

LCB File No. R119-04

PROPOSED REGULATION OF THE
DEPARTMENT OF TAXATION

PROPOSED AMENDMENT TO NEV. ADMIN. CODE CHAPTER 370A

Authority to adopt regulations: The Department of Taxation shall adopt such regulations as are necessary to ascertain the amount of excise tax collected by the State on the cigarettes of each manufacturer of tobacco products for each year.

Text proposed to be stricken is in ~~strike through~~.
New text is in *bold italics*.

~~[NAC 370A.010 Definitions. (NRS 360.090, 370A.130) As used in this chapter, unless the context otherwise requires, the words and terms defined in NAC 370A.020 and 370A.030 have the meanings ascribed to them in those sections.]~~

~~[NAC 370A.020 “Brand family” defined. (NRS 360.090, 370A.130) “Brand family” means:
—1. A brand family identified on the list maintained pursuant to NAC 370A.040; or
—2. A group of cigarettes with the same name, including the same manufacturer, brand name and trademark, the only differentiating feature being additional descriptive information, including, without limitation, “menthol,” “lights,” “kings” or “100’s.”]~~

~~[NAC 370A.030 “Wholesale dealer” defined. (NRS 360.090, 370A.130) “Wholesale dealer” means a wholesale dealer as defined in:
—1. NRS 370.055, who:
—(a) Is licensed pursuant to chapter 370 of NRS; and
—(b) Has affixed a revenue stamp to a pack of cigarettes; and
—2. NRS 370.440, who is licensed pursuant to chapter 370 of NRS.]~~

[New] 370A.010. *Definitions. As used in this chapter:*

1. *“Brand family” means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, “menthol,” “lights,” “kings” and “100s,” and includes any brand name, whether occurring alone or in conjunction with any other word, any trademark, logo, symbol, motto, selling message or recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.*
2. *“Cigarette” has the meaning ascribed to it in NRS 370A.050.*
3. *“Department” means the Department of Taxation.*
4. *“Manufacturer of tobacco products” has the meaning ascribed to it in NRS 370A.060.*
5. *“Master Settlement Agreement” has the meaning ascribed to it in NRS 370A.070.*
6. *“Nonparticipating manufacturer” means any manufacturer of tobacco products that is not a participating manufacturer.*

7. *“Participating manufacturer” has the meaning ascribed to it in NRS 370A.080.*
8. *“Qualified escrow fund” has the meaning ascribed to it in NRS 370A.090.*
9. *“Wholesale Dealer” means a person that is authorized to affix stamps to cigarette packages pursuant to NRS Chapter 370 or any person that is required to pay the taxes on cigarettes which are taxed pursuant to NRS 370.440 to 370.503.*
10. *“Units sold” has the meaning ascribed to it in NRS 370A.120.*

~~[NAC 370A.040 List of participating manufacturers and brand families. (NRS 360.090, 370A.130)~~

- ~~—1. The department, in consultation with the attorney general, will maintain a list of participating manufacturers and, for each participating manufacturer, a list of the brand families produced by that participating manufacturer.~~
- ~~—2. The department will make the list maintained pursuant to this section available on the Internet website of the department and at the office of the department.]~~

[New] 370A.020 1. *Every manufacturer of tobacco products whose cigarettes are sold in this state, whether directly or through a wholesale dealer, retailer or similar intermediary or intermediaries, shall execute and deliver on a form prescribed by the Department, a certification to the Department and the Attorney General, no later than the thirtieth day of April of each year, certifying under penalty of perjury that, as of the date of that certification, such manufacturer of tobacco products either is a participating manufacturer; or in full compliance with subsection 2 of NRS 370A.140,*

(a) A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update that list at least 30 calendar days before it adds to or modifies its brand families by executing and delivering a supplemental certification to the Attorney General and the Department.

(b) A nonparticipating manufacturer shall include in its certification (1) 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; (2) a list of all of its brand families that have been sold in the State at any time during the current calendar year; (3) indicating, by an asterisk, any brand family sold in the State during the preceding calendar year that is no longer being sold in the State as of the date of the certification; and (4) identifying, by name and address, any other manufacturer of those brand families in the preceding or current calendar year. A nonparticipating manufacturer shall update the information required by this paragraph at least 30 calendar days before it adds to or modifies its brand families by executing and delivering a supplemental certification to the Attorney General and the Department.

(c) In the case of a non-participating manufacturer, such certification shall further certify:

(1) That such non-participating manufacturer is registered to do business in the State or has appointed a resident agent for service of process and provided notice thereof as required by NAC 370A.030.

(2) That such nonparticipating manufacturer has (A) established and continues to maintain a qualified escrow fund; and (B) executed a qualified escrow agreement governing the qualified escrow fund that has been reviewed and approved by the Attorney General;

(3) That such nonparticipating manufacturer is in full compliance with chapter 370A of NRS and this chapter.

(4) and (A) the name, address and telephone number of the financial institution where the nonparticipating manufacturer has established such qualified escrow fund required pursuant to chapter 370A of NRS and all regulations adopted pursuant thereto; (B) the account number of that qualified escrow fund and any sub-account number for this state; (C) the amount the nonparticipating manufacturer placed in that qualified escrow fund for cigarettes sold in the State during the preceding calendar year, the date and amount of each such deposit, and such evidence or verification as may be deemed necessary by the Department to confirm the foregoing; and (D) the amount and date 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 chapter 370A of NRS and all regulations adopted pursuant thereto.

(d) A manufacturer of tobacco products shall not include a brand family in its certification unless, (1) in the case of a participating manufacturer, said manufacturer 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; or (2) in the case of a non-participating manufacturer, the manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of chapter 370A of NRS. Nothing in this subsection must be construed as limiting or otherwise affecting the State's right to maintain that a brand family constitutes cigarettes of a different manufacturer of tobacco products for purposes of calculating payments under the Master Settlement Agreement or for purposes of chapter 370A of NRS.

(e) Manufacturers of tobacco products shall maintain all invoices and documentation of sales and other such information relied upon by the manufacturer for its certification for at least five years, unless the manufacturer is otherwise required by law to maintain them for a greater period of time.

2. The Department shall develop and publish on its website a directory listing all manufacturers of tobacco products that have provided current and accurate certifications conforming to the requirements of subsection 1 and all brand families that are listed in those certifications, except as noted below.

(a) The Department shall not include or retain in such directory the name or brand families of any non-participating manufacturer that has failed to provide the required certification or whose certification the Department determines is not in compliance with subsections 1(b) and 1(c) of [new] 370A.020, unless the Department has determined that such violation has been cured to its satisfaction.

(b) Neither a manufacturer of tobacco products nor brand family shall be included or retained in the directory if the Department concludes, in the case of a non-participating manufacturer, that (1) Any escrow payment required pursuant to chapter 370A of NRS for any period for any brand family, whether or not listed by the nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement which has been approved by the Attorney General; or (2) any outstanding final judgment, including any interest thereon, for a violation of chapter 370A of NRS has not been fully satisfied for such brand family or manufacturer.

(c) The Department shall update the directory as necessary to correct mistakes and to add or remove a manufacturer of tobacco products or brand family to keep the directory in conformity with the requirements of this chapter.

(d) Every wholesale dealer shall provide and update as necessary an electronic mail address to the Department for the purpose of receiving any notifications as may be required by this chapter.

3. It shall be unlawful for any person (a) to affix a stamp to a package or other container of cigarettes of a manufacturer of tobacco products or brand family not included in the directory, (b) to sell, offer or possess for sale, in this State, cigarettes of a manufacturer of tobacco products or brand family not included in the directory.

[New] 370A.045 Agent for Service Process.

1. Any nonresident or foreign non-participating manufacturer that has not registered to do business in the State as a foreign corporation or other business entity must, as a condition precedent to having its brand families included or retained in the directory, appoint and continually engage without interruption the services of an agent in this state to act as its agent for the service of process on whom all process, in any action or proceeding against it concerning or arising out of the enforcement of this chapter and chapter 370A of NRS, , may be served in any manner authorized by law. Such service constitutes legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, phone number and proof of the appointment and availability of such agent to, and to the satisfaction of, the Department and the Attorney General.

2. The non-participating manufacturer shall provide notice to the Department and the Attorney General at least thirty calendar days prior to the termination of the authority of an agent and shall further provide proof to the satisfaction of the Attorney General and the Department of the appointment of a new agent no less than five calendar days before the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the non-participating manufacturer shall notify the Department and the Attorney General of said termination within five calendar days and include proof to the satisfaction of the Attorney General of the appointment of a new agent.

3. Any non-participating manufacturer whose cigarettes are sold in this state and who has not appointed and engaged an agent as required herein shall be deemed to have appointed the Secretary of State as such agent and may be proceeded against in courts of this state by service of process upon the Secretary of State; provided however, that the appointment of the Secretary of State as such agent does not satisfy the condition precedent for having the brand families of the nonparticipating manufacturer included or retained in the directory.

NAC 370A.050 Monthly reports by wholesale dealers. (NRS 360.090, 370A.130)

1. Each wholesale dealer shall submit to the department each month a report indicating the number of cigarettes manufactured by a manufacturer of tobacco products who is not a participating manufacturer that were sold by the wholesale dealer during the previous month. The number of cigarettes sold during the previous month must be measured by the excise taxes collected by this state on packs of cigarettes and containers of “roll-your-own” tobacco in the manner set forth in NRS 370A.120 for determining the number of units sold. For each cigarette sold during the previous month, the report must indicate:

- (a) The month the cigarette was sold;
- (b) The brand family of the cigarette;
- (c) The name and address of the manufacturer of tobacco products who manufactured the cigarette~~[, if known]~~;

(d) If the name and address of the manufacturer of tobacco products who manufactured the cigarette is not known, the name and address of the exclusive distributor or importer of the cigarette, ~~if known~~; and

(e) The name and address of the person from whom the wholesale dealer purchased the cigarette, if that person was not listed pursuant to paragraph (c) or (d).

2. The report required pursuant to this section must also contain:

(a) The number of cigarettes contained in all packs of cigarettes upon which the wholesale dealer affixed a revenue stamp during the previous month;

(b) The weight, in ounces, of “roll-your-own” tobacco upon which the excise taxes are due from the wholesale dealer;

(c) The number of revenue stamps the wholesale dealer has purchased but has not yet affixed to a pack of cigarettes; and

(d) If the wholesale dealer is a manufacturer of tobacco products, a statement that the wholesale dealer:

(1) Is in compliance with the requirements ~~set forth in NRS 370A.140 and subsection 1 of NRS 370A.160; and~~ *of this chapter and NRS Chapter 370A.*

(2) Has, since May 24, 1999, for all times when ~~NRS 370A.140 and subsection 1 of NRS 370A.160~~ *this chapter and NRS Chapter 370A* applied to the wholesale dealer:

(I) Been in compliance with ~~NRS 370A.140 and subsection 1 of NRS 370A.160~~ *this chapter and NRS Chapter 370A*; or

(II) Pursuant to subsection 2 of NRS 370A.160, been brought into compliance with ~~NRS 370A.140 and subsection 1 of NRS 370A.160~~ *this chapter and NRS Chapter 370A.*

3. If the wholesale dealer affixed a revenue stamp to the pack containing a cigarette, that cigarette must be included in the report required pursuant to this section whether, at the time the revenue stamp was affixed, that cigarette was owned by:

(a) The wholesale dealer; or

(b) A person other than the wholesale dealer.

4. The report required pursuant to this section must be submitted:

(a) On a form prescribed by the department; or

(b) Electronically, in a format prescribed by the department.

5. Except as otherwise provided in subsection 6, the report required pursuant to this section must be submitted:

(a) On the same date as a report submitted by the wholesale dealer pursuant to NRS 370.240 or 370.465, if the wholesale dealer submits a report pursuant to NRS 370.240 or 370.465; or

(b) Not later than the last date on which a report could be submitted pursuant to NRS 370.240 or 370.465, if the wholesale dealer does not submit a report pursuant to NRS 370.240 or 370.465.

6. If the number of cigarettes to be reported pursuant to subsection 1 for a month is less than 10,000, the wholesale dealer may make written application to the department to submit the report for that month on a date later than the date specified in subsection 5. The department may approve a written application pursuant to this subsection if the date requested by the wholesale dealer in the application for submitting the report is not later than 12 months after the date specified in subsection 5 for submitting the report.

7. Each wholesale dealer shall maintain a copy of each report submitted pursuant to this section for not less than 4 years after the date the report was submitted.

[New] 370A.055 Reporting

1. *The Department is authorized to disclose to the Attorney General any information received under this chapter and requested by the Attorney General for purposes of determining compliance with and enforcing the provisions of this chapter. The Department and Attorney General shall share with each other the information received under this chapter, and may share such information with other federal, state or local agencies only for purposes of enforcement of this chapter, chapter 370A of NRS or corresponding laws of other states.*

2. *The Attorney General may require at any time from the non-participating manufacturer proof, from the financial institution in which that manufacturer has established a qualified escrow fund for the purpose of compliance with chapter 370A of NRS, of the amount of money in that fund, exclusive of interest, the amount and date of each deposit to that fund, and the amount and date of each withdrawal from that fund.*

3. *In addition to the information otherwise required to be submitted pursuant to this chapter, the Department may require a wholesale dealer or manufacturer of tobacco products to submit any additional information, including, but not limited to,, samples of the packaging or labeling of each brand family, as is necessary to enable the Department to determine whether a manufacturer of tobacco products is in compliance with the provisions of this chapter.*

NAC 370A.060 Reports by wholesale dealers owned by certain noncomplying manufacturers. (NRS 360.090, 370A.130)

1. If a wholesale dealer is owned in whole or in part by a manufacturer of tobacco products who is not in compliance with NRS 370A.140 and subsection 1 of NRS 370A.160, the wholesale dealer may not submit a report required pursuant to NAC 370A.050 until:

(a) The manufacturer of tobacco products is in compliance with NRS 370A.140 and subsection 1 of NRS 370A.160; or

(b) The wholesale dealer is not owned in whole or in part by the manufacturer of tobacco products.

2. If a wholesale dealer submits a report in violation of subsection 1, ~~the report will not be considered submitted for the purposes of NAC 370A.070~~ *the wholesale dealer shall be subject to the penalties described in [new] NAC 370A.070.*

~~[NAC 370A.070 Failure to submit report or submission of incorrect information: Suspension or revocation of license; fine. (NRS 360.090, 370A.130) If a wholesale dealer fails to submit a report as required by NAC 370A.050 or submits incorrect information on a report submitted pursuant to NAC 370A.050, the department may:~~

~~—1. Suspend the license of the wholesale dealer until:~~

~~—(a) The wholesale dealer submits the report or resubmits the report with corrected information, as appropriate; and~~

~~—(b) The department determines that the information in the report is correct; and~~

~~—2. Impose a penalty on the wholesale dealer consisting of:~~

~~—(a) For the first violation within 7 years, a fine of \$1,000;~~

~~—(b) For a second or subsequent violation within 7 years, a fine of \$5,000; or~~

~~—(c) For a third or subsequent violation within 7 years, revocation of the license of the wholesale dealer.]~~

[New] 370A.070 Penalties

In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a wholesale dealer has violated [New] subsection 3 of NAC 370A.020 or any regulation adopted pursuant to this chapter, the Department may revoke or suspend the license of the wholesale dealer in the manner provided by NRS 370.250. Each stamp affixed and each sale or offer to sell cigarettes in violation of [New] subsection 3 of NAC 370A.020 shall constitute a separate violation.

[New] 370A.080 Miscellaneous Provisions.

- 1. A determination of the Department to not include or to remove from the directory a brand family or manufacturer of tobacco products may be appealed to the Tax Commission in the manner prescribed by NRS 360.245.*
- 2. No person shall be issued a license or granted a renewal of a license to act as a wholesale dealer unless such person has certified in writing, under penalty of perjury, that such person will comply fully with this chapter.*
- 3. For the year 2004, the first report of wholesale dealers required by the amended 370A.050 shall be due 30 calendar days after the effective date of this chapter; the certifications by a manufacturer of tobacco products described in [new] subsection 1 of NAC 370A.020 shall be due 45 calendar days after such effective date; and the directory described in [new] NAC 370A.040 shall be published or made available within 90 calendar days after such effective date.*
- 4. If a court of competent jurisdiction finds that the provisions of this chapter and of chapter 370A of NRS conflict and cannot be harmonized, then such provisions of chapter 370A of NRS shall control. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this chapter causes the chapter 370A of NRS to no longer constitute a Qualifying or Model Statute, as those terms are defined in the Master Settlement Agreement, then that portion of this chapter shall not be valid. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this chapter is for any reason held to be invalid, unlawful or unconstitutional such decision shall not affect the validity of the remaining portions of this chapter or any part thereof.*