

**NORTH CAROLINA
NON-PARTICIPATING MANUFACTURER'S (NPM)
APPLICATION / ANNUAL CERTIFICATION
INSTRUCTIONS
AND
FREQUENTLY ASKED QUESTIONS**

[See N.C. General Statutes §§ 66-290, 291, 292, 293, 294, 294.1, 294.2]

General Information:

Step 1. Please type the date in the top right hand corner of the Application/Annual Certification.

Please type your answers. The Application/Certification is available in pdf format which you can print and answer. Please provide your responses directly following each question or on labeled exhibits as indicated in each question.

Please review your responses carefully, complete all charts, and be certain to attach copies of all documentation requested. The signature(s) of the person(s) completing this form *must* be notarized.

Return your completed Application/Certification to:

OFFICE OF THE NORTH CAROLINA ATTORNEY GENERAL
Special Litigation Section - Tobacco Unit
114 W. Edenton Street
P.O. Box 629
Raleigh, North Carolina 27602

Once a fully completed Application/Certification is received and reviewed, the Applicant will be notified in writing concerning the Application/Certification status.

If the Application/Certification is incomplete or if any requested information is not provided, the Application/Certification will be returned to the Applicant. For any questions regarding the Application/Certification process, feel free to contact the Tobacco Unit of the N.C. Attorney General's office at (919) 716-6900.

Completion of Form:

Step 2. Check the type of form(s) you are completing: Initial Certification, Annual Certification, or Supplemental Certification.

1. Check **Initial Certification** if the NPM and its Brand has never been

approved for sale in the North Carolina or a compliant NPM is adding a Brand. Check the Add (A) Box.

2. Check **Annual Certification (this form is due annually and should be postmarked on or before April 30th)** if the Applicant is a NPM and sold Brands in North Carolina in the prior year. For example, NPMs listed on the Approved Tobacco List in 2016, must deposit escrow timely as required and submit the Annual Certification on or before April 30, 2017. On Attachment 1, check the Retain (R) box if the product should remain on the Approved Tobacco List. Check the Delete (D) box if the Brand should be removed.

3. Check **Supplemental Certification** if the NPM is providing a change of information, or to request addition or deletion of a brand(s) to the North Carolina Tobacco Directory.

Part 1- Tobacco Product Manufacturer (TPM) Identification

Complete the TPM identification. Provide all requested information including, but not limited to name, address, telephone number and email address. Check the applicable box(es) that further identify(ies) the role of the Applicant in the manufacturing process (e.g. the Trademark Owner; Fabricator of the tobacco product; First Importer for resale in the United States; or Other (please explain relationship)). Please note that if the Fabricator and Trademark Owner are different entities, **both** may need to complete and sign the application. If represented by legal counsel, please provide name, address, telephone number, facsimile number, email, state of licensure and bar number. If the manufacturer is located outside of the United States and is utilizing an importer, the importer must complete and sign an application. **The Importer/Trademark owner** on the multi-entity escrow agreement must also follow these instructions.

Part 2-Documentation, the Escrow Agreement, and the Gray Market Statute

DOCUMENTS: In this section, please attach the documents and information requested. Attach a plain sheet of paper to the front of each document that identifies the document by item number and name, (e.g. A - Service of Process Information). Please provide all documents in English or attach an accurate English translation.

Escrow Agreement- Like the Application/Certification, the Escrow Agreement should be signed by all parties having control/manufacturing the brand. If there is more than one entity, the parties must agree to be jointly and severally liable to the State of North Carolina for the payment of escrow for the approved Brands.

The MODEL ESCROW AGREEMENT may be found at our website located at <http://www.ncdoj.com> or by calling the Tobacco Unit at (919) 716-6900. Please note that there are two versions of the Model Escrow Agreement: one for single TPM and one for multiple entity TPM and importer and/or trademark owner (additional applicants). No modification to the language of an escrow agreement will be accepted without prior

approval.

Some states now require a Revised Escrow Agreement which more clearly describes the reporting and investment obligations under the Escrow Agreement. If submitted, North Carolina will consider approval of a Revised Escrow Agreement currently required by another state.

Compliance with N.C. Gen. Stat. § 14-401.18 (Gray Market Statute)

N.C. Gen. Stat. § 14-401.18 states that it is a Class A1 misdemeanor and an unfair trade practice prohibited by N.C. Gen. Stat. § 75-1.1 if a person sells or holds for sale a package of cigarettes that meets one or more of the following descriptions:

1. The package differs in any respect with the requirements of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, for the placement of labels, warnings, or any other information upon a package of cigarettes that is to be sold within the United States.
2. The package is labeled “For Export Only,” “U.S. Tax Exempt” “For Use Outside U.S.,” or has similar wording indicating that the manufacturer did not intend that the product be sold in the United States.
3. The package was altered by adding or deleting the wording, labels, or warnings described in subdivision (1) or (2) of this section.
4. The package was imported in the United States after January 1, 2000, in violation of 26 U.S.C. § 5754.
5. The package violates federal trademark or copyright laws, federal laws governing the submission of ingredient information to federal authorities pursuant to 15 U.S.C. § 1335a, federal laws governing the import of certain cigarettes pursuant to 19 U.S.C. § 1681 and 19 U.S.C. § 1681b, or any other provision of federal law or regulation . . .

Part 3-Brand and Escrow Information

- A. Brand Family Identification** - Identify the Brand Name of the cigarettes Applicant intends to sell in North Carolina (whether directly or through any distributor, retailer or similar intermediary) and seeks to have included on the **Annual Approved Tobacco List**. Only Brands identified will be included on the **Annual Approved Tobacco List**. Do not include a Brand unless Applicant intends to affirm that it is the **TPM**.

The NPM Brand Identification certification must include:

1. A list of all of Applicant's **Brands that have been sold or that the Applicant intends to be sold in North Carolina.**
2. The number of **UNITS SOLD** for each Brand during the preceding calendar year.
3. The number of **UNITS SOLD** for each **BRAND** that are sold or intended to be sold during the current calendar year (See also Annual Certification, Attachment 1).
4. Designate by an "**A**" to Add a Brand on the **List**.
5. Designate by an "**R**" to Retain a Brand on the List.
6. Designate by a "**D**" to Delete a Brand from the **List**.
7. Designate the trademark owner and fabricator and, if applicable, importer for each Brand.

B. Distributor Information - To verify the accuracy of Distributor's revenue reports and the escrow amounts due on each Brand, North Carolina requires that the TPM list all Distributors who sell its Brands in North Carolina. Please provide a contact name, address, telephone number, units sold and the dates TPM shipped to the Distributor. TPMs may obtain a North Carolina Distributor's License by contacting the North Carolina Department of Revenue Tobacco Products Unit at (919) 733-3651.

C. Escrow Information - Escrow Rates and Payments: Multiply the Units Sold by the appropriate rate for the sales year. For 2016, multiply the Units Sold on Attachment 1 by \$.0327588. (Units Sold x \$.0327588 = Escrow Deposit)

NOTE: The base escrow amount for 2016 sales in North Carolina is \$.0188482 for each cigarette or .09 ounces of roll your own (RYO). The inflation adjustment percentage for escrow and deposits covering 2016 sales is 73.80355%. Thus, the amount of escrow which must be deposited for 2016 sales in North Carolina, including the base amount adjusted for inflation is \$.0327588 (as shown in formula) per each cigarette or per each 0.09 ounces of RYO.

Part 4-Non-Participating Manufacturer (NPM) Escrow Certification Information

A. Registered Agent / Approved Agent for Service of Process- N.C. Gen. Stat. § 66-294(b)(1) states that an NPM **must 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.**

****Please note that if more than one entity will be signing the Escrow Agreement as TPM, a service agent for each entity must be provided. Additionally, each entity must provide a Certificate of Authority as issued by the North Carolina Secretary of State (See Part 2 of Application, p. 5(M)).**

Note: A NPM and its Brand may be deleted from the Annual Approved Tobacco List if the manufacturer/applicant fails to continuously maintain the agent for service of process.

B. Qualified Escrow Fund - Financial Information- Identify the following:

1. Name, address, telephone number, and contact person of the financial institution where the NPM has established a Qualified Escrow Fund pursuant to N.C. Gen. Stat. § 66-290 et seq.
2. The account number of the Qualified Escrow Fund and any sub-account number for North Carolina.
3. An original signed copy of the properly executed Model Escrow Agreement and any amendments approved by North Carolina.

C. Escrow Deposit / Withdrawal History for North Carolina - Identify the following:

1. The amount the NPM placed in the escrow fund for cigarettes and/or RYO sold in North Carolina during the preceding calendar year, the date and the amount of each deposit
2. The amount and date of any withdrawal or transfer of funds the NPM made at any time from the fund or from any other Qualified Escrow Fund.

D. Answer each question pertaining to the Escrow and the Brand Listing Statutes.

Part 5- Additional Information-

Provide the following information:

- A. Names of each State where the Brand(s) have been approved.

Part 6. Affirmation and Execution by Authorized Designee.

On the Application/Annual Certification, the Applicant is asked to affirm under penalty of perjury that the information contained in its Application/Certification is complete and accurate, that the Applicant is currently in compliance with all applicable laws, and that the Applicant has resolved any prior violation of the escrow or brand listing laws. Please review these carefully as this affirmation is made under penalty of perjury. Please initial and date each item.

FREQUENTLY ASKED QUESTIONS:

1. Who is required to file the Annual Certification?

- Any tobacco product manufacturer (TPM) which:
 - (1) Sells, or desires to sell cigarettes within the State of North Carolina (whether directly or through any distributor, retailer, or similar intermediary), and
 - (2) Has not become a participating manufacturer (PM) in the tobacco Master Settlement Agreement (the MSA). An electronic copy of the MSA and a list of participating manufacturers can be found at <http://www.naag.org/>.

North Carolina requires the entity or entities that control or own the manufacturing process, and the Brand mark, including any importer (See N.C. Gen. Stat. § 66-294.2) to apply and be responsible for a Brand(s) approved for sale and for the escrow payments.

Parties who fall within this definition must file an Initial Certification and an Annual Certification each year thereafter to report the units of cigarettes and/or RYO sold in the State of North Carolina and the amount of escrow deposited for those states. Non-Participating Manufacturers (NPMs) must make a required escrow deposit (N.C. Gen. Stat. §§ 66-291(a)(2) or 66-294.1(c)). The Annual Certification must be filed by April 30th of each year.

NOTE: Participating Manufacturers (PMs), must provide a list of Brands for inclusion on the Annual Approved Tobacco List and certain required supporting documents. N.C. Gen. Stat. §§ 66-294 and 66-294.1. PMs are required to make payments to the States in accordance with the terms of the MSA. TPMs interested in obtaining more information about participating in the MSA should contact Michael Hering at the National Association of Attorneys General (NAAG) at (202) 326-6023 or check the NAAG website at <http://www.naag.org/>.

2. What is the definition of a tobacco product manufacturer (TPM)?

- Any entity that manufactures cigarettes, including roll-your-own, anywhere that such manufacturer intends to be sold in the United States including cigarettes that are intended to be sold in the United States through an importer;
- 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
- A successor of any entity described above.

3. Who can be a TPM?

A product cannot exist by Brand unless the owner of the intellectual property (trademark, trade dress, etc.) allows the actual fabrication and/or importation of the product. Hence, the owner/controller of the intellectual property is by definition and intent a part of the manufacturing process. North Carolina generally accepts as a TPM for a Brand the entity/entities that can demonstrate control of the Brand's trademark and manufacturing process.

4. What is a Non-Participating Manufacturer?

A Non-Participating Manufacturer (NPM) is any TPM who has not signed onto the MSA .

5. What is a qualified escrow fund?

Each NPM must establish an escrow arrangement with a U.S. federal or U.S. state-chartered financial institution having no affiliation with any TPM and having assets of at least \$1,000,000,000. The escrow arrangement requires the financial institution to hold the escrowed funds' principal for the benefit of the State of North Carolina (and possibly other "Releasing Parties" as defined in the MSA) and prohibits the NPM from

using, accessing, or directing the use of the funds' principal except as consistent with Article 37 of Chapter 66 of the North Carolina General Statutes, N.C. Gen. Stat. § 66-290 et seq.

Per N.C. Gen. Stat. § 66-291(b), the escrow funds remain the property of the NPM but may only be released for three reasons: (1) to pay a judgment or settlement against a manufacturer; (2) to return funds to manufacturer in excess of North Carolina's allocable share; or (3) if not released under 1 or 2, to be returned to TPM 25 years after the date TPM places the funds in escrow

6. What is the Annual Certification?

The Annual Certification is required from each NPM whose Brand is sold in North Carolina. Each NPM certifies to North Carolina the Brand(s) it requests be approved for sale and be listed on the Annual Approved Tobacco List. The NPM also certifies to North Carolina the total escrow due and payable for its prior year sales in North Carolina. In the certification, the NPM states who makes the product and who owns the brand. The NPM verifies that the product complies with all applicable state and federal laws. The name/names of the TPMs responsible for each Brand will appear with the Brand on the Approved Tobacco List. For a complete list of all items required in the Annual Certification, please see the Application/Certification located at our website located at <http://www.ncdoj.com>.

7. When is the Annual Certification due?

The signed and notarized Annual Certification must be filed on or before April 30th of the year following the sales year.

The NPM must have the Escrow Agent to fax, mail, or email proof of its deposit to the Office of the North Carolina Attorney General, P.O. Box 629, Raleigh, NC 27602. Fax number is (919) 716-6763.

For 2016, the sales year for tobacco products sold in **North Carolina** is January 1, 2016 - December 31, 2016. The Annual Certification is due April 30, 2017.

8. What are the penalties for failure to pay escrow?

Pursuant to N.C. Gen. Stat. § 66-291(c)(1): if the escrow is paid late, the penalty is either (a) 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; or (b) for a knowing violation, 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.

9. What is a Cigarette?

"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 (l) 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 “cigarettes,” 0.09 ounces of “roll-your-own” tobacco shall constitute an individual “cigarette.” (N.C. Gen. Stat. § 66-290(4))**

10. What is a Brand?

A package of cigarettes bearing a unique trademark that a consumer can recognize and associate with a particular TPM.

11. What is a Brand Family?

“Brand Family” means all styles of cigarettes sold under the same trade mark and differentiated from one another by means of additional modifiers including, but not limited to, “menthol,” “kings,” and “100's.” (N.C. Gen. Stat. § 66-292) The TPM is responsible for the entire Brand Family sold in North Carolina.

12. What are Units Sold?

“Units Sold” means the number of individual cigarettes sold in North Carolina by the applicable TPM (whether directly or through a distributor, retailer or similar intermediary) during the year in question, as measured by excise taxes collected by the State of North Carolina on packs or “roll-your-own” tobacco containers. (N.C. Gen. Stat. § 66-290(10))

13. What is the Annual Approved Tobacco List and Where it is Located?

N.C. Gen. Stat. § 66-294.1(b) requires the Office of the Attorney General to create Annual Lists of Participating Manufacturers (PMs) and compliant Non-Participating Manufacturers (NPMs) whose Application/Certification for inclusion have been found to be complete and accurate and whose escrow agreements have been approved. These lists must include the brands each manufacturer produces. The Annual Approved Tobacco List may be found on the Attorney General’s website at <http://www.ncdoj.com>. (Click on Legal Services, Tobacco and then on Tobacco List.) For convenience, the Annual Approved Tobacco List is provided alphabetically in four separate lists: NPM Brands, NPM Manufacturers, PM Brands and PM Manufacturers. If you have a question about a brand or manufacturer on the Annual Approved Tobacco List, please call the Tobacco Unit at (919) 716-6900.

CAUTION: Retailers and Distributors in North Carolina may only sell tobacco products on the Annual Approved Tobacco List. If the Retailer/Distributor is offered unlisted tobacco products for sale in North Carolina, please direct the seller of the

tobacco product to this website or please contact the Tobacco Unit at (919) 716-6900 and provide the name, address and contact information of the person who offered the unlisted product so that the Attorney General's Office may provide them with the appropriate procedures and Application/Certification forms.

14. What procedures are required?

NPMs wishing to sell cigarettes in North Carolina must file an Initial Certification. For each year of sales, the NPM must also deposit escrow pursuant to N.C. General Statute § 66-294.1(c) and file with the Department of Justice the Annual Certification by April 30th. The North Carolina Department of Revenue also requires TPMs to file certain forms to ensure the correct MSA and escrow payments are made on Brands sold in North Carolina. North Carolina maintains an Annual Approved Tobacco List at its website <http://www.ncdoj.com>. **All distributors and retailers in North Carolina should check the Annual Approved Tobacco List before purchasing cigarettes for sale in North Carolina.**

15. What are the penalties for the sale of Non-Approved Brands?

Penalties for the sale of Non-Approved Brands can be severe. Each sale or delivery of a non-approved Brand in North Carolina may result in a fine which is the greater of 500% of the retail value or \$5000. Please see N.C. Gen. Stat. §§ 66-293, 66-294, 66-294.1.

16. How do I use the Brand Listing and Escrow Forms?

Before a NPM may sell a Brand in North Carolina, the NPM must apply for approval. A North Carolina Certification Application addressing the following three conditions must be completed and submitted.

1. Initial Certification - Tobacco Product Manufacturer/Applicant is not currently listed on the North Carolina Approved Tobacco Directory.
2. Annual Certification - NPMs must file by April 30th for all Brands sold in North Carolina.
3. Supplemental Certification – Change of information provided to the Attorney General, or to request addition or deletion of brands to the North Carolina Tobacco Directory.

Complete the form following the steps in the Instruction section.

17. What North Carolina Department of Revenue forms are required?

MSA payments are based on federal excise tax paid. NPM escrow payments are based on North Carolina excise tax collected. N. C. Gen. Stat. §66-290(10) requires the Secretary of Revenue to promulgate such rules as are necessary to ascertain the amount of State excise tax paid on the cigarettes for each TPM for each year. The Department of Revenue may also require a TPM to obtain a distributor's license in certain situations. (See N.C. Gen. Stat. § 105.113.4(3) and §105.113.11). Additionally, the Department of Revenue requires the tobacco taxpayer to file a form each month that lists all tobacco

UNITS SOLD by Brand and by Manufacturer. All questions relating to the interpretation and application of North Carolina Revenue statutes, regulations and forms should be directed to the North Carolina Department of Revenue Tobacco Products Unit at (919) 754-2631.

18. It is unlawful to offer for sale in the State of North Carolina any cigarette that is not compliant with the North Carolina Fire Safety Standard and Firefighter Protection Act. The brands sought to be certified in the Application/Annual Certification are fire safe compliant with the North Carolina Fire Safety Standard and Firefighter Protection Act. Please visit this website for additional information. <http://www.ncdoi.com/osfm/FireSafetyPrograms>