

CHAPTER 55  
FORMERLY  
HOUSE BILL NO. 242

AN ACT TO AMEND TITLE 30 OF THE DELAWARE CODE RELATING TO TOBACCO PRODUCT, INCLUDING VAPOR PRODUCT, TAXATION AND LICENSING.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Three-fifths of all members elected to each house thereof concurring therein):

Section 1. Amend Chapter 53, Title 30 of the Delaware Code as follows:

Chapter 53. Tobacco Product Taxation and Licensing.

Section 2. Amend § 5301, Title 30 of the Delaware Code as follows and by redesignating accordingly:

§ 5301. Definitions.

As used in this chapter:

(1) "Affixing agent" means any tobacco products dealer or any other person within or without this State appointed by the Department of Finance as an agent to affix the stamps to be used in paying the excise tax imposed by this chapter. The first vendor who has possession of unstamped tobacco products in this State for sale in this State is deemed an affixing agent.

(2) "Cigar" means any roll for smoking which is not a cigarette and which is made wholly or in part of tobacco or any substitute therefor when the cover of the roll is made chiefly of tobacco.

(3) "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape, and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco.

(6) "Distributor" means any of the following:

a. Any person engaged in the business of selling tobacco products in this State who brings or causes to be brought into this State from without the State any tobacco products for sale.

b. Any person who makes, manufactures, or fabricates tobacco products in this State for sale in this State.

c. Any person engaged in the business of selling tobacco products without this State who ships or transports tobacco products to retail dealers in this State to be sold by those retail dealers.

(7) "Electronic smoking device" means a nonlighted, noncombustible device that employs a mechanical heating element, battery, or circuit, regardless of shape or size, to produce aerosolized or vaporized nicotine for inhalation into the body of an individual. "Electronic smoking device" includes a device that is manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, e-hookah, vape pen, or any other similar product with any other product name or descriptor.

(8) "Moist snuff" means any finely cut, ground, or powdered tobacco that is not intended to be smoked, but does not include any finely cut, ground, or powdered tobacco that is intended to be placed in the nasal cavity.

(10) "Place of business" means any place where tobacco products are sold, or where tobacco products are bought or kept for the purpose of sale or consumption, including, so far as applicable, any vessel, airplane, train, or vending machine dispensing tobacco products.

(12) "Sale" means in addition to its usual meaning, any sale, transfer, exchange, theft, barter, gift, or offer for sale and distribution, in any manner or by any means whatsoever.

(14) "Smokeless tobacco products" means all products, other than moist snuff, made primarily of tobacco for individual consumption, not intended to be smoked.

(15) "Tobacco products" means all products made primarily from tobacco for individual consumption, including cigarettes, cigars, pipe tobacco, and vapor products.

(16) "Tobacco product tax stamps" means any adhesive stamps, tax meter impression, or other stamps, labels, or prints authorized by the Department of Finance to evidence the payment of the tax imposed by this chapter.

(20) "Vapor product" means any nicotine liquid solution or other material containing nicotine that is intended to be used with or in an electronic smoking device.

(22) "Wholesale price" means the price for which a manufacturer sells a tobacco product to a distributor exclusive of any discount, rebate, or other reduction.

Section 3. Amend § 5305, Title 30 of the Delaware Code as follows:

§ 5305. Levy of tax, limitation; exemption.

(a) An excise tax is imposed and assessed upon the sale or use of cigarettes within this State at the rate of 105 mills per cigarette. This tax applies only once to the same pack of cigarettes. In the event the tax computed according to this subsection results in a tax per pack or other unit of sale to which this tax applies involving a fraction of a cent, the tax applicable to that pack or other unit must be computed by rounding the tax to the next higher whole cent.

(b) A tax is imposed and assessed upon the sale or use of all tobacco products, except those tobacco products taxed under subsection (a) or (c) of this section, within this State at the rate of 30% of the wholesale price on such products.

(c)(1) A tax is imposed and assessed upon the sale or use of moist snuff within this State at the rate of 92 cents per ounce and a proportionate tax at the like rate on any fractional parts of an ounce. The per ounce tax imposed under this subsection must be computed based on the net weight as listed by the manufacturer.

(2) An excise tax is imposed and assessed upon the sale or use of vapor products within this State at the rate of 5 cents per fluid milliliter of vapor product. The tax imposed by this paragraph (c)(2) of this section must be computed based on the amount of vapor product in milliliters as listed by the manufacturer. All invoices for vapor products issued by a manufacturer must state the amount of vapor product in milliliters.

(d) No tax imposed by this chapter may be levied upon the possession or sale of tobacco products which this State is prohibited from taxing under the Constitution or statutes of the United States.

(e) If the seller and purchaser have registered with the Department and obtained exemption certificates, the following sales are exempt:

(1) Sales to veterans' organizations approved by the Department, if the tobacco products are being purchased by the organization for gratuitous issue to veteran patients in federal, state, or state-aided hospitals;

(2) Sales to patients in Veterans' Administration Hospitals by retail dealers located in such hospitals.

(f) [Transferred to § 5301 of this title.]

Section 4. Amend § 5306, Title 30 of the Delaware Code as follows:

§ 5306. Liability for payment of tax.

The tax must be paid and the stamp must be affixed by the first person who has possession of tobacco products in this State.

Section 5. Amend § 5307, Title 30 of the Delaware Code as follows:

§ 5307. License for sales of tobacco products.

A person may not engage in or conduct the business of manufacturing, purchasing, selling, consigning, or distributing tobacco products in this State or acting as an affixing agent without having first obtained the appropriate license for that purpose as prescribed by this chapter.

Section 6. Amend § 5308, Title 30 of the Delaware Code as follows:

§ 5308. License charges.

(a) Wholesale license. — For each wholesale license issued there must be paid to the Department of Finance a fee of \$200. If a holder of a wholesale license sells or intends to sell tobacco products at 2 or more places of business, whether established or temporary, a separate license is required for each place of business.

(b) Retail license. — For each retail license there must be paid to the Department of Finance a fee of \$50. If a holder of a retail license sells or intends to sell tobacco products at 2 or more places of business, whether established or temporary, or whether in the same building or not, a separate license is required for each place of business.

(c) Vending machine license. — Every vending machine from which tobacco products are offered for sale must have affixed to it an identification stamp issued by the Department of Finance for which a fee of \$15 must be paid to the Department. If 2 or more vending machines are fastened together, each set of mechanisms must have a separate vending machine license.

(d) Affixing agent license. — For each affixing agent's license issued there must be paid to the Department of Finance a fee of \$200, but only 1 license fee of \$200 is required of any person who is both a wholesale dealer and an affixing agent.

Section 7. Amend § 5309, Title 30 of the Delaware Code as follows:

§ 5309. Application for license.

(a) Every person desiring to engage in the sale of tobacco products at wholesale, retail, or by tobacco product vending machines within this State, except those persons who are exempt under § 5305(d) of this title, and

every person desiring to become an affixing agent shall file an application for a license with the Department of Finance.

(1) Every application for a tobacco product license must be made upon a form prescribed, prepared, and furnished by the Department and must set forth the name under which the applicant transacts or intends to transact business; the location of the applicant's place of business, whether within or without the State; whether or not the applicant is the holder of a mercantile or business license in effect when the application is made and, if so, the number of such license and the county for which such license was issued; and such other information as the Department may require.

(2) If the applicant has or intends to have more than 1 place of business within the State, the application must state the location of each place of business.

(3) If the applicant is an association, the application must set forth the names and addresses of the persons constituting the association; and if a corporation, the names and addresses of the principal officers thereof and any other information prescribed by the Department for purposes of identification.

(4) The application must be signed and verified by oath or affirmation by the owner, if a natural person, and, in the case of an association, by a member or partner thereof and, in the case of a corporation, by an executive officer thereof, or some person specifically authorized to sign the application, to which must be attached the written evidence of such person's authority.

(b) A single application may be filed for more than 1 license. The operator of tobacco product vending machines shall list all locations at which the operator has machines at the time of the application. The operator may also request extra licenses for new machines to be placed in new locations up to 10 percent of the listed locations on file with the Department without submitting actual locations. As the new machines are placed on location for sale of tobacco products, the operator shall immediately notify the Department and the operator shall become eligible to apply for licenses for an additional 10 percent of the operator's new totals. Failure to notify the Department when and where new machines are placed in operation is cause for suspension and seizure of all licenses and tobacco product vending machines.

Section 8. Amend § 5312, Title 30 of the Delaware Code as follows:

§ 5312. Replacement of licenses.

Whenever any license issued under this chapter is defaced, destroyed, or lost, the Department of Finance may issue a duplicate to the holder of the defaced, destroyed, or lost license upon the payment of a fee of \$10 by the holder.

Section 9. Amend § 5314, Title 30 of the Delaware Code as follows:

§ 5314. Transfer of license.

Any licensed dealer may transfer a license from 1 location to another or from 1 tobacco product vending machine to another in accordance with the rules and regulations of the Department.

Section 10. Amend § 5315, Title 30 of the Delaware Code as follows:

§ 5315. Tobacco product tax stamps; affixing; amount; cancellation.

(a) Within the time prescribed, every authorized affixing agent shall affix to each pack of tobacco products received by the agent and shall cancel Delaware tobacco product tax stamps to evidence payment of the tax imposed by this chapter, unless such stamps have been affixed to the packs of tobacco products and cancelled before such authorized affixing agent received them.

(b) Stamps in an amount not less than the tax thereon must be affixed to each pack of tobacco products in such manner that they will be visible to the purchaser. The authorized affixing agent, affixing such stamps, shall cancel them immediately in such manner as may be prescribed by the Department.

Section 11. Amend § 5316, Title 30 of the Delaware Code as follows:

§ 5316. Design and sale of stamps.

(a) Delaware tobacco product tax stamps must be adhesive stamps, tax meter impressions, or other stamps, labels, or prints of such designs and denominations as may be prescribed by the Department.

(b)(1) The Department shall make provisions for the sale of Delaware tobacco product tax stamps in such places and at such times as it deems necessary.

(2) All stamps must be paid for at the time of purchase.

(3) Notwithstanding paragraph (b)(2) of this section, an authorized affixing agent may enter into an agreement with the Department of Finance providing for deferred payment for tobacco product stamps or for amounts added to tobacco product tax meters during a month to a date not later than 30 days from the date of purchase or addition to a tobacco product tax meter if the affixing agent furnishes a bond to assure payment in such amount as required by the Secretary of Finance, and pays all amounts due for the month of June by June 30.

(4) A person may not purchase tobacco product stamps from any person other than the Department of Finance or its authorized agents, except in accordance with the Finance Department's regulations relating to the stamping of floor stock.

Section 12. Amend § 5317, Title 30 of the Delaware Code as follows:

§ 5317. Time for affixing stamps; reporting requirements; violation.

(a) The authorized affixing agent shall affix the required amount of Delaware tobacco product tax stamps to unstamped tobacco products within 72 hours after receipt of the tobacco products and prior to the sale of the tobacco products, unless the tobacco products are exempt by other provisions of this chapter. Whenever any tobacco products are found in the place of business of the authorized affixing agent without the stamps affixed as provided by this subsection, or not segregated or marked as having been received within the preceding 72 hours, or not segregated or marked as exempt from requirement of Delaware tobacco product tax stamp under other provisions of this chapter, a prima facie presumption arises that such tobacco products are possessed in violation of this chapter.

(b) Between noon local time and midnight on each July 31 and December 31, an affixing agent may not have in its possession cigarettes without the stamps affixed as provided under subsection (a) of this section or not segregated or marked as exempt from the requirement of Delaware tobacco product tax stamps. The affixing agent shall accurately report to the Director of Revenue the quantity of cigarettes bearing stamps and the balance

remaining in any device used for affixation of stamps at that time. Failure to comply with this subsection is prima facie cause for suspension or revocation of licenses under § 5313 of this title.

Section 13. Amend § 5318, Title 30 of the Delaware Code as follows:

§ 5318. Appointment of stamp affixing agents; commission.

(a) The Department may appoint any manufacturer of tobacco products or wholesaler within this State and may appoint any other person within or without this State as its agent to affix Delaware tobacco product tax stamps. Tax affixing agents located outside the State must apply the stamps to all taxable tobacco products before bringing them into this State.

(b) Whenever the Department shall sell, consign, or deliver Delaware tobacco product tax stamps to any authorized stamp affixing agent, such agent is entitled to receive as compensation for such agent's services and expenses a commission at the rate of 3/10 of 1 cent for affixing the tax stamp to each package of 20 or more cigarettes. The commission is to be retained out of the moneys to be paid by such agent for such stamps purchased from the Department.

Section 14. Amend § 5321, Title 30 of the Delaware Code as follows:

§ 5321. Duties imposed on licensed tobacco products dealers; lists.

(a) A licensed tobacco products dealer may not sell tobacco products or purchase tobacco products from any person required to be licensed who is not so licensed or is improperly licensed; except that a licensed wholesale tobacco products dealer may sell tax paid tobacco products to a tobacco products manufacturer's representative if the manufacturer's representative presents valid proof that the representative is a bona fide sales representative of the tobacco products manufacturer.

(b) All holders of wholesale licenses shall maintain at every licensed location a list of the names and license numbers or holders of wholesale and retail licenses to whom tobacco products are sold or delivered.

(c) A licensed tobacco products dealer may not sell smokeless tobacco products unless the package for such smokeless tobacco product bears a legible legend required by any federal law, rule, or regulation relating to the possible hazard involved in use of the product.

Section 15. Amend § 5322, Title 30 of the Delaware Code as follows:

§ 5322. Duties imposed on manufacturer's representatives.

A tobacco products manufacturer's representative may sell only to a licensed tobacco products dealer, unless the representative obtains a dealer's license under this chapter and the rules and regulations promulgated under this chapter. A manufacturer's representative who participates in promotional activities involving the sale of tobacco products to persons other than licensees is presumed to be acting as an agent of the licensee who furnished the tobacco products.

Section 16. Amend § 5327, Title 30 of the Delaware Code as follows:

§ 5325. Late filing penalty.

Every stamp affixing agent shall file with the Department, on or before the twentieth day of each month, a report in such form as the Secretary of Finance shall prescribe. The report must disclose the number of tobacco

products on hand on the first and last days of the calendar month immediately preceding the month in which such report is required, together with such information concerning the amount of stamps purchased, used and on hand during the report period, together with any other information for the report period that the Secretary of Finance shall prescribe. Any tax affixing agent who fails to file any report on the day when it is due shall forfeit, as a penalty for each day thereafter until the report is filed, the sum of \$15 to be collected in the manner provided in this chapter for the collection of penalties. The Secretary of Finance, if satisfied that the failure to comply with this section was excusable, may remit the whole or any part of said penalty.

Section 17. Amend § 5326, Title 30 of the Delaware Code as follows:

§ 5326. Refunds.

Whenever any packs of tobacco products upon which stamps have been placed have been sold and shipped into another state for sale or use therein, or have been sold to persons exempt under § 5305(d) of this title for resale to authorized purchasers, or have been returned to the manufacturer for credit because they became unfit for use and consumption or became unsalable by reason of fire, flood, or other causes beyond the control of the person who sold the tobacco products and shipped them into another state for sale or for use therein or who sold the tobacco products to persons exempt under § 5305(d) of this title for resale to authorized purchasers or who owned the tobacco products at the time they were returned to manufacturer because they became unfit for use and consumption or unsalable by reason of fire, flood, or other cause beyond the control of the person seeking the refund shall be entitled to a refund of the actual amount of tobacco product tax paid with respect to such tobacco products. If the Department is satisfied that a refund is proper, it shall certify the proposed amount of refund and thereafter shall issue to the person seeking the refund stamps or cash of sufficient value to cover the refund.

Section 18. Amend § 5327, Title 30 of the Delaware Code as follows:

§ 5327. Exempt sales.

The Department may promulgate regulations to relieve authorized affixing agents from affixing stamps to packs of tobacco products to be sold and delivered to points outside the State for use outside the State, or to be sold to purchasers designated as exempt under § 5305(d) of this title for resale to authorized purchasers. However, all sales are presumed to be taxable and the burden is upon the person claiming an exemption to prove such person's right to the exemption.

Section 19. Amend § 5328, Title 30 of the Delaware Code as follows:

§ 5328. Invoices or delivery tickets and purchase orders required in certain cases.

(a) A person who possesses or transports 10 or more packs or packages, or an equivalent amount unpackaged, of unstamped tobacco products upon the public highways, roads, or streets of this State for the purpose of delivery, sale, or disposition is required to have in the person's possession invoices or delivery tickets and purchase orders for the tobacco products which must show all of the following:

- (1) The true name and complete and exact address of the consignor or seller.
- (2) The true name and complete and exact address of the person transporting the tobacco products.

(3) The quantity and brand of the tobacco products transported and the true name and complete and exact address of the person who has been licensed to assume the payment of the Delaware tax or the tax, if any, of the state or foreign country at the point of ultimate destination.

(b) Notwithstanding subsection (a) of this section, any common carrier which has issued a bill of lading for shipment of tobacco products and is without notice to itself or to any of its agents or employees that the tobacco products are not stamped as required by this chapter is deemed to have complied with this chapter.

(c) The absence of proper invoices or delivery tickets and purchase orders required under this section is prima facie evidence that the person is in violation of this chapter and subject to the penalties of this chapter.

Section 20. Amend § 5330, Title 30 of the Delaware Code as follows:

§ 5330. Bonds.

The Secretary, at the Secretary's discretion, in order to protect the revenues to be obtained under this chapter, may require any person liable for the payment of a tax imposed under this chapter to furnish a bond executed by a surety company authorized to do business in this State and approved by the State Insurance Commissioner as to solvency and responsibility, in such amounts as the Secretary may fix, to secure the payment of any tax and interest or penalties due or which may become due from the person.

(1) If the Secretary determines that a person must file a bond, the Secretary shall give notice to such person to that effect, specifying the amount of the bond required.

(2) The bond must be filed 5 days after the giving of notice under paragraph (1) of this section, unless within 5 days of such notice a request in writing for a hearing before the Secretary of Finance is made.

(3) At a hearing held under paragraph (2) of this section, the Secretary of Finance shall review and determine the necessity, propriety, and amount of the bond.

(4) Secretary's determination is final and the person requesting the hearing must comply with the determination within 15 days after notice of the determination is sent by the Secretary to the person requesting the hearing.

Section 21. Amend § 5341, Title 30 of the Delaware Code as follows:

§ 5341. Sale of unstamped tobacco products; refusal to permit inspection; counterfeited or reused stamps; penalty.

(a) A person may not sell any pack of tobacco products that does not have affixed to it the proper amount of Delaware tobacco product tax stamps.

(b) A dealer may not refuse to permit the Department to examine such dealer's books and records, stock of tobacco products, or premises and equipment in order to verify the accuracy of the tax payments imposed by this chapter.

(c) A person may not falsely or fraudulently make, forge, alter, or counterfeit any stamp prescribed by the Department under this chapter; or cause or procure a stamp to be falsely or fraudulently made, forged, altered, or counterfeited; or knowingly and wilfully utter, publish, pass, or tender as true a false, altered, forged, or



counterfeited stamp; or use more than once any stamp provided for and required by this chapter for the purpose of evading the tax hereby imposed and assessed.

(d) A person who violates this section may be fined not more than \$1,000, or imprisoned for not more than 1 year, or both.

Section 22. Amend § 5342, Title 30 of the Delaware Code as follows:

§ 5342. Possession of untaxed tobacco products.

(a) Except as authorized by this chapter, a person who is not an affixing agent or does not hold a valid, unexpired exemption certificate may not possess within this State 10 or more packs or packages, or an equivalent unpackaged amount of tobacco products upon which the Delaware tobacco product tax has not been paid, or to which Delaware tobacco product tax stamps are not affixed in the amount required.

(b) Whenever any tobacco products are found at the place of business of a dealer, whether a stamp affixing agent or not, and the tobacco products do not have the proper amount of stamps affixed and cancelled, or it is determined that the Delaware tobacco product tax has not been paid on such tobacco products, and the boxes, cartons, or other containers have not been marked as having been received within 72 hours, such dealer may be fined not less than \$100 nor more than \$1,000, or imprisoned not more than 90 days, or both.

(c) Notwithstanding the provisions of subsection (b) of this section, any violation of § 5317(b) of this title is punishable as a violation of subsection (b) of this section, except that the Superior Court in and for the county in which any element of the offense occurred has exclusive original jurisdiction over offenses under this subsection.

Section 23. Amend § 5344, Title 30 of the Delaware Code as follows:

§ 5344. Liability joint and several as between owner and operator.

Whenever a duty or liability is imposed under this chapter on the owner or operator of tobacco product vending machines, the owner and operator is jointly and severally liable for the performance of such duty or satisfaction of such liability.

Section 24. Amend § 5345, Title 30 of the Delaware Code as follows:

§ 5345. Police powers; arrests.

(a) Employees of the Department of Finance who are designated "tobacco product tax-enforcement officers" are peace officers and have the same police power and authority as constables throughout the State.

(b) Such officers may arrest on view, except in private homes, without warrant, any person actually engaged in the unlawful sale of unstamped tobacco products, or unlawfully having in such person's possession unstamped tobacco products, contrary to this chapter.

Section 25. Amend § 5351, Title 30 of the Delaware Code as follows:

§ 5351. Forfeiture of tobacco products; disposal.

(a) In the event of a conviction under § 5342 of this title, the tobacco products which were the subject of the violation are automatically forfeited to the State.

(b) The Department shall destroy any tobacco products forfeited under this section. The Department may, prior to the destruction of any tobacco products, permit the true holder of the trademark rights in the tobacco product

brand to inspect such forfeited tobacco products in order to assist the Department in any investigation regarding such tobacco products.

Section 26. Amend § 5352, Title 30 of the Delaware Code as follows:

§ 5352. Forfeiture of vehicle used in illegally transporting tobacco products.

Any vehicle used in the transporting of tobacco products in violation of this chapter is subject to the provisions of subchapter II of Chapter 23 of Title 11.

Section 27. Amend § 5354, Title 30 of the Delaware Code as follows:

§ 5354. Seizure of untaxed tobacco products and tobacco product vending machines.

Whenever any law-enforcement officer, the Department or its agents have reasonable grounds to believe that any untaxed tobacco products are unlawfully in the State or that a vending machine is being used to hold untaxed tobacco products, they may seize such tobacco products or tobacco product vending machines and hold them in custody pending a decision of the Court. No tobacco products or tobacco product vending machines being held in custody shall be seized or taken therefrom on any writ of replevin or like judicial process.

Section 28. Effective Dates.

(a)(1) Section 5305(a), (b), and (c)(1) of Title 30, as contained in Section 3 of this Act, takes effect on September 1, 2017, and establishes the rate of tax payable on tobacco products, other than vapor products.

(2)a. The tax imposed under subsection (a)(1) of this Section must be imposed on all of the following:

1. Stocks or inventories of tobacco products in possession of any person liable for the tax as of midnight August 31, 2017, which as of that date have been affixed with any tobacco product tax stamp or other indicia of payment of the tax.

2. Any tobacco product tax stamps purchased, but not yet affixed, before midnight August 31, 2017.

b. The amount of tax due under this subsection of this Section is equal to the tax determined at the rates specified in § 5305(a), (b), and (c)(1) of Title 30, as contained in Section 3 of this Act, less the tax previously paid with respect to such tobacco products, other than vapor products. The amount of tax due under this subsection of this Section must be paid by December 31, 2017.

(b) Section 5301(7), (15), and (20) of Title 30, as contained in Section 2 of this Act; § 5305(c)(2) of Title 30, as contained in Section 3 of this Act; § 5308(b) and (c) of Title 30, as contained in Section 6 of this Act; Section 8 of this Act take effect on January 1, 2018.

(c) All other provisions or Sections of this Act take effect upon enactment.

Approved July 3, 2017