Article 37.

Tobacco Reserve Fund and Escrow Compliance.

Part 1. Tobacco Reserve Fund.

§ 66-290. Definitions.

As used in this Article:

(1) "Adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement.

(2) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns," "is owned," and "ownership" mean ownership of an equity interest, or the equivalent thereof, of ten percent (10%) or more, and the term "person" means an individual, partnership, committee, association, corporation, or any other organization or group of persons.

(3) "Allocable share" means Allocable Share as that term is defined in the Master Settlement Agreement.

(4) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (i) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (ii) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (iii) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (i) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette."

(5) "Master Settlement Agreement" means the settlement agreement (and related documents) entered into on November 23, 1998, by the State and leading United States tobacco product manufacturers.

(6) "Qualified escrow fund" means an escrow arrangement with a federally or State chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least one billion dollars ($1,000,000,000) where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds' principal except as consistent with G.S. 66-291(b).

(7) "Released claims" means Released Claims as that term is defined in the Master Settlement Agreement.

(8) "Releasing parties" means Releasing Parties as that term is defined in the Master Settlement Agreement.

(9) "Tobacco Product Manufacturer" means an entity that after the effective date of this Article directly (and not exclusively through any affiliate):

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

b. Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

c. Becomes a successor of an entity described in sub-subdivision a. or b. of this subdivision.

The term "Tobacco Product Manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within any of sub-subdivisions a. through c. of this subdivision.

(10) "Units sold" means the number of individual cigarettes sold in the State by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) during the year in question, on which the State has authority under federal law to impose excise or similar taxes or to collect escrow. The term does not include cigarettes sold (i) on a federal installation in a transaction that is exempt from state taxation under federal law or (ii) on a Native American tribe's reservation to a consumer who is an adult enrolled member of that tribe in a transaction that is exempt from state taxation under federal law. The Secretary of Revenue shall promulgate such rules as are necessary to ascertain the amount of State excise tax paid on the cigarettes of such tobacco product manufacturer for each year. In lieu of adopting rules, the Secretary of Revenue may issue bulletins or directives requiring taxpayers to submit to the Department of Revenue the information necessary to make the required determination under this subdivision. (1999-311, s. 1; 2002-145, s. 2; 2015-241, s. 6.24(b).)

§ 66-291. Requirements.

(a) Any tobacco product manufacturer selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after the effective date of this Article shall do one of the following:

(1) Become a participating manufacturer (as that term is defined in section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or

(2) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):

a. 1999: $.0094241 per unit sold after the effective date of this Article.
b. 2000: $.0104712 per unit sold.
c. For each of 2001 and 2002: $.0136125 per unit sold.
d. For each of 2003 through 2006: $.0167539 per unit sold.
e. For each of 2007 and each year thereafter: $.0188482 per unit sold.

(b) A tobacco product manufacturer that places funds into escrow pursuant to subdivision (2) of subsection (a) of this section shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

(1) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the State or any releasing party located or residing in the State. Funds shall be released from escrow under this subdivision (i) in the order in which they were placed into escrow and (ii) only to the extent and at the time necessary to make payments required under such judgment or settlement;

(2) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the State in a particular year was greater than the Master Settlement Agreement payments, as determined pursuant to Section IX(i) of that agreement, including after final determination of all adjustments, that the manufacturer would have been required to make on account of the units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or

(3) To the extent not released from escrow under subdivisions (1) or (2) of this subsection, funds shall be released from escrow and revert back to such tobacco product manufacturer 25 years after the date on which they were placed into escrow.

(c) Each tobacco product manufacturer that elects to place funds into escrow pursuant to this section shall annually certify to the Attorney General that it is in compliance with this section. The Attorney General may bring a civil action on behalf of the State against any tobacco product manufacturer or joint and severally liable importer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this section shall:

(1) Be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a violation either of subdivision (2) of subsection (a) of this section, of subsection (b) of this section, or of this section, may impose a civil penalty (the clear proceeds of which shall be paid to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2) in an amount not to exceed five percent (5%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent (100%) of the original amount improperly withheld from escrow;

(2) In the case of a knowing violation, be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a knowing violation either of subdivision (2) of subsection (a) of this section, of subsection (b) of this section, or of this section, may impose a

civil penalty (the clear proceeds of which shall be paid to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2) in an amount not to exceed fifteen percent (15%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent (300%) of the original amount improperly withheld from escrow; and

(3) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary) for a period not to exceed two years.

Each failure to make an annual deposit required under this section shall constitute a separate violation. (1999-311, s. 1; 2000-140, s. 58; 2002-145, s. 2; 2005-276, s. 6.12(a); 2005-435, s. 59.1(a); 2015-241, s. 6.24(c).)

Part 2. Tobacco Escrow Compliance.

§ 66-292. Definitions.

The following definitions apply in this Part:

(1) Brand family. – All styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers including, but not limited to, "menthol", "lights", "kings", and "100s".

(2) Escrow agreement. – An agreement by which a qualified escrow fund is created and maintained.

(3) Nonparticipating manufacturer. – A tobacco product manufacturer that is not a participating manufacturer.

(4) Participating manufacturer. – Defined in subsection II(jj) of the Master Settlement Agreement. (2002-145, s. 3.)

§ 66-293. Sale of certain cigarettes prohibited.

(a) Civil Penalty. – It is unlawful for a person required to pay taxes pursuant to Part 2 or 3 of Article 2A of Chapter 105 of the General Statutes to sell or deliver cigarettes belonging to a brand family of a nonparticipating manufacturer if the sale of the cigarettes is subject to such taxes unless the cigarettes are included on the compliant nonparticipating manufacturer's list prepared and made public by the Office of the Attorney General under G.S. 66-294.1 as of the date the person sells or delivers the cigarettes. It is not a violation of this subsection if the brand family was on the compliant nonparticipating manufacturer's list when the person purchased the cigarettes and the person sold or delivered the cigarettes within 30 days of the purchase. The Attorney General may impose a civil penalty on a person that it finds violates this subsection. The amount of the penalty may not exceed the greater of five hundred percent (500%) of the retail value of the cigarettes sold or five thousand dollars ($5,000).

(b) Contraband. – Cigarettes described in subsection (a) of this section are contraband and may be seized by a law enforcement officer. The procedure for seizure and disposition of this contraband is the same as the procedure under G.S. 105-113.31 and G.S. 105-113.32 for non-tax-paid cigarettes. (2002-145, s. 3; 2015-241, s. 6.24(d).)

§ 66-294. Duties of manufacturers.

(a) Participating Manufacturers. – Unless the Office of the Attorney General provides a waiver, a participating manufacturer must submit to the Office of the Attorney General a list of all of the manufacturer's brand families by April 30th of each year. The participating manufacturer

must notify the Office of the Attorney General of any changes to the list of brand families it offers for sale 30 days prior to the change.

(b) Nonparticipating Manufacturers. – A nonparticipating manufacturer must:

(1) Appoint and continuously maintain a process service agent within the State of North Carolina to accept service of any notification or enforcement of an action under this Article. The manufacturer shall file a certified copy of each instrument appointing a process service agent with the Secretary of State and the Office of the Attorney General.

(2) Submit an annual application to the Office of the Attorney General for inclusion of the nonparticipating manufacturer's products on the compliant nonparticipating manufacturer's list, in accordance with subsection (c) of this section.

(3) Notify the Office of the Attorney General of any changes to the list of brand families it offers for sale 30 days prior to the change.

(4) Have made the escrow payments required under G.S. 66-291(a)(2) for all cigarettes belonging to the brand families included in the list submitted in the application for inclusion and any brand families added to the list since it was submitted to the Office of the Attorney General.

(5) Submit an escrow agreement to the Office of the Attorney General.

(6) Not deliver cigarettes unless the cigarettes are included on the compliant nonparticipating manufacturer's list in effect on the date of delivery.

(7) Notwithstanding any other provision of law, if a newly qualified nonparticipating manufacturer is to be listed in the North Carolina Tobacco Directory (the Directory), or if the Attorney General reasonably determines that any nonparticipating manufacturer who has filed a certification pursuant to G.S. 66-291, et seq., poses an elevated risk for noncompliance with this Article, neither such nonparticipating manufacturer nor any of its brand families shall be included in the Directory unless and until such nonparticipating manufacturer, or its United States importer that undertakes joint and several liability for the manufacturer's performance in accordance with G.S. 66-291, et seq., has posted a bond in accordance with this section.

The bond shall be posted by a corporate surety located within the United States in a form and manner acceptable to the Attorney General, or a cash equivalent posted by the nonparticipating manufacturer, in an amount equal to the greater of fifty thousand dollars ($50,000) or the greatest amount of escrow the manufacturer in either its current or predecessor form was required to deposit as a result of its highest calendar year's sales in North Carolina for any of the preceding three calendar years or greatest quarterly escrow deposit for any of the preceding 12 calendar quarters, depending on the manufacturer's required escrow deposit frequency. The bond or its cash equivalent shall be posted at least 10 days in advance of each calendar year or quarter depending on the manufacturer's required escrow deposit frequency. The bond shall be written in favor of North Carolina and such bond or cash equivalent shall be conditioned on the performance by the nonparticipating manufacturer or its United States importer that undertakes joint and several liability for the manufacturer's performance, in accordance with G.S. 66-294.2, of all of its

duties and obligations under this Article during the year in which the certification is filed and the next succeeding calendar year. The bond may be drawn upon by the Attorney General to cover unsatisfied escrow obligations, penalties, and any other liability under the tobacco laws of the State.

Some factors, though not exclusive, which the Attorney General may consider in determining whether any nonparticipating manufacturer or importer poses an elevated risk of noncompliance are (i) the nonparticipating manufacturer or any affiliate thereof or importer has illegally failed to satisfy an escrow obligation with respect to any state in the past; (ii) any state has removed the nonparticipating manufacturer or its brand families or an affiliate or any of the affiliate's brand families from the state's tobacco directory for noncompliance with the state's laws; (iii) any state has pending litigation against, or an unsatisfied judgment against the nonparticipating manufacturer or any affiliate thereof or importer for escrow or penalties related to noncompliance with state escrow laws; (iv) the nonparticipating manufacturer sells its cigarettes or tobacco products directly to consumers via remote or other non-face-to-face means; (v) a state or federal court has determined that the nonparticipating manufacturer or importer has violated any tobacco tax or tobacco control law or engaged in unfair business practice or unfair competition; or (vi) the nonparticipating manufacturer or importer fails to submit or complete any required forms, documents, certifications, or notices, in a timely manner or, to the satisfaction of the Attorney General.

(c) Nonparticipating Manufacturer's Application. – A nonparticipating manufacturer must submit an application to the Office of the Attorney General by April 30th of each year for inclusion on the compliant nonparticipating manufacturers' list. The Attorney General may provide a waiver of the deadline for good cause. The application must include a certification that the nonparticipating manufacturer has fulfilled the duties listed in subsection (b) of this section and a list of the brand families of the manufacturer offered for sale in the State during either the current calendar year or the previous calendar year. The certification must be in the form required by the Office of the Attorney General. (2002-145, s. 3; 2015-241, s. 6.24(e); 2016-92, s. 4(a).)

§ 66-294.1. Duties of Attorney General.

(a) Annual Lists. – The Office of the Attorney General shall prepare the following lists annually and shall make those lists available for public inspection:

(1) Participating manufacturers. – A list of the participating manufacturers and all brand families of each participating manufacturer that the manufacturer has identified to the Attorney General, in accordance with G.S. 66-294.

(2) Compliant nonparticipating manufacturers. – A list of the nonparticipating manufacturers whose applications for inclusion have been found to be complete and accurate and whose escrow agreements have been approved by the Office of the Attorney General. The list must include those brand families that the manufacturer has identified to the Attorney General, in accordance with G.S. 66-294.

(b) Supplemental Lists. – The Office of the Attorney General must supplement the annual lists as necessary to reflect additions to or deletions of manufacturers and brand families. The Attorney General shall delete a nonparticipating manufacturer and its brand families from the list if

it determines that the manufacturer fails to comply with the duties listed in G.S. 66-294. The Attorney General must add a nonparticipating manufacturer and its brand families to the list if it determines all of the following:

(1) The nonparticipating manufacturer, as well as any joint and severally liable importer, has submitted an application under G.S. 66-294, and it is found to be complete and accurate.

(2) The Office of the Attorney General has approved the manufacturer's escrow agreement.

(3) The manufacturer has made any past due payments owed to its escrow account for any of its listed brand families.

(4) The manufacturer has resolved any outstanding penalty demands or adjudicated penalties for its listed brand families.

(c) Quarterly Escrow Installments. – To promote compliance with this Article, the Attorney General shall require a nonparticipating manufacturer to make the escrow deposits required by G.S. 66-291(a)(2) in quarterly installments during the year in which the sales covered by the deposits are made if one or more of the conditions in this subsection apply. A quarterly installment must be made by the last day of the month following the end of the quarter. The Attorney General must notify a nonparticipating manufacturer required to make quarterly escrow deposits under this subsection of its duty to do so by first-class mail sent to the manufacturer's last known address. The Attorney General may require production of information sufficient to enable the Attorney General to determine the adequacy of the amount of any installment escrow payment.

(1) The nonparticipating manufacturer has not previously established and funded a qualified escrow fund in North Carolina.

(2) The nonparticipating manufacturer has not made any escrow deposits for more than one year.

(3) The nonparticipating manufacturer has failed to make a timely and complete escrow deposit in any prior calendar year.

(4) The nonparticipating manufacturer has failed to pay any judgment, including any civil penalty.

(5) The Attorney General has reasonable cause to believe that the nonparticipating manufacturer may not make its full required escrow deposit by April 15 of the year following the year in which the cigarette sales are made. (2002-145, s. 3; 2007-435, s. 1; 2015-241, s. 6.24(f).)

§ 66-294.2. Joint and several liability of importers of cigarettes manufactured by nonparticipating manufacturers located outside the United States.

For each nonparticipating manufacturer located outside the United States, each importer into the United States of any such nonparticipating manufacturer's brand families that are or are intended to be sold in North Carolina shall bear joint and several liability with such nonparticipating manufacturer for deposit of all escrow due under this Article and payment of all penalties imposed and shall so designate in a form prepared and provided by the Attorney General and shall appoint and continually maintain a process service agent with the Secretary of State and the Office of the Attorney General. (2015-241, s. 6.24(g).)