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HEALTH AND SAFETY CODE - HSC

DIVISION 103. DISEASE PREVENTION AND HEALTH PROMOTION [104100 - 106036] (*Division 103 added by Stats. 1995, Ch. 415, Sec. 5.)*

PART 3. RISK REDUCTION [104350 - 104895] (*Part 3 added by Stats. 1995, Ch. 415, Sec. 5.)*

CHAPTER 1. Tobacco Control [104350 - 104559.5] (*Chapter 1 added by Stats. 1995, Ch. 415, Sec. 5.)*

ARTICLE 4.5. Unflavored Tobacco [104559.1- 104559.1.] (*Article 4.5 added by Stats. 2024, Ch. 849, Sec. 6.)*

104559.1. (a) The Attorney General shall establish and maintain on the Attorney General's internet website a list of tobacco product brand styles that lack a characterizing flavor. This list shall be known as the Unflavored Tobacco List (UTL).

(b) (1) Every manufacturer and every importer of tobacco products shall submit to the Attorney General a list of all brand styles of tobacco products that they manufacture or import for sale or distribution in or into California that lack a characterizing flavor. The Attorney General may deem each submission to be a request that the brand style be included on the UTL. Any submission under this section shall be accompanied by a certification by the manufacturer or importer, under penalty of perjury, that does all of the following:

(A) Describes each brand style, brand, and tobacco product category. Categories shall include, but not be limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff, electronic cigarettes, electronic pipes, and electronic hookahs.

(B) Describes, for each brand style, if a formal authorization, approval, or order from the United States Food and Drug Administration under Section 387e(j) or 387j of the Federal Food, Drug, and Cosmetic Act (FFDCA) (21 U.S.C. Sec. 301 et seq.) has been sought and, if so, the status of any request for that authorization, approval, or order.

(C) Certifies that each brand style lacks a characterizing flavor.

(2) (A) Upon the request of the Attorney General, a manufacturer or importer shall provide additional information and factual substantiation regarding a brand style's lack of characterizing flavor.

(B) Information submitted to the Attorney General by a manufacturer or importer pursuant to this paragraph shall be considered confidential and corporate proprietary information. This information shall not be subject to disclosure under the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code).

(3) (A) Upon the request of the Attorney General, a manufacturer or importer shall provide additional information and documentation regarding tobacco product status, packaging, or marketing of a brand style.

(B) Information submitted to the Attorney General by a manufacturer or importer pursuant to this paragraph and designated as nonpublic shall be considered confidential and corporate proprietary information. This information shall not be subject to disclosure under the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code).

(c) In determining whether or not a brand style has a characterizing flavor the Attorney General shall consider, among other factors, information received from the manufacturer or importer to the Attorney General regarding the brand style.

(d) The Attorney General shall presume a brand style to have a characterizing flavor if the manufacturer or importer, or any employee or agent of the manufacturer or importer, in the course of their employment by the agency, has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, any text, color, or images on the product's labeling or packaging, that explicitly or implicitly communicates that the tobacco product has a characterizing flavor. This presumption may be rebutted by the manufacturer or importer.

- (e) The Attorney General shall decline to include on the UTL any brand style that the Attorney General reasonably determines has a characterizing flavor. The Attorney General may decline to include on the UTL any brand style that is adulterated as defined in Section 387b of or misbranded as defined in Section 387c of the FFDCA or that is otherwise required to obtain and has not received a formal authorization, approval, or order under Section 387e(j) or 387j of the FFDCA.
- (f) (1) The Attorney General shall remove from the UTL any brand style that the Attorney General determines has a characterizing flavor. The Attorney General may remove from the UTL any brand style that the Attorney General determines is adulterated as defined in Section 387b of or misbranded as defined in Section 387c of the FFDCA or that is required to obtain and has not received a formal authorization, approval, or order under Section 387e(j) or 387j of the FFDCA.
- (2) (A) The Attorney General shall promptly provide the manufacturer or importer that submitted a certification regarding a brand style with written notice when the Attorney General removes it from the UTL. This notice shall include the basis for the Attorney General's determination.
- (B) Removal of a brand style from the UTL will be effective 30 days after the manufacturer or importer is given notice pursuant to subparagraph (A).
- (C) A manufacturer or importer may provide additional materials that the manufacturer or importer deems relevant to the determination described in paragraph (1) within 30 days of the notice provided pursuant to subparagraph (A).
- (D) Information submitted to the Attorney General by a manufacturer or importer pursuant to this paragraph shall be considered confidential and corporate proprietary information. This information shall not be subject to disclosure under the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code).
- (g) Any brand style not on the UTL shall be deemed a flavored tobacco product under subdivision (b) of Section 104559.5.
- (h) Every manufacturer and every importer that has made a submission under this section shall submit updated information to the Attorney General whenever it no longer manufactures or imports for sale or distribution in or into the state a brand style listed on the UTL or when the brand style it manufactures or imports no longer lacks a characterizing flavor. This updated information shall be provided to the Attorney General by the manufacturer or importer prior to or on the date upon which the manufacture or importation of the brand style ceases, or prior to or on the date upon which the brand style no longer lacks a characterizing flavor.
- (i) Every manufacturer or importer that submits a brand style pursuant to this section shall also do all of the following:
- (1) Consent to the jurisdiction of the California courts for the purpose of enforcement of this section and for enforcement of regulations adopted pursuant to this section.
- (2) Appoint a registered agent for service of process in this state.
- (3) Identify the registered agent to the Attorney General.
- (4) Waive any sovereign immunity defense that may apply in an action to enforce this section or to enforce regulations adopted pursuant to this section.
- (j) The Attorney General may require a manufacturer or importer of tobacco products that are sold or distributed in or into California, whether directly or indirectly through a distributor, wholesaler, or retailer, to submit to the Attorney General a list of all brand styles of tobacco products that they manufacture or import.
- (k) (1) Every manufacturer and importer submission under paragraph (1) of subdivision (b) shall be accompanied by an initial application fee of up to one thousand dollars (\$1,000) per brand style, not to exceed the reasonable costs of processing the submissions and operating the UTL, to offset the costs incurred by the Attorney General for processing the submissions and operating the UTL. The Attorney General shall collect an annual renewal fee of up to one thousand dollars (\$1,000) per brand style, not to exceed the reasonable costs of maintaining the UTL, to offset the costs associated with operating the UTL. The fee shall be for the fiscal year ending June 30 and shall not be prorated.
- (2) Application and renewal fees received under this subdivision shall be deposited into the California Unflavored Tobacco List Fund, which is hereby created in the State Treasury. Notwithstanding Section 13340 of the Government Code, all amounts deposited into the California Unflavored Tobacco List Fund are hereby continuously appropriated without regard to fiscal year to the office of the Attorney General for the purpose of processing the submissions and operating the UTL.
- (l) (1) Upon receiving notice from the Attorney General that a brand style is either removed from the UTL or that the Attorney General declines to include it on the list, the manufacturer or importer that provided the certification to the Attorney General that the brand style lacks a characterizing flavor may challenge the Attorney General's determination as erroneous, seek to rebut any presumption relied upon by the Attorney General, and seek relief from the determination, by filing a writ of mandate pursuant to Section 1085 of the Code of Civil Procedure in the Superior Court of the County of Sacramento, or as otherwise provided by law. The filing of the petition shall not operate to stay the Attorney General's determination except upon a ruling of a court of competent jurisdiction.

(2) A manufacturer or importer may challenge a decision by the Attorney General pursuant to paragraph (1) in addition to providing additional materials to the Attorney General pursuant to subdivision (f).

(m) The Attorney General shall publish the UTL beginning on or before December 31, 2025.

(n) The Attorney General may seek injunctive relief and a civil penalty not to exceed fifty thousand dollars (\$50,000) and recover reasonable attorney's fees, investigation costs, and expert fees against an entity or individual that certifies to the Attorney General that a brand style lacks a characterizing flavor when the certifying entity or individual had no reasonable basis to believe the certification was true.

(o) (1) Except as provided in paragraph (2), a distributor or wholesaler shall not sell any tobacco product not appearing on the UTL or any tobacco product flavor enhancer to any retailer, wholesaler, or other person for sale in California. A delivery seller shall not sell a tobacco product not appearing on the UTL or a tobacco product flavor enhancer to a consumer in California.

(2) This subdivision does not apply to the sale of tobacco products by a distributor or wholesaler to a retailer, wholesaler, distributor, or any other person that the state, pursuant to the United States Constitution, the laws of the United States, or the California Constitution, is prohibited from regulating.

(3) For each tobacco product or tobacco product flavor enhancer sold in violation of this subdivision, the Attorney General may assess civil penalties against the distributor, wholesaler, or delivery seller according to the following schedule:

(A) A civil penalty of not more than two thousand dollars (\$2,000) for the first violation.

(B) A civil penalty of not more than three thousand five hundred dollars (\$3,500) for the second violation within a five-year period.

(C) A civil penalty of not more than five thousand dollars (\$5,000) for the third violation within a five-year period.

(D) A civil penalty of not more than six thousand five hundred dollars (\$6,500) for the fourth violation within a five-year period.

(E) A civil penalty of not more than ten thousand dollars (\$10,000) for a fifth or subsequent violation within a five-year period.

(p) Whenever the Attorney General prevails in a civil action to enforce this section, the court shall award to the Attorney General all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs. Awards under this section shall be paid to the Public Rights Law Enforcement Special Fund established pursuant to Section 12530 of the Government Code.

(q) The Attorney General may adopt those rules and regulations the Attorney General deems necessary to implement the purposes of this section, including regulations further delineating tobacco product status and characterizing flavor determinations, requiring reporting of delivery sales of tobacco products and constitutionally exempted distributions of flavored tobacco products, and adopting an administrative process for the imposition of civil penalties. The regulations adopted to implement this section are emergency regulations in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code and shall be considered by the Office of Administrative Law to be necessary for the immediate preservation of the public health, safety, and welfare.

(r) This section does not preempt or otherwise prohibit the adoption of a local ordinance that is more restrictive than this section, that references or incorporates the UTL, or that imposes standards or definitions for a characterizing flavor that are more restrictive than those in this section.

(s) For the purposes of this section, the following definitions apply:

(1) "Brand style" means a style of tobacco product within a brand that is differentiated from other styles of that brand by weight, volume, size, Universal Product Code, Stock Keeping Unit, nicotine content, characterizing flavor, logo, symbol, motto, labeling, marketing, materials, packaging, or other indicia of product identification.

(2) "Characterizing flavor" has the same meaning as in Section 104559.5.

(3) "Tobacco product" means a tobacco product as defined in Section 104559.5, but excludes looseleaf tobacco, premium cigars, and shisha tobacco products, as those terms are defined in that section.

(4) "Tobacco product flavor enhancer" has the same meaning as defined in Section 104559.5.

(5) "UTL" means the Unflavored Tobacco List described in subdivision (a).

(t) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(Added by Stats. 2024, Ch. 849, Sec. 6. (AB 3218) Effective January 1, 2025.)

