



Instructions for Completing State of West Virginia Certification of Tobacco Product Manufacturers

(Pursuant to WV Code § 16-9D)

GENERAL INFORMATION

Who is required to file this certification?

Any tobacco product manufacturer that intends to sell cigarettes within the state of West Virginia, whether directly or through any distributor, retailer, or similar intermediary.

Two certification forms have been developed. A [participating manufacturer](#), *i.e.*, one who signed the Master Settlement Agreement, will complete and file a three-page certification. [All other tobacco product manufacturers](#) are required to complete and file the six-page certification. Both forms are available at the Tax Commissioner's web site to download and print, on the [Tobacco Products page](#), under the topic, "Certification of Tobacco Product Manufacturers".

This certification is required by W. Va. Code § 16-9D-3, and is in addition to any certification of Compliance that may be required pursuant to W. Va. Code § 16-9B-3.

When is this Certification due?

The first certification under W. Va. Code § 16-9D-3 must be postmarked on or before July 1, 2003, and provide information covering the period beginning January 1, 2002, to the date of certification. Thereafter, the certification must be executed and postmarked not later than April 30th of each year.

Additionally, a certification must also be filed at least thirty (30) days before a tobacco manufacturer begins to directly or indirectly sell a brand in West Virginia that was not included in the manufacturer's previous certification or withdraws from selling a brand in West Virginia.

To whom must this Certification be delivered?

The certification must be delivered to both:

Tobacco Litigation Unit
The Office of the Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, WV 25305

and

State Tax Department
ATTN: Excise Tax Unit
P. O. Box 2991
Charleston, WV 25330-2991

Records Retention Requirement

Tobacco Product Manufacturers must maintain all invoices and documentation of sales and other information relied upon for the certification for a period of five years, unless otherwise required by law to maintain them for a greater period of time.

DEFINITIONS:

The following definitions apply when making the certifications required by W. Va. Code §§ 16-9D-3 and 16-9D-4.

- “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 (alone or in conjunction with any other word), trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.
- “Cigarette” means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains:
 - (1) Any roll of tobacco wrapped in paper or in any substance not containing tobacco; or
 - (2) 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
 - (3) 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 as that term is described in this subsection.
- The term ‘cigarette’ includes ‘roll-your-own’, which means 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.
- “Directory” means the listing of all tobacco product manufacturers that have provided current and accurate certification conforming to the requirements of W. Va. Code § 16-9D and all brand families that are listed in such certification; except as otherwise provided in W. Va. Code § 16-9D-3(b).
- “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.”
- “Nonparticipating manufacturer” means any tobacco product manufacturer that is not a participating manufacturer.
- “Participating manufacturer” means a tobacco product manufacturer that is or becomes a signatory to the Agreement [MSA], provided that:

- (1) in the case of a tobacco product manufacturer that is not an original participating manufacturer, such tobacco product manufacturer is bound by the Agreement and the consent decree (or, in any settling state that does not permit amendment of the consent decree, a consent decree containing terms identical to those set forth in the consent decree) in all settling states in which the Agreement and the consent decree binds original participating manufacturers (provided, however, that such tobacco product manufacturer need only become bound by the consent decree in those settling states in which the settling state has filed a released claim against it), and
 - (2) in the case of a tobacco product manufacturer that signs the Agreement after the MSA execution date, such tobacco product manufacturer, within a reasonable period of time after signing the Agreement, makes any payments (including interest thereon at the prime rate) that it would have been obligated to make in the intervening period had it been a signatory as of the MSA execution date.
- “Participating manufacturer” shall also include the successor of a participating manufacturer. Except as expressly provided in the Agreement, once an entity becomes a participating manufacturer, such entity shall permanently retain the status of participating manufacturer.
 - Each participating manufacturer shall regularly report its shipments of cigarettes in or to the fifty United States, the District of Columbia and Puerto Rico to Management Science Associates, Inc. (or a successor entity as set forth in subsection (mm)). Solely for purposes of calculations pursuant to subsection IX(d), a tobacco product manufacturer that is not a signatory to the Agreement shall be deemed to be a “participating manufacturer” if the original participating manufacturers unanimously consent in writing.
 - “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 \$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 subdivision 16-9B-3(b)(2).
 - “Stamping agent” includes any distributor or other person that is authorized to affix tax stamps to packages or other containers of cigarettes under the Tobacco Products Excise Tax Act, W. Va. Code § 11-17-1 *et seq.*, or any person that is required to pay the excise tax imposed on cigarettes pursuant to the Tobacco Products Excise Tax Act.
 - “Tobacco product manufacturer” means an entity that after March 12, 1999, directly (and not exclusively through any affiliate):
 - (1) 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 subsections 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);

- (2) 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
 - (3) Becomes a successor of an entity described in subdivision (1) or (2) of this subsection.
- The term "tobacco product manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within subdivision (1), (2) or (3).
 - As used in the definition of tobacco product manufacturer, "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" means ownership of an equity interest, or the equivalent thereof, of ten percent or more, and the term "person" means an individual, partnership, committee, association, corporation or any other organization or group of persons.
 - "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, as measured by excise taxes collected by the state on packs of "roll-your-own" tobacco containers bearing the excise tax stamp of the state.

SPECIFIC INSTRUCTIONS:

Participating Manufacturers follow the instructions given below for parts 1, 2.A. and 5.

Nonparticipating Manufacturers follow all instructions given here except for 2.A.

Part 1: Manufacturer's Identification.

Identify the Tobacco Product Manufacturer's name, address, telephone, fax number and electronic mail address, and Name/Title of the person completing the report.

Part 2: Brand Family Identification. Only those Brand Families listed may be included in the Directory published by the Tax Commissioner.

A. Participating Manufacturers

A Participating Manufacturer shall list its Brand Families. [W. Va. Code § 16-9D-3(a)(1)]

A Participating Manufacturer may not include a Brand Family in its certification unless it affirms that the Brand Family is to be considered 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. [W. Va. Code § 16-9D-3(a)(4)(A)]

The Participating Manufacturer shall update such list thirty calendar days prior to any addition to or modification of its Brand Families by executing and delivering a

supplemental certification to the Commissioner and the Attorney General. [W. Va. Code § 16-9D-3(a)(1)]

B. Nonparticipating Manufacturers

A Nonparticipating Manufacturer shall include:

(A) a list of all of its Brand Families and the number of units sold for each Brand Family that were sold in this State during the preceding calendar year,

(B) a list of all of its Brand Families that have been sold in this State at any time during the current calendar year, indicating, by an asterisk, any Brand Family sold in this State during the preceding calendar year that is no longer being sold in this State as of the date of the certification, and

(C) identification, by name and address, of any other manufacturer of the Brand Families in the preceding calendar year. [W. Va. Code § 16-9D-3(a)(2)]

A Nonparticipating Manufacturer may not include a Brand Family in its certification unless it affirms that the Brand Family is to be considered to be its cigarettes for purposes of W. Va. Code § 16-9B. [WV Code § 16-9D-3(a)(4)(B)]

A Nonparticipating Manufacturer shall update the list thirty calendar days prior to any addition to or modification of its Brand Families by executing and delivering a supplemental certification to the Commissioner and the Attorney General. [W. Va. Code § 16-9D-3(a)(2)(C)]

Part 3: Nonparticipating Manufacturer Certification

A. Agent for Service of Process.

Certify whether the Nonparticipating Manufacturer is

(i) domiciled in the State of West Virginia;

(ii) a non-resident or foreign Nonparticipating Manufacturer that has registered to do business in West Virginia as a foreign corporation or business entity; or

(iii) a Nonparticipating Manufacturer that has appointed a resident agent for service of process pursuant to W. Va. Code § 16-9D-5 on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of W. Va. Code § 16-9B-1 *et seq.* and § 16-9D-1 *et seq.*, may be served in any manner authorized by law.

If the Nonparticipating Manufacturer has appointed a resident agent for service of process, please supply the information requested and attach proof of the appointment and availability of the agent.

Note: The Nonparticipating Manufacturer must provide Written Notice to the Tax Commissioner and the Attorney General thirty (30) days prior to the termination of the authority of an agent and shall further provide proof to the satisfaction of the Attorney General of the appointment of a new agent no less than five (5) calendar days prior to the termination of an existing agency appointment. In the event an agent terminates an agency appointment, the Nonparticipating Manufacturer shall notify the Commissioner and the Attorney General in writing of the termination within five (5) calendar days and shall include proof to the

satisfaction of the Attorney General of the appointment of a new agent. [W. Va. Code § 16-9D-5(b)]

B. Qualified Escrow Fund – Financial Institution. Identify:

(i) the name, address, e-mail address, and telephone number of the financial institution where the Nonparticipating Manufacturer has established a Qualified Escrow Fund pursuant to W. Va. Code § 16-9B-3(b);

(ii) the account number of such Qualified Escrow Fund and any sub-account number for the State of West Virginia. Also provide the name of a representative of the financial institution who is knowledgeable about the Qualified Escrow Fund.

Please attach a copy of the Nonparticipating Manufacturer's Escrow Agreement and state whether the Escrow Agreement has been reviewed by the West Virginia Attorney General's Office.

C. Escrow Deposit/Withdrawal History for West Virginia. Identify:

(i) the amount the Nonparticipating Manufacturer placed in the Qualified Escrow Fund for cigarettes sold in this State; and

(iii) the amount of and date of any withdrawal or transfer of funds the Nonparticipating Manufacturer made at any time from the fund or from any other Qualified Escrow Fund into which the manufacturer ever made escrow payments pursuant to W. Va. Code § 16-9B-(3)(b) and all regulations promulgated pursuant thereto.

Please attach copies of records of the financial institution confirming the foregoing.

Note: All withdrawals must comply with W. Va. Code § 16-9B-3(b)(2). Verification of compliance must be attached.

Part 4. Additional Certification of Tobacco Product Manufacturer wanting to sell cigarettes in this State for the first time.

A tobacco product manufacturer whose cigarettes have not previously been sold in West Virginia, whether directly or through a distributor, retailer or similar intermediary or intermediaries, shall, at least thirty calendar days before beginning to sell its cigarettes in this State, make the certification required by W. Va. Code § 16-9D-3.

In addition to the information required by W. Va. Code § 16-9D-3, the manufacturer shall include the following information in its certification:

(1) If the tobacco product manufacturer is a partnership, limited liability company, corporation, association or other business entity, the following where applicable:

(A) The names and addresses of every partner, member, officer, resident agent, director or person performing a function similar to a director;

(B) The names and addresses of any person owning of record a ten percent or greater equity interest in the tobacco product manufacturer; and

(C) A list of all names under which the tobacco manufacturer, or any partner, member, officer, resident agent, director, or person owning a ten percent or greater equity interest in the tobacco manufacturer, previously did business as a

tobacco product manufacturer in the United States within the five-year period preceding the date of submission of the certification; and

(2) A statement of whether the tobacco product manufacturer, or any partner, member, officer, resident agent, director, or person owning a ten percent or greater equity interest in the tobacco manufacturer, or in any subsidiary, affiliate or persons controlled by or under common control with the tobacco manufacturer, has ever been an officer, partner, director or person owning a ten percent or greater equity interest in a tobacco product manufacturer that ever defaulted in fully funding the escrow account required by article nine-b of this chapter in the five-year period prior to the date of submission of the certification under W. Va. Code § 16-9D-4 and, if so, a brief explanation of the facts involved.

Part 5: Execution by Authorized Designees. The person executing the certification must be an employee of the Tobacco Product Manufacturer identified in Part 1 authorized to execute this certification on the manufacturer's behalf. The Designee's name and title must be printed and the certification must be executed in the presence of an authorized notary.

Supplemental Information Requirements

The West Virginia Attorney General's office requests also requests the following information:

1. Corporate documents evidencing officers and ownership of the NPM;
2. Affidavit from the president of the NPM attesting that it physically manufactures its cigarettes at its manufacturing factory;
3. The complete address of any facility where the NPM manufactures its cigarettes;
4. Complete list of the brand names for all cigarettes the NPM manufactures or has manufactured, regardless of where the cigarettes are sold;
5. Copy of the permit as a manufacturer or importer of tobacco products required pursuant to 26 U.S.C. Sections 5712 and 5713; see also, 27 C.F.R. Part 40.62 and 40.375;
6. Copy of the current letter from the HHS/CDC Office on Smoking and Health approving the ingredient reporting;
7. Copy of the current complete rotation plan, including package samples, submitted to the FTC for approval for each brand;
8. Copy of the FTC rotation plan approval letter for each brand;
9. If the NPM is located in a foreign country:
 - a. Copy of the license, permit or other registration document required by the government of the foreign county for a tobacco manufacturer whose manufacturing facilities are located in such county.
 - b. Copy of the letter the NPM provides to the importer to comply with 19 U.S.C. Section 1681a;
 - c. Copies of representative brand Custom Forms 7501 for each of the preceding two calendar years;
 - d. If the brand bears a U.S. registered trademark, a certificate signed by the owner of the trademark stating that under penalty of perjury that the owner consents to the importation of cigarettes into the U.S.;
 - e. A certificate signed by the importer stating that under penalty of perjury that the consent referred to in the previous paragraph is accurate, remains in effect and has not been withdrawn.