TITLE 316 CHAPTER 58
TOBACCO PRODUCT MANUFACTURERS

Reg-58-003 MANUFACTURER'S CERTIFICATION

003.01 Every tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, shall annually execute and deliver a certification to the Tax Commissioner and the Attorney General.

003.01A The certification shall be on a form prescribed by the Tax Commissioner. The form will be available on the Nebraska Department of Revenue website.

003.01B The certification shall be delivered no later than April 30 of each year.

003.01C The certification shall be updated with a supplemental certification as required by 003.06.

003.02 Every participating manufacturer must certify under penalty of perjury that, as of the date of the certification, that it is a participating manufacturer. It shall include in its certification a list of its brand families.

003.02A A participating manufacturer shall not include a brand family in its certification unless it affirms that the brand family is to be deemed to be its cigarettes for purposes of calculating its payments under the Master Settlement Agreement for the relevant year in the volume and shares determined pursuant to the Master Settlement Agreement.

003.03 Every nonparticipating manufacturer shall certify, under penalty of perjury that, as of the date of the certification, such manufacturer is in full compliance with §69-2703(2) and these regulations, and has made all quarterly installment payments required by Reg-58-005, and shall include in its certification the following information:

003.03A A list of all of its brand families and the number of units sold for each brand family that were sold in the state during the preceding calendar year. A list of the brand families that were sold in the state during the current year. The list shall include the name of any of its brand families sold in the state during the current or preceding calendar years that is no longer being sold in the state as of the date of the certification. Additionally, the list shall identify, by name and address, any other manufacturer in the preceding calendar year of any brand family listed.

003.03A(1) A brand family should not be included in the list unless the nonparticipating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of §69-2703(2), which establishes the obligation to make escrow deposits.

003.03B A statement that the nonparticipating manufacturer has established and continues to maintain a qualified escrow fund pursuant to a qualified escrow agreement. The date of approval of or submission to the Attorney General should be included.

003.03B(1) A statement including the name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established a qualified escrow fund; the account number of such fund and any sub-account number for the State of Nebraska; the amount deposited in the fund for cigarettes

sold in the state during the preceding calendar year; the dates and amount of each such deposit, along with a copy of a deposit slip, account statement or a letter signed by an officer of the financial institution verifying the deposit, the amounts and dates of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from such fund or from any other qualified escrow fund into which it ever made escrow payments pursuant to §69-2703(2).

003.03C A statement that the nonparticipating manufacturer, unless it is a resident of this state, is either registered to do business in Nebraska as a corporation or business entity, or has appointed an agent for service of process located in the United States on whom all process and any action or proceeding against the nonparticipating manufacturer concerning or arising out of the enforcement of §§ 69-2703 through 69-2710 may be served in any manner authorized by law. Said agent for service of process must be appointed and continually engaged without interruption.

003.03C(1) The nonparticipating manufacturer shall provide the name, address, telephone number of such agent to the Tax Commissioner and Attorney General, along with a written acceptance of the appointment and availability of the agent.

<u>003.03D The nonparticipating manufacturer shall consent to be sued in the district courts of the State of Nebraska for purposes of the state (i) enforcing any provision of sections 69-2703 to 69-2710 and any rules and regulations adopted and promulgated thereunder or (ii) bringing a released claim as defined in section 69-2702.</u>

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

003.05 The Tax Commissioner or Attorney General may require a tobacco product manufacturer to submit any additional information, including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to a determination of whether a manufacturer is in compliance with §69-2704 through § 69-2710.

003.06 A supplemental certification shall be required in the following situations.

003.06A The list of brand families shall be updated by the tobacco product manufacturer thirty calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Tax Commissioner and the Attorney General.

003.06B The nonparticipating manufacturer shall provide notice to the Tax Commissioner and Attorney General thirty calendar days prior to termination of the authority of an agent and shall further provide satisfactory proof of the appointment of a new agent no less than five calendar days prior to the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the Tax Commissioner and Attorney General of the termination within five calendar days and shall include satisfactory proof of the appointment of a new agent.

003.07 The supplemental certification shall include the following information:

03.07A For supplemental certifications required under 003.06A , the name and address of the tobacco product manufacturer with a list of the names of any new brand families being sold and the names of any brand families no longer being sold.

003.07B For supplemental certifications required under 003.06B , the name and address of the nonparticipating tobacco product manufacturer with a statement of the termination of the authority of the registered agent and the effective date of said termination, along with a statement of the appointment of a new registered agent, including said agents name, address, and phone number. Attached to the supplemental certification shall be a signed statement by the new registered agent showing acceptance of its appointment as a registered agent and the effective date thereof.

(Sections 69-2706, 69-2707, 69-2708, 69-2709, and 69-2710, . .)

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REG-58-004 DIRECTORY OF CIGARETTES APPROVED FOR SALE IN NEBRASKA

004.01 The Tax Commissioner shall develop, maintain, and make public a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of §69-2706(1) and all brand families that are listed in such certifications.

004.02 The Tax Commissioner shall not include or retain in the directory the following:

004.02A The name or brand families of any tobacco product manufacturer that has failed to provide the required certification or whose certification the Tax Commissioner determines is not in compliance with the requirements of § 69-2706(1) unless the Tax Commissioner determines that such noncompliance has been cured to the Tax Commissioner's satisfaction.

004.02B The name or brand families of any tobacco product manufacturer if the Attorney General recommends and notifies the Tax Commissioner who concludes, in the case of a nonparticipating manufacturer, that either (1) any escrow payment required pursuant to §69-2703(2) <u>or §69-2708(4)</u> for any period for any brand family, whether or not listed by such nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been submitted for approval or approved by the Attorney General or (2) any outstanding final judgment, including interest thereon, for violations of §69-2703, has not been fully satisfied for such brand family and such manufacturer.

004.03 The Tax Commissioner shall update the directory no later than May 15 of each year to reflect certifications made or on before April 30 of that year. The Tax Commissioner shall continuously update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformance with §§69-2704 to 69-2710.

004.04 The directory shall be made available by the Tax Commissioner for public inspection or published on its internet website.

004.05 It shall be unlawful for any person to affix a Nebraska tax stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory or to sell, offer, or possess for sale in this state cigarettes of a tobacco product manufacturer or brand family ~~intended for sale in this state~~ not included in the directory.

004.06 Tobacco product manufacturers shall be notified in writing of a decision made by the Tax Commissioner not to include a tobacco product manufacturer in the Directory.

004.06A If the Tax Commissioner determines that a tobacco product manufacturer or a brand family shall not be included in the Directory, the tobacco product manufacturer may seek a review of such determination by requesting a contested case before the Tax Commissioner under the Administrative Procedure Act.

004.06A(1) A contested case may be initiated by filing a petition in writing in the office of the Tax Commissioner which shall:

004.06A(1)(a) Identify the petitioner;

004.06A(1)(b) Identify and attach a copy of the Tax Commissioner's determination being contested;

004.06A(1)(c) Set forth an explanation in detail regarding petitioner's claim of compliance with §69-2706, §69-2707(1), § 69-2703 and any applicable regulations and attach copies of all documentation supporting such claim;

004.06A(1)(d) Set forth the relief to which petitioner claims to be entitled.

004.06A(2) The petition shall be filed within thirty calendar days after the date of the Tax Commissioner's written determination that the manufacturer shall not be included in the directory.

004.06A(3) The hearing shall be conducted pursuant to the procedures set forth in the Administrative Procedure Act, except as specifically modified herein. A hearing for inclusion in the directory shall be held within 60 days after the filing of the petition. However, upon written agreement of the parties, the hearing may be concluded at a date beyond the expiration of the 60-day period. Discovery shall proceed as in the rules of civil procedure, except a written response shall be required within 20 days after service of a discovery request. The hearing shall determine whether the tobacco product manufacturer is in compliance with §§69-2703 through 69-2710 and whether the manufacturer should be listed in the directory. The burden of proof shall be on the petitioner.

004.06A(4) The Tax Commissioner's final decision in a proceeding for inclusion in the Directory shall be rendered within 30 days after conclusion of the hearing and served upon the petitioner as set forth in the Administrative Procedure Act.

004.06A(5) The Tax Commissioner's final decision may be appealed as set forth in the Administrative Procedure Act.

004.07 The Tax Commissioner shall give a tobacco product manufacturer 30 days written notice of the Tax Commissioner's intention to remove the manufacturer or a brand family from the directory for noncompliance with §§69-2703 through 69-2710. This notice shall also be posted in the directory.

004.07A The tobacco product manufacturer may seek judicial review of this notice of removal and if a temporary injunction is obtained within the 30 day period, the manufacturer or brand family shall remain on the directory unless and until a judicial order is obtained dissolving the injunction. Absent an injunction being entered by a court of competent jurisdiction, the Tax Commissioner shall remove the tobacco product manufacturer or brand family from the directory 30 days after the notice is sent unless the Tax Commissioner determines that the manufacturer is no longer out of compliance with the provisions of §§69-2703 through 69-2710.

004.07B The Tax Commissioner shall provide notice, electronically or by other practicable means at the discretion of the Tax Commissioner, of the removal of a tobacco products manufacturer or brand family from the directory to the stamping agents. Stamping agents must provide and update as necessary an electronic mail address to the Tax Commissioner in order to receive any notification under §§69-2704 through 69-2710.

004.07C A stamping agent shall provide reasonable written or electronic notice to its customers for a brand family regarding any notice it receives from the Tax Commissioner of the removal of a tobacco product manufacturer or a brand family from the directory. The stamping agent shall give its customers a 7 day period from the date of its service of the notice for the customer's return of cigarettes that have been removed from the directory.

004.08 A tobacco product manufacturer or brand family removed from the directory may thereafter be restored to the directory upon the determination of the Tax Commissioner that it has met all of the requirements of §§69-2703 through 69-2710.

004.08A A tobacco product manufacturer or brand family removed from the directory shall not thereafter be restored unless and until it has refunded to the stamping agents all money to which the stamping agents establish that they are entitled under § 69-2706(2)(d).

004.08B The Tax Commissioner's determination not to include the tobacco product manufacturer in the directory for failure to make such payments to the stamping agents shall be given to the manufacturer in writing pursuant to the provisions of and be subject to the procedures set forth above.

(Sections 69-2706, 69-2707, 69-2708, 69-2709, and 69-2710, .)

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REG-58-005 REQUIREMENT OF QUARTERLY PAYMENTS

005.01 A nonparticipating manufacturer is required to make the escrow payments owed under §69-2703(2) in quarterly installments when any of ~~during the year in which~~ the sales covered by such deposits are made under any of the circumstances enumerated in paragraph 005.02.

005.02 The circumstances under which escrow payments shall be required to be made in quarterly payments include any one of the following:

> 005.02A Such quarterly installments are required by a nonparticipating manufacturer through the end of the ~~during the first~~ calendar year following the year in which the nonparticipating manufacturer ~~it~~ is first listed or is relisted on the directory established by §69-2706(2).
>
> 005.02B Such quarterly installments are required by a nonparticipating manufacturer if such manufacturer has failed to make a complete and timely escrow deposit for any calendar year as required by §69-2703, or for any quarter as required by §69-2708.
>
> 005.02C Such quarterly installments are required by a nonparticipating manufacturer if such manufacturer has failed to fully pay a judgment, including civil penalties, ordered under §69-2703 or §69-2709.

005.03 When required, quarterly installment payments shall be made into the manufacturer's qualified escrow account, established pursuant to an escrow agreement approved or submitted for approval to the Attorney General, on or before the date which is thirty days after the end of the calendar quarter.

005.04 The manufacturer required to make quarterly payments shall submit written proof of the deposit, such as a copy of the bank deposit slip or bank account statement, to the Attorney General's office within 10 days after the quarterly deposit deadline.

005.05 Upon the request of the Tax Commissioner, the manufacturer required to make quarterly payments shall promptly submit proof of the number of units sold in the State of Nebraska during the calendar quarter at issue and such other information as may be required to determine the adequacy of the amount of the quarterly installment.

005.06 A tobacco product manufacturer required to make a quarterly installment payment into escrow that fails to fully and timely make such deposit shall be removed from the Directory, pursuant to the procedures set forth Reg-58-004.07.

(Section 69-2708(4),  .)