United States Department of Health and Human Services the report required by this section and by 42 U.S.C. 300X-26. This report is known as the “Synar Report.” To review a copy of the most recent Synar Report, visit the DAODAS website at <http://www.daodas.state.sc.us/>.

### **C. Tobacco Escrow Fund and Fund Enforcement**

On November 23, 1998, leading United States tobacco product manufacturers entered into the “Master Settlement Agreement” (“Agreement”) with South Carolina. This Agreement obligates these manufacturers, in return for a release of past, present, and certain future claims against them, to pay substantial sums to the State based in part on the volume of sales of their products in South Carolina. In 1999, the General Assembly enacted the “Tobacco Escrow Fund” and found that it is the policy of this State that financial burdens imposed on the State by cigarette smoking be borne by tobacco product manufacturers rather than by the State.<sup>12</sup>

“Tobacco Escrow Fund” provides that any tobacco product manufacturer selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) shall either become a participating manufacturer, as defined in section II(jj) of the Master Settlement Agreement, and generally perform its financial obligations under the Master Settlement Agreement or place certain amounts into a qualified escrow fund based on the number of cigarettes sold.<sup>13</sup> Under this law, the Department determines the number of cigarettes sold in the State by the applicable tobacco product manufacturer during the year in question, as measured by excise taxes collected by the State on packs or “roll-your-own” tobacco containers.<sup>14</sup> This is the Department’s only duty with respect to this law.

In 2005, the General Assembly enacted laws for purposes of enacting procedural enhancements designed to deter potential violations and promote the enforcement of the Tobacco Escrow Fund Act, and safeguard the Agreement, the financial interests of the State, and the public health.<sup>15</sup> These provisions<sup>16</sup> became effective January 1, 2006.

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<sup>10</sup> South Carolina Code §16-17-503(B).

<sup>11</sup> South Carolina Code §16-17-503(B).

<sup>12</sup> Act No. 47 of 1999.

<sup>13</sup> South Carolina Code §11-47-30.

<sup>14</sup> South Carolina Code §11-47-20(j).

<sup>15</sup> Act No. 61 of 2005 added these enforcement provisions in Chapter 48 to Title 11 of the SC Code of Laws.

<sup>16</sup> Chapter 48 to Title 11 of the SC Code of Laws.

Administration and enforcement of these provisions<sup>17</sup> rests with the South Carolina Attorney General; however, the Department is involved with two aspects of this law:

1. A cigarette distributor is required to submit information to the Attorney General to facilitate compliance with these enforcement provisions including, but not limited to, a list by brand family of the total number of cigarettes or in the case of roll-your-own, the equivalent stick count for which the cigarette distributor affixed stamps during the previous calendar quarter, or otherwise paid the tax due for the cigarettes. The cigarette distributor shall maintain, and make available to the Attorney General, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and other information relied upon in reporting to the Attorney General for a period of five years.<sup>18</sup>

The distributors must also provide this information and documentation to the Department and any other documentation requested by the Department. The Department must process this information as needed by it, and as needed by the Attorney General for the purposes of enforcement and for purposes of the Tobacco Escrow Fund Act.<sup>19</sup>

2. It is unlawful for a cigarette manufacturer, cigarette importer, cigarette distributor, or cigarette retailer to sell or possess counterfeit cigarettes. A person who violates this subsection is guilty of a felony and, upon conviction, is subject to a fine, imprisonment or both. In addition, certain violations require the revocation by the Department of any cigarette and tobacco products license issued by the Department and held by the cigarette manufacturer, cigarette importer, cigarette distributor, or cigarette retailer.<sup>20</sup>

Note: All cigarette brands in compliance with the Tobacco Escrow Fund Act, and therefore legal for sale within South Carolina, are listed on the current Tobacco Directory published by the Office of the South Carolina Attorney General. In addition, employees of the Department of Revenue assist the Office of the South Carolina Attorney General by conducting inspections of cigarette inventories to ensure compliance with the Tobacco Escrow Fund Act.

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<sup>17</sup> Chapter 48 to Title 11 of the SC Code of Laws.

<sup>18</sup> South Carolina Code §11-48-50.

<sup>19</sup> South Carolina Code §11-48-50.

<sup>20</sup> South Carolina Code §11-48-90.