

Title 37—Law
Office of Attorney General
37 Pa. Code Chs. 901—907

The Office of Attorney General (OAG), through its Public Protection Division, proposes to amend 37 Pa. Code by adding a new Part XII (relating to enforcement of the Tobacco Settlement Agreement Act and the Tobacco Product Manufacturer Directory Act) to read as set forth in Annex A.

A. Effective Date

This proposed rulemaking will be effective upon final publication in the *Pennsylvania Bulletin*.

B. Contact Person

For further information on the proposed rulemaking, the primary contact is Joseph S. Swartz, Senior Deputy Attorney General, Tobacco Enforcement Section, and the secondary contact is Edmund “Tad” Berger, Chief Deputy Attorney General, Tobacco Enforcement Section, Pennsylvania Office of Attorney General, Strawberry Square, 15th Floor, Harrisburg, PA 17120, (717) 783-1794. This proposed rulemaking is available on the OAG website at www.attorneygeneral.gov/tobacco-enforcement.

C. Statutory Authority

This rulemaking is proposed under the authority of section 311 of the Tobacco Product Manufacturer Directory Act (TPMDA) (35 P.S. § 5702.311), regarding the statutory rulemaking authority of the OAG, and section 506 of the Administrative Code of 1929 (71 P.S. § 186), regarding general rulemaking authority.

To the extent the TPMDA addresses the requirements and enforcement of the Tobacco Settlement Agreement Act (TSAA) (35 P.S. §§ 5671-5675), the Attorney General is implicitly empowered to promulgate regulations necessary to enforce the TSAA. 35 P.S. § 5702.311(a); (*see also* 35 P.S. §§ 5702.102 (providing for definitions), 5702.301 and 5702.303 (providing for certification of compliance with the TSAA to appear or remain on the Directory), 5702.304 (providing for production of information relating to compliance with the TSAA), 5702.305 (providing for appointment of an agent for service of process for any action relating to enforcement of the TPMDA or the TSAA), 5702.306 (providing for retention and production of documents relied upon in certifications of compliance with the TPMDA), 5702.312 (providing for joint and several liability of importers for failure to deposit escrow as required by the TSAA), 5702.313 (providing for surety bonds conditioned on compliance with the TPMDA and the TSAA)).

D. Purpose and Background

The proposed rulemaking is designed to improve and enhance the OAG’s enforcement of the requirements of the TPMDA (35 P.S. §§5701.101 – 5702.2102) and the TSAA (collectively the “Acts”) and to make it easier for tobacco product manufacturers and distributors to comply

with such requirements. The specific purpose of the rulemaking is described in more detail under the summary of proposed rulemaking.

E. Summary of Proposed Rulemaking

The OAG enforces and administers the Tobacco Master Settlement Agreement (MSA) and the Acts, and maintains the Pennsylvania Tobacco Product Directory (Directory). Under the MSA, major tobacco companies that are signatories to the MSA (“Participating Manufacturers” or “PMs”) make annual settlement payments¹ to the MSA Settling States (hereafter “Settling States”), one of which is Pennsylvania. Funds received through MSA payments are used in part to support tobacco cessation and prevention programs. MSA payments also increase the retail cost of cigarettes, providing a financial incentive for smokers to quit and making it more expensive for youth to begin smoking. These payments are adjusted up and down under various MSA provisions each year, one of which is a potential downward adjustment to Settling States’ payments related to the increase in market share of tobacco product manufacturers who do not sign the MSA, who are referred to as “Non-Participating Manufacturers” or “NPMs.” The adjustment is known as the NPM Adjustment. Settling States that diligently enforce their state’s MSA “Qualifying Statute” are not subject to the NPM Adjustment. The TSAA is the Commonwealth’s Qualifying Statute. The TSAA requires NPMs to deposit escrow on their sales in amounts roughly equivalent to the amounts, per cigarette, of MSA payments. The escrow is held, and interest is paid to the NPMs from the accounts, for 25 years from the date of deposit. This prevents NPMs from gaining a competitive advantage in the near term against the PMs in order to protect the public health gains that have resulted from the MSA.

After the Qualifying Statutes were implemented, the Settling States passed Complementary Legislation to further ensure compliance with the TSAA. The TPMDA - the Commonwealth’s Complementary Legislation - became effective on December 30, 2003, and was amended most recently effective March 6, 2024. The 2024 amendments to the TPMDA included, among other things, (1) modifying the definition of “units sold,” (2) imposing joint and several liability upon importers for escrow deposit obligations, (3) requiring NPMs to post surety bonds conditioned upon their compliance with the Acts, (4) providing new certification requirements and circumstances in which manufacturers must be excluded from the Directory, and (5) further delineating the scope of permissible sharing of information received under the TPMDA.

The Department of Revenue (the Department) previously adopted regulations to enable the Department to ascertain the amount of state excise tax paid on cigarettes manufactured by a tobacco product manufacturer for each year, including reporting and record retention requirements. 61 Pa. Code §§ 71.31 - 71.32. The OAG has not previously commenced a rulemaking under the TPMDA and has implemented its enforcement and administration without regulations. However, in light of the recent amendments to the Acts, the OAG has determined that the proposed rulemaking is necessary to provide industry with greater clarity regarding

¹ The MSA payment made to the Commonwealth in April 2025 was \$329,116,760.04. Since 1999, the Commonwealth has received over \$9.6 billion in MSA payments.

enforcement procedures and practice, thereby ensuring continued compliance and preserving the public health gains of the MSA.

There are 23 tobacco product manufacturers and approximately 400 cigarette stamping agents and OTP wholesalers that will be directly affected by these proposed regulations. The rulemaking reflects current practice and operates within the Attorney General's authority as currently provided by the Acts. In addition to ensuring compliance and protecting public health, these regulations are intended to provide clarity and predictability for tobacco product manufacturers and distributors, saving them time, money, and avoiding potential civil or criminal penalties for noncompliance. This proposed rulemaking relates to carrying out the Acts, including submission and processing of certifications, administering the directory, maintaining and submitting information, administering qualified escrow funds, posting and execution of required surety bonds, and enforcement. Below is an outline of the proposed regulations:

Chapter 901. Preliminary Provisions

§ 901.1. General Provisions.

§ 901.2. Definitions.

Chapter 902. Certifications

§ 902.1. Certification Forms.

§ 902.2. Types of Certifications.

§ 902.3. Certifications Submission.

Chapter 903. The Directory

§ 903.1. Administration.

§ 903.2. Grounds for Denial of Inclusion on or Removal from the Directory.

Chapter 904. Maintenance and Submission of Information

§ 904.1. Record Retention and Production.

§ 904.2. Document and Information Production.

Chapter 905. Qualified Escrow Funds

§ 905.1. Administration.

§ 905.2. Qualified Escrow Agreements.

§ 905.3. Escrow Agents.

§ 905.4. Escrow Release Requests.

Chapter 906. Surety Bonds

§ 906.1. Bond Requirements.

§ 906.2. Bond Execution.

Chapter 907. Enforcement

§ 907.1. Enforcement Generally.

§ 907.2. Notice and Opportunity to Cure.

§ 907.3. Burden of Proof.

§ 907.4. Notice of Appointment and Termination of Agent for Service of Process.

1. *Preliminary Provisions*

Chapter 901. Preliminary Provisions

Section 901.1 of the first chapter of new Part XII sets out the scope and purpose of the regulations, specifies that the regulations are to be construed consistently with the Acts and that its provisions are severable. The regulations govern compliance with, and enforcement of, the Acts with respect to cigarettes and roll-your-own tobacco (RYO). The purpose of the regulations is to ensure compliance with and improve enforcement of, the Acts, thereby protecting the Commonwealth and its residents from the public health hazards posed by cigarette sales and addiction to cigarette smoking.

Section 901.2 provides definitions for terms used in the chapter and states that terms not otherwise defined therein are defined as provided by the TSAA and the TPMDA. The following are the defined terms that are more than mere acronyms or recitations of the definitions found in the Acts.

CSA - Cigarette Stamping Agent - “As that term is defined by Section 8201 of the Tax Reform Code of 1971 (72 P.S. § 8201).” Section 8201 refers to a CSA as a “cigarette stamping agency,” but a CSA is more commonly known and referred to by industry and by the Department as a “cigarette stamping agent,” so the latter term is used by the proposed regulations.

FET - Federal Excise Tax - “The federal tax applicable to sales of cigarettes or RYO.” References to FET are necessary because FET records may be useful in ensuring compliance with the Acts.

OTP - Other Tobacco Products - “Any ‘tobacco product’ as that term is defined by Section 8201-A of the Fiscal Code (72 P.S. § 8201-A).” RYO falls within this definition, and certain distributors are licensed to sell OTP and remit the state excise tax applicable to OTP to the Commonwealth, so several references to OTP are necessary.

PACT Act - The “Prevent All Cigarette Trafficking Act (Pub. L. No. 111-154) (15 U.S.C. §§ 375-378, as amended).” Reports submitted pursuant to the PACT Act are helpful in verifying distributor sales figures and compliance with the Acts, so references to the PACT Act are necessary where such reports are required to be submitted and where the regulations address the effect of PACT Act noncompliance.

TES - “The Tobacco Enforcement Section within the Public Protection Division of the Pennsylvania Office of Attorney General.” TES is the section within OAG tasked with enforcing the MSA and the Acts and maintains the Directory. TES receives and reviews certifications from TPMs seeking to remain or be added to the Directory, oversees qualified escrow funds and the agents managing those funds, and investigates and interdicts potential violations of state law.

Certification - The term “certification” is used frequently throughout the regulations, and this definition seeks to make clear that the term refers to a document signed by a TPM and submitted to the Attorney General, and that it includes “forms, documents, attachments, information, and correspondence provided with, in anticipation of, or subsequent to submission

of the certification,” and that without additional qualifiers it refers to all types of certifications collectively, “including annual, initial, quarterly, supplemental, and non-directory certifications.”

Certification Form - This term refers to the “form prescribed by the Attorney General pursuant to the TPMDA,” including “any forms, documents, instructions, checklists, correspondence, or other information attached to, linked within, or otherwise included with the certification form.” This is differentiated from a “certification” in that a certification form is a blank form, whereas a certification is a certification form that has been completed by a TPM and submitted to the Attorney General.

Cigarette - This term is defined as in the Acts, noting for clarity that such definition includes RYO and that RYO would not be excluded from references to “cigarettes” unless “such exclusion is made explicitly.”

Contraband - “Units sold that belong to a TPM or brand style not appearing on the directory, that otherwise constitute unlawful cigarettes pursuant to Section 302 of the TPMDA (35 P.S. § 5702.302), or on which Pennsylvania SET has not been paid.” This definition is meant to specify that references to “contraband” in the regulations are limited to cigarettes that are unlawful pursuant to the TPMDA or the Tax Reform Code of 1971, as opposed to other state or federal laws relating to cigarettes.

Distributor - “Any person acting as a CSA, OTP wholesaler, or a cigarette or RYO importer, wholesaler, or other similar intermediary, notwithstanding whether such person is licensed or otherwise authorized by the Department to so act.” This term encompasses every type of cigarette dealer other than TPMs and retailers (unless the TPM or retailer also acts as a distributor), because there are some provisions of the regulations where reference to such entities to the exclusion of TPMs and retailers is useful.

Model Escrow Agreement - “The model form prescribed by the Attorney General for purposes of establishing a qualified escrow fund under the TPMDA.” Section 303(a)(2) of the TPMDA requires NPMs that submit a certification to certify that they have executed a qualified escrow agreement approved by the Attorney General. To facilitate compliance with this requirement, the Attorney General publishes a model escrow agreement containing terms the Attorney General typically finds acceptable. An NPM using the model escrow agreement without altering its terms may receive such approval more quickly than otherwise.

OTP Wholesaler - “A ‘wholesaler’ as defined by 72 P.S. § 8201-A,” which provides for licensing wholesalers of tobacco products other than cigarettes. Unlike cigarettes, which are distributed by CSAs, RYO is distributed by OTP wholesalers that remit SET to the Commonwealth for such sales. Since cigarette is defined to include RYO, OTP wholesalers have similar reporting and record-keeping obligations and the Acts affect them the same as if they were a CSA. References to OTP wholesalers are meant to make this point clear.

Qualified Escrow Agreement – “An agreement between a TPM and an escrow agent to which the Commonwealth is explicitly made a third-party beneficiary, which governs the holding, management, investment, and disposition of funds within a qualified escrow fund, and which has been approved by the Attorney General prior to its implementation.” This term is not

defined by the Acts, though they do include the requirements related to qualified escrow agreements, so this definition is meant to clearly distill such requirements.

Sales Records – “Any documents, regardless of format, relating to cigarettes or RYO sold by any person.” The Acts impose record retention and production obligations on CSAs, OTP wholesalers, and TPMs. This definition and the provisions related to record retention are meant to ensure these entities are aware of such obligations and preserve their records in a way that will allow them to comply with the Acts.

“Sell” or “sold” – “As that term is defined in the Acts, including any shipment or transfer of cigarettes that would result in an obligation to pay SET, notwithstanding whether SET is paid or collected or whether any consideration is exchanged for such cigarettes.” The Acts define these terms as including “sales made directly or through a distributor, retailer or similar intermediary.” This delineation of the meaning of this term ensures that it applies to all instances where such “sales” could constitute units sold which, in the case of an NPM, would require escrow to be deposited by the NPM. Consideration is not necessary for the sale or possession of cigarettes to constitute “units sold,” but absent this clarification the term “sell” may be read to imply an exchange of money or other consideration for it to apply.

2. Tobacco Product Manufacturer Certifications

Chapter 902. Certifications

The second chapter provides for requirements related to certification forms and submission to the Attorney General. Subsection 902.1(a) explains the Attorney General’s standard practice when modifying certification forms to give industry clear expectations as to when such forms are expected to be available. Subsection 902.1(b) clarifies that all documents and forms posted to a certification webpage are part of the certification form and that all documents and correspondence submitted by a TPM relating to a certification are part of that certification. It also advises TPMs to carefully follow all instructions and checklists provided by the Attorney General when submitting certifications.

Subsection 902.2 lays out requirements for specific types of certifications.

902.2(a) – **Initial certifications** are those submitted by a TPM that is not currently included on the directory. Such TPMs must include photographs and diagrams of their manufacturing facility and, in the case of an NPM, a fully executed copy of the model escrow agreement, including any amendments or attachments thereto. This subsection also clarifies that initial certifications may be submitted at any time throughout the year, that any forms submitted with the certifications must have been completed within 15 days of such submission, and that the TPM may not sell its brand families and styles in the Commonwealth unless and until such brand families and styles appear on the directory.

902.2(b) – **Annual certifications** are those submitted between April 15 and April 30 each year in order for a TPM and its brand families and styles to appear or remain on the directory. As part of the annual certification, a TPM attests to, among other things, its compliance with the Acts. This subsection also provides that whether to accept an annual certification submitted after April 30 shall be within the sole discretion of the Attorney General. For NPMs required to

submit a quarterly certification for the first quarter of a year, this provision makes clear that such NPMs are not required to also file an annual certification in April of that same year.

902.2(c) – **Quarterly certifications** are required to be submitted by all newly certified NPMs or any NPM that is otherwise required to file quarterly certifications (e.g. by the terms of an assurance of voluntary compliance). Subsection 304(d) of the TPMDA (35 P.S. § 5702.304(d)) requires NPMs who have not previously had sales within the Commonwealth to submit certifications and escrow deposits on a quarterly basis for the first year the NPM has sales within the Commonwealth. This subsection (c) specifies that the year does not begin to run when the NPM and its brand families are added to the directory, but rather when the NPM makes its initial sale into the Commonwealth, and that such date cannot be prior to their addition to the directory. If an NPM does not initiate sales into the Commonwealth within 365 days of its brand family appearing on the directory, the NPM’s brand family may be removed from the directory. This requirement applies to each of the NPM’s brand families separately, so sales of each brand family must be initiated for those brand families to remain on the directory.

902.2(d) – An NPM that currently does not seek to appear or remain on the directory that either appeared on the directory or sold cigarettes into this Commonwealth during the prior calendar year shall submit a **non-directory certification** between April 15 and April 30 of the current year. For example, an NPM appearing on the directory in year 1 and that has sales in the Commonwealth prior to April 30 of year 2 but does not seek to appear on the directory in year 2 shall submit a non-directory certification between April 15 and April 30 of year 2 (relating to year 1 sales) and year 3 (relating to year 2 sales). Such a certification is still required by the TSAA to ensure the appropriate amount of escrow has been deposited for all sales into the Commonwealth.

902.2(e) – A TPM that has filed a certification based upon information that is no longer accurate or complete shall submit a **supplemental certification** correcting or completing such information within 30 days after such information became inaccurate or incomplete. A TPM seeking to add a brand family or a style to a brand family already appearing on the directory shall do so by submitting a supplemental certification. This subsection (g) also provides that the TPM may not sell such brand family or style within the Commonwealth until it is added to the Directory.

Section 902.3 prescribes requirements for TPMs submitting certifications to the Attorney General. Subsection 902.3(a) provides that a TPM’s failure to abide by document format requirements prescribed by the Attorney General may be treated as the TPM’s failure to include such document in their submission. Such failure may result in non-transmittal of the document or transmittal of the document such that TES is unable to effectively review or evaluate the document. Thus, failing to abide by the format requirements might effectively be equivalent to not submitting the document at all, so it is appropriate to give the Attorney General discretion to treat such documents as if they had not been submitted.

Subsection 902.3(b) lays out a non-exhaustive list of information required from a TPM when submitting a certification, including specific requirements related to NPMs. Though additional information may be required or requested by the Attorney General, this provision is

intended to help TPMs understand what they must submit and how to properly prepare a certification, providing clarity about the scope of what is required.

Subsection 902.3(c) provides NPMs the opportunity to make rolling productions of PACT Act reports and federal excise tax returns on an ongoing basis to satisfy the requirements of subsection 902.3(b) relating to such documents. Subsection 902.3(d) prescribes requirements for submission and formatting of packaging images and reminds TPMs that such packaging images will be posted to the Attorney General's directory webpage.

Subsection 902.3(e) provides that TPMs submitting a certification make certain representations under penalty of perjury and subject to the penalties of 18 Pa.C.S. §4904 (relating to unsworn falsification to authorities). This provision includes representations that specifically apply to non-RYO brand families, NPMs, and TPMs submitting supplemental certifications. Subsection 902.3(f) provides that such representations will be spelled out by the Attorney General in a document attached to each certification webpage, thereby incorporating them into each certification form. Subsection 902.3(g) provides that inconsistencies between documents or information submitted or representations made by a TPM to the Attorney General may be construed against the TPM at the Attorney General's discretion.

3. Tobacco Product Manufacturer Directory

Chapter 903. The Directory

The third chapter relates to maintaining the Directory of tobacco product manufacturers and brands that are certified for sale in the Commonwealth. The OAG's authority under this chapter is derived from Sections 301 and 303-306 of the TPMDA. 35 P.S. §§ 5702.301, 5702.303-5702.306. Subsection 903.1(a) provides that the directory shall consist only of the TPMs, brand families, and styles which have been approved by the Attorney General for inclusion on the directory, and that cigarettes sold, transferred, or intended for sale in this Commonwealth belonging to a TPM, brand family, or style not appearing on the directory constitute contraband as provided by the TPMDA. Subsection 903.1(b) provides that each product listing on the directory shall include the TPM, brand family, and brand style, and that the brand style designation should include the style name, whether it contains menthol, filter status (if non-filtered), the pack type (e.g. soft pack), and sizes other than "king" (e.g. 100s, 120s, etc.).

Subsection 903.1(c) clarifies that a brand family or style can only be listed by one manufacturer at a time. TPMs transferring brand families and wishing to avoid having the brand family removed from the directory in the interim must provide advance notice of such transfers to the Attorney General. This subsection (c) further clarifies that, under the TPMDA definition of "brand family," brand styles within the same brand family may nonetheless be based upon separate trademarks if they otherwise fall within the definition of "brand family" (i.e. the styles "use a 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"). This clarification is necessary due to the phrase "under the same trademark" found in the first sentence of the definition of "brand family," to make clear that the term does not *only* include

cigarettes sold under the same trademark, which is supported by the inclusion of the phrase “with any other... trademark” in the second sentence of the same definition.

Section 903.2 lays out a non-exhaustive list of grounds for denial of certifications or removal of brand families or styles from the directory, including situations in which OAG *must* reject a certification and situations where the OAG *may* deny a certification. Because of their differing obligations under the TSAA and TPMDA, requirements for PMs and NPMs differ where such obligations differ under the Acts. The proposed grounds upon which OAG *must* deny certification relate to specific requirements of the TSAA, the TPMDA and state and federal laws which may otherwise prohibit the sale of such cigarettes in the Commonwealth. These grounds should be mandatory because they are specifically provided for by the Acts or indicate a high risk of noncompliance with the Acts’ financial requirements.

The proposed grounds upon which OAG *may* deny certification relate to compliance, reporting, or financial issues that the TPM, its affiliates, its importers, or its predecessors have had in Pennsylvania or elsewhere. These grounds should be discretionary because they include situations where the TPM has not irreparably violated the Acts and whatever violation they may have committed could be corrected promptly. It may also relate to circumstances where agency judgment is necessary to assess the risk posed by the noncompliance. TES’s experience has shown that allowing room for such corrections helps ensure compliance, whereas treating these grounds as mandatory may incentivize TPMs to conceal the violations in order to remain on the market in the Commonwealth, leaving the violation unresolved. They also include grounds where innocent mistakes occasionally occur without ultimately affecting the TPM’s compliance with the Acts, such as failing to attach a required document to a certification, misstating sales or escrow deposits, or submitting a certification late by a day or so. Under such circumstances, automatic removal is usually not necessary and TES is adept at detecting these errors and working with TPMs to correct them. Other discretionary grounds bear upon the TPM’s risk of noncompliance, but may not necessarily justify removal from the directory. These include another state’s rejection of the TPM’s certification, affiliation with any entity that has failed to abide by the Acts, or having managers and directors with histories of noncompliance with tobacco-related state or federal laws.

Subsection 903.2(d) makes clear that this section is a non-exhaustive list of the grounds upon which the Attorney General may deny inclusion of or remove a TPM or its brand families from the directory. This treatment is necessary to provide the Attorney General with the discretion to address factual situations that a TPM may pose to TES when determining how to ensure compliance while still providing private stakeholders with notice of many of the situations which will or may result in denials or removal from the directory.

4. Record Retention and Submission

Chapter 4. Maintenance and Submission of Information

Chapter 904 of the proposed rulemaking seeks to ensure proper recordkeeping and document production by TPMs, CSAs, and OTP Wholesalers. The OAG’s authority under this Chapter derives from Section 306 of the TPMDA, which requires maintenance and production of

invoices and documentation of NPM sales. 35 P.S. § 5702.306 (relating to maintenance and submission of records and information to the OAG and the Department).

Section 904.1 reminds TPMs, CSAs, and OTP Wholesalers of their record retention obligations under the TPMDA and requires that they provide OAG with notice of any planned or unplanned document destruction. With such notifications, TES can determine whether there are outstanding disputes or inquiries related to those years and whether a request for those documents should be made prior to their destruction. Also, OTP Wholesalers are responsible, under the Tax Reform Code, for recordkeeping and reporting requirements similar to those imposed on CSAs. 72 P.S. §214-A. Because roll-your-own tobacco is included in the definition of “Cigarette” in the TPMDA and “Tobacco Products” in the Tax Reform Code, the requirements applicable to CSAs under the TPMDA are also applicable to OTP Wholesalers who sell RYO tobacco with respect to those sales.

Section 904.2 provides for ongoing requests for documents and information that must be produced on a regular basis. These ongoing requests are made pursuant to Section 306 of the TPMDA (35 P.S. § 5702.306) and encompass reports filed pursuant to the federal PACT Act in jurisdictions other than Pennsylvania, monthly sales reports for sales throughout the United States (including Pennsylvania), and bills of lading for sales made in Pennsylvania. This information enables the Commonwealth to ensure consistency in reporting nationwide by the reporting entity. We note that PACT Act reports of shipments into Pennsylvania are already required to be provided to the Commonwealth by the PACT Act so they do not need to be provided for in this section.

Subsection 904.2(c) obligates TPMs, CSAs, and OTP wholesalers to report contraband sales and shipments that they may be aware of, to identify all of their business and storage locations, and to alert OAG of any failure to maintain required records or to advise OAG of destruction prior to information being destroyed. The responsibility to report contraband sales and shipments is a product of the change in the “Units sold” definition in the TSAA and TPMDA, 35 P.S. §5673 and 35 P.S. §5702.101, extending that definition to all cigarettes and RYO tobacco on which “the Commonwealth has authority under Federal law to collect State excise tax,” i.e. cigarettes and RYO on which state excise tax is due even if not paid. TPMs are also required to report tobacco-related enforcement actions or investigations, whether civil, criminal, or administrative, that relate to the TPM, its affiliates, or those who own or are involved in operations of such entities.

Section 904.2 allows the Attorney General to request information from any TPM, importer, CSA, OTP Wholesaler, distributor, or retailer as necessary to ensure compliance with these regulations, the TSAA, and the TPMDA. While Section 306 of the TPMDA only specifies TPMs and CSAs as entities from which the Attorney General may request such information, it is often necessary to obtain information from these other entities within the stream of commerce to corroborate representations made and information produced by TPMs and CSAs. Therefore, such information is necessary for the Attorney General to enforce the Acts.

5. *Qualified Escrow Funds*

The fifth chapter relates to NPM Qualified Escrow Funds (QEFs) required by the TSAA to be deposited and maintained with a qualified escrow agent. 35 P.S. §§ 5673 (defining “qualified escrow fund”), 5674(a)(2) (requiring NPMs to deposit escrow on an annual basis). The TPMDA further specifies directory and certification requirements relating to QEFs and qualified escrow agreements between NPMs and escrow agents. 35 P.S. § 5702.301(1)(ii) (relating to an NPM’s failure to make payment into a QEF as required by the TSAA), 5702.301(1)(iv) and 35 P.S. 5702.303(a) (relating to an NPM’s failure to establish and continuously maintain a QEF pursuant to a qualified escrow agreement approved by OAG), 5702.304(b)(3) (relating to an NPM’s obligation to include certain information in a certification relating to its QEF).

Section 905.1 relates to administration of QEFs and specific requirements related to escrow refund requests and transfer or abandonment of a QEF. These procedures are promulgated pursuant to the TPMDA’s requirements relating to enforcement of the escrow fund requirements found in the TSAA. *See* 35 P.S. §§ 5702.301(1) (requiring the NPM to make all payments required under the TSAA), 5702.303(a) (requiring “full compliance” with the TSAA).

Subsection 905.1(a) provides for documents and information required to substantiate and authorize a refund of escrow. This includes (1) an affidavit stating the facts supporting the request, (2) an accounting of all units sold and escrow deposited for the sales year in which the NPM alleges that excess funds were deposited in their QEF and each subsequent sales year in which the NPM sold cigarettes within the Commonwealth, (3) all invoices, shipping records, and other evidence supporting the request for the time period at issue, and (4) any other documents or information the Attorney General deems necessary to ensure that the requested refund is authorized by the TSAA and that the NPM is eligible for the requested refund.

This subsection also clarifies that a refund of escrow for an overstatement of units sold or computational error shall not constitute a “release” of escrow for purposes of subsection 5674(b) of the TSAA (35 P.S. § 5674(b)). This clarification is necessary because the TSAA only allows “releases” of escrow under certain circumstances. Since a refund would only affect funds that were not required to be deposited in the first place, they would not constitute a “release” of escrow, but rather setting the QEF back to where it would have been without the error. An NPM still must establish that the TSAA authorizes the refund and that they are entitled to the refund. Subsection 905.1(a)(6) states that it is within the Attorney General’s sole discretion whether to grant a request for a refund, but in no case may a refund be granted more than one year following the date of the alleged over-deposit. This restriction is necessary to avoid having to make such determinations far removed from the sales year in question and to encourage NPMs to ensure their distributors are reporting sales accurately.

Subsection 905.1(a)(7) provides that applying an overpayment of escrow to a future sales year is not permitted, as it effectively constitutes a release and redeposit of escrow for a different sales year. This is distinct from a mere adjustment for overpayment, because with an adjustment the NPM still must deposit escrow the next year. Applying an overpayment to a future year would unduly complicate administration and tracking of escrow funds.

Subsection 905.1(b) addresses transfers of an NPM's reversionary interest in a QEF from an NPM to (1) another NPM appearing on the directory (in which case both NPMs must have fully funded their respective QEFs in accordance with section 5674 of the TSAA (35 P.S. § 5674)) or (2) an entity other than an NPM appearing on the directory (in which case the transferor must be fully compliant with its required escrow principal and the transferee must not be an affiliate of nor be a person that has failed to timely deposit required escrow). In any case, the transferee shall have the same obligations as the original NPM under the TSAA and this Part, and such transfer may only be made if the Attorney General has approved the transfer in advance. Allowing noncompliant NPMs or their affiliates to transfer QEFs would make future noncompliance more likely, so this restriction is necessary to ensure compliance with the TSAA and the appropriate administration of QEFs.

Subsection 905.1(c) governs the disposition of abandoned QEFs. While the Abandoned and Unclaimed Property Law (the "Unclaimed Property Law," 72 P.S. §§ 1301.1 – 1301.29) applies to QEFs, as a third party beneficiary to the QEF, the Commonwealth would constitute an "owner" as defined by the Unclaimed Property Law. 72 P.S. § 1301.1 ("Owner" shall mean a person that has a legal or equitable interest in property subject to this article...). This subsection provides for the efficient maintenance of an abandoned QEF by the Attorney General until the NPM reappears or until 25 years has passed since deposit. In the latter case, if the NPM has not replied to the Attorney General's or the escrow agent's notices or otherwise made their location and contact information known by contacting the Attorney General, the funds may be released to the Commonwealth.

Subsection 905.1(d) relates to the timing and notice of OAG's determinations relating to refunds, releases, transfers, and abandonment of QEFs. The Attorney General may request additional information from the NPM, the escrow agent, or any other interested person in order to make such determinations. Such determination shall be made within 60 days after all necessary information is submitted, including any additional information requested by the Attorney General. The Attorney General shall send notice of such determination to the escrow agent and NPM, and in the case of an abandonment determination such notice shall be sent to the escrow agent, the last known address of the NPM, and the Secretary of the Commonwealth. The TPMDA provides that an NPM shall appoint a resident agent for service of process, and if an agent has not been appointed then the NPM is deemed to have appointed the Secretary of the Commonwealth (35 P.S. § 5702.305), so sending the determination to the Secretary of the Commonwealth is meant to provide notice to the NPM if at all possible or, at least, to establish that the determination has been served as required by the TPMDA.

OAG publishes an approved model qualified escrow agreement on its website, which it may modify from time-to-time. Section 905.2 provides that NPMs and their escrow agents must utilize the model unless the Attorney General agrees to modifications. This is consistent with the TPMDA, which requires NPMs to utilize an escrow agreement approved by the Attorney General. 35 P.S. §5702.303(a)(2).

Section 905.3 provides requirements for escrow agents and procedures for transfers of QEFs to another qualified escrow agent and resignation of escrow agents. Procedures for transfers of QEFs, resignations of escrow agents, transfers of NPM's interests in a QEF, and

NPM abandonment of QEFs, are not delineated in the TPMDA so these regulations spell out a process to address them and ensure the administration of escrow funds complies with the Acts.

Section 905.4 provides more specifically for requirements and procedures related to requests to release escrow funds. This section is tailored to confirm that the requirements of the TSAA are met prior to allowing an escrow agent to release funds from a QEF. There are three situations in which the TSAA permits such funds to be released: (1) to pay a judgment or settlement on any released claim brought against the NPM by the Commonwealth, (2) to the extent the NPM establishes that the amount it was required to place into escrow was greater than the MSA payments it would have otherwise been required to make, or (3) to the extent funds were not otherwise released 25 years after the date on which they were placed in escrow. In each case, Section 905.4 sets forth the documents and information necessary for OAG to confirm whether the NPM is entitled to a release under the TSAA, providing predictability and consistency for NPMs requesting a release of escrow from QEFs. 905.4 also makes clear that the OAG is entitled to request additional information to make such determinations.

6. Surety Bonds

Section 906.1 sets forth requirements and procedures related to the surety bonds provided for by Section 313 of the TPMDA (35 P.S. §5702.313). This includes a quarterly review of the bond amount by the Attorney General and a prohibition on affiliates of an NPM serving as a surety for the NPM. This is consistent with the TPMDA's prohibition against affiliate escrow agents. The TPMDA prohibited affiliate escrow agents to avoid self-dealing and maladministration of the escrow funds. Since the surety bonds are meant to replace the escrow funds where an NPM fails to deposit escrow, it is just as necessary to prohibit affiliate surety bonds to ensure the NPM and the surety would not work together to thwart the Commonwealth's recovery under the bond.

Section 906.2 relates to execution on NPM surety bonds in accordance with the TPMDA. 35 P.S. §5702.313. Surety bonds are required to be adjusted quarterly if the required amount of the bond, as specified in the TPMDA, increases or if the Attorney General determines that the NPM's escrow obligations may exceed the current surety amount. 35 P.S. §5702.313(a)(5). Upon 15 days' notice and subject to section 10(b)'s opportunity to cure, the Attorney General may execute on the bond to cover not only escrow obligations, but civil penalties, cost, fees, disgorgement of profits, and other damages or obligations, including damages and obligations imposed on non-compliant predecessors and importers. 35 P.S. §5702.313(c).

7. Enforcement

The seventh chapter of the proposed regulations addresses enforcement of the Acts by the Attorney General. The proposed regulations address various components of the enforcement process, including service of process, notice and opportunity to cure, burden of proof, and review of the Attorney General's determinations.

Subsection 907.1(a) highlights the Attorney General's enforcement authority under the Acts. The Attorney General maintains and updates the directory (35 P.S. § 5702.301). The Attorney General prescribes the certification forms to be completed and submitted by TPMs and

approves certifications for TPMs to be included on the directory (35 P.S. § 5674(c), 35 P.S. § 5702.303). The Attorney General approves qualified escrow agreements (35 P.S. § 5702.303(a)(2)). The Attorney General ensures that NPMs and importers of NPM brands provide proof of the appointment of an agent for service of process (35 P.S. § 5702.305). The Attorney General has authority to request additional information necessary to ensure an NPM's compliance with the TPMDA (35 P.S. § 5702.306). Where violations of the TPMDA are found, the Attorney General has the authority to seek injunctive relief, civil penalties, and costs, including costs of investigation, expert witness fees, and attorney fees (35 P.S. §§ 5674(c), 5674(d), 35 P.S. §§ 5702.307, 5702.308). Further, the Attorney General is explicitly empowered to "promulgate regulations necessary to enforce [the TPMDA]" (35 P.S. § 5702.311). And the Attorney General determines the required surety bond amount for an NPM that does not currently appear on the directory and may execute upon a surety bond for noncompliance with the Acts (35 P.S. § 5702.313).

Notably, the Attorney General's enforcement authority is not exclusive. The Department is empowered to enforce the TPMDA in certain respects, including requiring monthly reports from distributors (35 P.S. § 5702.306(b)), requesting additional information to ensure compliance with the TPMDA (35 P.S. § 5702.306(e)), and imposing civil penalties and license sanctions for violation of section 302 of the TPMDA (35 P.S. § 5702.307(a)).

Consistent with the TPMDA, subsection 907.1(b) provides that contraband cigarettes are subject to seizure by and forfeiture to the Attorney General or the Department. The TPMDA provides that "cigarettes that have been sold, offered for sale or possessed for sale in this Commonwealth in violation of section 302 shall be deemed to be contraband and shall be subject to seizure and forfeiture." 35 P.S. § 5702.307(b). The TPMDA implies that contraband cigarettes shall be seized by and forfeited to the Attorney General and the Department, but does not explicitly specify who would seize such cigarettes. This subsection clarifies that it is both the Attorney General and the Department that may seize contraband cigarettes.

Subsection 907.1(c) provides for physical inspections by the Attorney General to ensure compliance with the TSAA and the TPMDA. The Attorney General's authority to conduct compliance inspections is not specifically set forth in the TPMDA. However, the TPMDA makes cigarettes sold, offered for sale or possessed in violation of section 302 of that act contraband and subject to seizure and forfeiture (35 P.S. § 5702.307(b)) and provides that the Attorney General "may promulgate regulations necessary to enforce this act." 35 P.S. § 311(a). In practice, the Attorney General could not actively detect and seize contraband cigarettes without physically inspecting business locations of tobacco dealers, so the General Assembly's broad grant of authority to enforce the TPMDA necessarily encompasses inspections of such business premises. We also note that the Attorney General is expressly empowered to physically inspect business premises under the Cigarette Fire Safety and Firefighter Protection Act (Fire Safe Act). 35 P.S. § 1254.6(c). The proposed regulation would make OAG's inspection authority explicit as applicable to enforcement of both the TSAA and the TPMDA.

Subsection 907.1(d) provides that a TPM whose cigarettes have been sold in the Commonwealth and its affiliates and importers are subject to personal jurisdiction within the Commonwealth with respect to actions related to the TSAA, the TPMDA, or these regulations.

This question was partially addressed by the Commonwealth Court in *Commonwealth ex rel. Pappert v. KT&G Corp.*, 863 A.2d 1254 (Pa. Cmwlth. 2004), where the Court held that, due to its interactions with the Commonwealth (filing certifications, establishing a qualified escrow fund, and retaining an agent for service of process), a foreign TPM was subject to personal jurisdiction in the Commonwealth even though its product was distributed by others.

Subsection 907.1(e) provides that the “Attorney General may initiate litigation to enforce, and may seek injunctive relief to prevent a threatened or actual violation of, the Acts and this Part,” and that in such actions, “the Attorney General shall be entitled to equitable and monetary relief provided by the Acts including, as applicable, “costs of investigation, costs of litigation, attorney fees, disgorgement of profits, civil penalties, or any other monetary recovery allowed by the Acts.” This subsection simply distills parts of sections 307(c) and 308 of the TPMDA without expanding the scope of allowable recovery in such actions.

Section 907.2 provides a TPM notice and opportunity to cure where a deficiency would result in exclusion or removal of the TPM or any of its brand families or styles from the directory. Subsection 907.2(a) provides that such notice shall include the factual and legal basis upon which the determination is based and the date by which attempts to cure must be completed (in no case fewer than seven calendar days). The notice may also specify actions that the TPM must take to cure the deficiencies. Subsection 907.2(b) requires delivery of such notice to the TPM via electronic mail and U.S. mail and, in the case of an NPM, the notice must also be sent to the NPM’s agent for service of process and importer (if any).

Subsection 907.2(c) provides that, if the Attorney General determines that the deficiency has been cured, notice of such determination shall be sent to the TPM. On the other hand, if the Attorney General determines any of the deficiencies have not been cured by the date specified in the notice, subsection 907.2(d) provides that the Attorney General may take any necessary actions pursuant to section 301 of the TPMDA (35 P.S. § 5702.301). The TPMDA provides a TPM the right to appeal a determination of the Attorney General by filing a petition for review with the Commonwealth Court within 21 days of such determination (35 P.S. § 5702.310), so subsection 907.2(d) further provides that the 21 day appeal period shall not begin to run until the day after the date specified in the notice of deficiency. Subsection 907.2(e) provides that the Attorney General may extend any time period provided by this Part.

Section 907.2 is intended to be consistent with current TES procedures while providing TPMs with some level of predictability as to when determinations will be made and how long they have to cure deficiencies. As a practical matter, TES currently posts notice of removal to the directory 21 days prior to the actual removal, so subsection 907.2(f) provides that such notice of removal would not be posted to the directory until after the date by which any deficiencies must be cured and that a TPM or brand family shall not be removed from the directory until 21 days following publication of such notice on the directory.

Subsection 907.2(g) clarifies that the Attorney General does not intend for the proposed regulations to provide for any adjudicatory or evidentiary hearings beyond those provided by section 310 of the TPMDA. The Commonwealth Court has held that “the procedures provided in the [Administrative Agency Law] would only be invoked in the event that the procedures

provided in the [applicable statute] were deficient.” *Mercy Regional Health System (formerly Mercy Hosp.) of Altoona v. Department of Health*, 645 A.2d 924, 930 n. 11 (Pa. Cmwlth. 1994). The due process protections provided by section 310 of the TPMDA are sufficient to protect a TPM’s right to due process and to prevent the removal of the TPM or its brand families from the directory before a hearing is held. The notice and opportunity to cure provided by section 907.2 is over and above the adequate due process protections provided by section 310 of the TPMDA and occurs well before any changes are made to the directory, so the Administrative Agency Law does not require the Attorney General to provide a predetermination hearing.

Subsection 907.2(h) of the proposed regulations states that section 310 of the TPMDA provides for a TPM’s due process rights by allowing the TPM to appeal the Attorney General’s determination to the Commonwealth Court (35 P.S. § 5702.310). By providing 21 days to file a petition for review prior to the TPM or its brand families being removed from the directory, the TPMDA provides notice and an opportunity for the TPM to be heard and present evidence to the Court. This appeal process meets or exceeds the baseline due process protections provided by the Administrative Agency Law (2 Pa.C.S.A. §§ 501-508, 701-704).

Section 907.3 sets forth proposed regulations delineating the burden of proof of TPMs, CSAs and OTP Wholesalers with respect to certain requirements. Under the proposed regulations, TPMs carry the burden to show (1) that a brand family or style constitutes cigarettes of the TPM or that they don’t belong to the TPM; (2) that the TPM and its brand families comply with the TSAA and the TPMDA and the proposed regulations, including with respect to prior owners of the brand families; (3) the number of units sold for the applicable period; (4) the amount of escrow deposited into a QEF for the benefit of the Commonwealth; and (5) entitlement to a release of funds from a QEF. CSAs and OTP Wholesalers carry the burden to show (1) compliance with section 302 of the TPMDA; (2) compliance with reporting and document retention and submission requirements under section 306 of the TPMDA; (3) that a product does not constitute contraband under section 307 of the TPMDA; and (4) the accuracy of its business records and reports.

This allocation of the burden of proof is consistent with Pennsylvania law, which provides that a presumption of validity attaches to state agency action and that the burden of proof rests on the party seeking to have the action reversed. *Forbes Metro. Health Sys. v. Com., Dep’t of Pub. Welfare*, 558 A.2d 159 (Pa. Cmwlth. 1989); *Isadore v. Workmen’s Compensation Appeal Board (Owens–Illinois)*, 465 A.2d 1096 (Pa. Cmwlth. 1983). *See also Bunce v. Sec’y of State*, 607 N.W.2d 372, 378 (Mich. Ct. App. 1999) (“an agency can reallocate the burden of proof, either by rule or agency procedure, when necessary and consistent with the legislative scheme”); *Prechel v. Dep’t of Soc. Servs.*, 465 N.W.2d 337 (Mich. Ct. App. 1990); *Zenith Industrial Corp. v. Dep’t of Treasury*, 468, 343 N.W.2d 495 (Mich. Ct. App. 1983). It is also consistent with the standards that govern review of agency action under the Administrative Agency Law (2 Pa.C.S.A. § 704) and the Tax Reform Code of 1971 (72 P.S. § 9705). Under these statutes, those asserting a position before an administrative agency on petition or appeal carry the burden of proof by substantial evidence. *Yuhas v. W.C.A.B. (City of Pittsburgh)*, 476 A.2d 1377 (Pa. Cmwlth. 1984). Numerous agencies have issued regulations addressing burden of proof. For example, in 2006, the Department of Human Services (formerly the Department of Welfare) issued regulations establishing the burden of proof for medical assistance provider

appeal procedures. 55 Pa.Code Ch. 41. That agency discussed, at length, the basis for regulations on burden of proof at 36 Pa.B. 7195 (11/25/2006).

Under the TPMDA, the burden falls on TPMs to provide a “current and accurate certification.” 35 P.S. §§ 5702.301, 5702.303. The current and accurate certification requirement places an affirmative duty on TPMs and requires OAG to deny certification in the following cases:

- A TPM fails to provide the “required certification,” which extends to the representations and information required by section 304;
- A TPM is “not in compliance with section 303”;
- A TPM fails to make payments or escrow deposits under the TSAA (“whether or not listed by the tobacco product manufacturer”) (*see also* Section 304(d));
- A TPM failed to satisfy an outstanding final judgment;
- A TPM fails to provide the payment or deposit certification required under section 303(a);
- An NPM fails to provide the information required by section 304(b);
- An NPM’s importer has not submitted the declaration required by section 304(b)(4) with respect to section 312’s imposition of joint and several liability on importers;
- An NPM has not posted the required bond or OAG has executed on a bond because of an NPM’s failure to timely deposit escrow;
- A TPM fails to affirm that a brand family included in its certification is deemed to be its cigarettes for purposes of the TSAA (in the case of an NPM) or for purposes of calculating its payments under the MSA (for a PM).

Given these affirmative obligations and the prescriptive authority of the Attorney General to establish certification requirements, the burden of proof is on the TPM to demonstrate that it has fulfilled these responsibilities. Thus, the proposed regulations ***require*** denial or removal in these circumstances.

Sections 303(b) and 306 of the TPMDA extends broad authority to OAG to prescribe additional requirements for certification and to request additional information. As a result, even where the TPMDA does not require OAG to deny or remove a listing, OAG can nonetheless deny or remove a listing where the information provided (or the absence of information provided) warrants such denial or removal. Section 301(2) provides this discretionary authority where “necessary to ensure compliance with this act” in conjunction with the provisions of section 303(b) and section 306. More specifically, section 306(e) enables OAG to require TPMs or CSAs to submit additional information “to determine whether a tobacco product manufacturer is in compliance with this act.” Consequently, even where OAG’s determination to deny or remove a listing is based on its discretionary authority, the burden of proof is on the TPM or CSA to show that the TPM is in compliance with the TPMDA or that OAG’s action is not necessary to ensure compliance with the TPMDA. As noted in the discussion of Chapter 903, ensuring compliance with the TPMDA encompasses examination of a range of compliance, reporting, and financial issues that the TPM, its affiliates, its importers, or its predecessors, have had in Pennsylvania or elsewhere. The imposition of the burden of proof on the TPM with

respect to compliance established by the Attorney General is consistent with the Administrative Agency Law and the TPMDA.

Section 907.4 – relating to the appointment of a resident agent for service of process – follows the requirements of the TPMDA for both NPMs and importers. 35 P.S. § 5702.305. Subsection 907.5(d) clarifies that the “availability” of the agent means the agent’s business hours and the days, times, and manners in which the agent may be contacted. Subsection 907.5(e) advises NPMs that have appeared on the directory and importers of such NPMs to continue to engage a resident agent for service of process after the NPM and its brand families have been removed from the directory. Otherwise, by operation of subsections 305(c) and 305(d) of the TPMDA (35 P.S. § 5702.305(c), 5702.305(d)), the NPM or importer would be deemed to have appointed the Secretary of the Commonwealth as its resident agent. In order to ensure the NPM or importer receives actual notice of and may resolve deficiencies and violations of the Acts discovered after the NPM is removed from the directory, continuing to engage a resident agent is encouraged.

Annex A

TITLE 37—LAW

PART XII. TOBACCO PRODUCT MANUFACTURER DIRECTORY

Chapter 901. Preliminary Provisions

§ 901.1. General Provisions.

- (a) Scope. This Part governs compliance with and enforcement of the Tobacco Settlement Agreement Act (“TSAA,” 35 P.S. §§ 5671–5675) and the Tobacco Product Manufacturer Directory Act (“TPMDA,” 35 P.S. §§ 5702.101 - 5702.2102) related to cigarettes and roll-your-own tobacco (“RYO”).
- (b) Purpose. The purpose of this Part to ensure compliance with, and to improve enforcement of, the TSAA and the TPMDA (collectively the “Acts”). By ensuring compliance and improving enforcement, the Commonwealth advances the ultimate purpose of protecting its residents from the public health hazards posed by cigarette sales and addiction to cigarette smoking.
- (c) Construction. This Part is intended to implement and be construed consistently with the Acts.
- (d) Severability. The provisions of this Part are severable. If any provision of this Part or its application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Part which can be given effect without the invalid provision or application as determined by the Attorney General.

§ 901.2. Definitions.

- (a) The terms used in this Part shall be defined as provided by the Acts.
- (b) The following terms shall be defined as provided below when used in this Part in addition to the definition of such terms provided by the Acts, if any.

CSA – Cigarette stamping agent – As that term is defined by Section 8201 of the Tax Reform Code of 1971 (72 P.S. § 8201).

FET – Federal excise tax – The tax imposed by the United States applicable to sales of cigarettes or RYO.

HNB – “Heat not burn” – a cigarette designed to be heated by an electronic device.

MSA – The Master Settlement Agreement.

NPM – Nonparticipating manufacturer.

OTP – Other tobacco products – Any “tobacco product” as that term is defined by Section 8201-A of the Fiscal Code (72 P.S. § 8201-A).

PM – Participating manufacturer.

PACT Act – The Prevent All Cigarette Trafficking Act of 2009 (Pub L. No. 111-154) (15 U.S.C. §§ 375-378, as amended).

QEF – Qualified escrow fund.

RYO – Roll-your-own tobacco – 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 Part and as provided by the Acts, 0.09 ounces of RYO constitutes one individual “cigarette.”

SET – State excise tax – the tax imposed by the Commonwealth upon the sale and possession of cigarettes or RYO.

TES – The Tobacco Enforcement Section within the Public Protection Division of the Pennsylvania Office of Attorney General.

TPM – Tobacco product manufacturer.

TPMDA – The Tobacco Product Manufacturer Directory Act (35 P.S. §§ 5702.101–5702.2102).

TSAA – The Tobacco Settlement Agreement Act (35 P.S. §§ 5671–5675).

Acts – The TSAA and the TPMDA, referred to collectively.

Calendar quarter – A period of three consecutive calendar months, with the first quarter beginning January 1 and ending March 31, the second quarter beginning April 1 and ending June 30, the third quarter beginning July 1 and ending September 30, and the fourth quarter beginning October 1 and ending December 31.

Certification – A document signed by a person duly authorized by a TPM and submitted to the Attorney General pursuant to the Acts. This term includes forms, documents, attachments, information, and correspondence provided with, in anticipation of, or subsequent to submission of the certification. For the purposes of this Part, when used without additional qualifying terms, the term “certification” refers to all types of certifications collectively, including annual, initial, quarterly, supplemental, and non-directory certifications.

Certification form – A form prescribed by the Attorney General pursuant to the TPMDA upon which TPMs must certify their compliance with the Acts. The term “certification form” includes any forms, documents, instructions, checklists, correspondence, or other information attached to, linked within, or otherwise included with the certification form. The Attorney General may prescribe separate certification forms for different types of certifications.

Certification webpage – A webpage on the Attorney General’s website containing the certification form prescribed by the Attorney General that a TPM must complete for the TPM and its brand families to be included and retained on the directory.

Cigarette – As that term is defined by the Acts, which includes RYO. A reference to “cigarettes” shall only exclude RYO if such exclusion is made explicitly. A reference to “cigarettes and RYO” or “cigarettes or RYO” in this Part is made for clarity and does not by itself except or exclude RYO from references to “cigarettes” elsewhere in this Part.

Commonwealth – The Commonwealth of Pennsylvania.

Contraband – Units sold that belong to a TPM or brand style not appearing on the directory, that otherwise constitute unlawful cigarettes pursuant to Section 302 of the TPMDA (35 P.S. § 5702.302), or on which Pennsylvania SET has not been paid.

Department – The Pennsylvania Department of Revenue.

Directory – The Commonwealth’s listing of TPMs and brand families developed by the Attorney General as provided by Section 301 of the TPMDA (35 P.S. § 5702.301).

Distributor – Any person acting as a CSA, OTP wholesaler, or a cigarette or RYO importer, wholesaler, or other similar intermediary involved in the chain of distribution, notwithstanding whether such person is licensed or otherwise authorized by the Department to so act.

Escrow agent – A federally chartered or State-chartered financial institution that has no affiliation with any TPM, has assets of at least \$1 billion, and has entered into a qualified escrow agreement with an NPM.

Importer – A person in any state or territory of the United States to whom cigarettes that are manufactured outside the United States are shipped, delivered or consigned for resale. A distributor or retailer that is not the first purchaser within the United States of cigarettes manufactured outside the United States would not constitute an importer for purposes of the certification and importer declaration requirements of the TPMDA and this Part. A distributor or retailer that is not the first purchaser within the United States of cigarettes manufactured outside the United States and that is not an affiliate of the manufacturer or importer of such cigarettes would not constitute an importer for purposes of section 312 of the TPMDA (35 P.S. § 5702.312) (relating to NPM and importer joint and several liability for escrow obligations).

Model escrow agreement - The model form prescribed by the Attorney General for purposes of establishing a QEF under the TPMDA.

OTP wholesaler – A “wholesaler” as defined by 72 P.S. § 8201-A, or any other distributor subject to reporting of SET-paid RYO sales.

Qualified escrow agreement – An agreement between a TPM and an escrow agent to which the Commonwealth is explicitly made a third-party beneficiary, which governs the

holding, management, investment, and disposition of funds within a QEF, and which has been approved by the Attorney General prior to its implementation.

Sales records – Any documents, regardless of format, relating to cigarettes or RYO sold by any person.

“Sell” or “sold” – As those terms are defined by the Acts, including the term “sale.” These terms include any shipment or transfer of cigarettes that would result in an obligation to pay SET, notwithstanding whether SET is paid or collected or whether any consideration is exchanged for such cigarettes.

Units sold – As that term is defined by the Acts.

Chapter 902. Certifications

§ 902.1. Certification Forms.

- (a) Publishing and Revising Certification Forms. The TPMDA empowers the Attorney General to prescribe the certification form that a TPM must complete in order for the TPM and its brand families to be included and retained on the directory.
 - (1) The Attorney General may revise the certification forms at any time and may prescribe submission of certifications electronically.
 - (2) The Attorney General may require a TPM to enter information into fields on a certification webpage and upload forms and documents through a certification webpage in order to submit the certifications required by the Acts.
 - (3) TES routinely disables the certification webpages between mid-February and mid-April to update the certification forms and conduct quality control testing to ensure that the certification webpages are functioning properly. TPMs are advised that the certification forms may not be available during this time.
 - (4) TES endeavors to avoid altering the certification forms between April 15 and April 30, though TES may make revisions to the certification forms during this time period. TES will attempt to limit such revisions to resolving exigent circumstances or correcting typographical errors.
 - (5) Revisions to certification forms will take immediate effect once the certification form is published to the certification webpage.
- (b) Forms and Attachments to Certifications. For purposes of determining a TPM’s compliance with the Acts and this Part:
 - (1) All documents posted by the Attorney General to a certification webpage, including instructions, checklists and forms to be completed by the TPM, shall be considered part of the applicable certification form as if their contents were spelled out at length

on the certification webpage, notwithstanding whether such documents are required to be included with the TPM's certification.

- (2) All documents, attachments, information, and correspondence submitted by a TPM relating to a certification shall be considered part of that certification.
- (3) When submitting a certification, a TPM shall provide all documents and information required by the certification form or otherwise requested by the Attorney General.
- (4) TPMs are advised to carefully read all instructions and checklists posted to the certification webpage to allow for more expedient certification processing.

§ 902.2. Types of Certifications.

(a) Initial Certification. A TPM that is not currently included on the directory shall submit an initial certification in order to be included on the directory.

- (1) An initial certification may be submitted at any time during the course of the year.
- (2) An initial certification shall be submitted no later than 15 days after any form completed by the TPM and submitted with the initial certification is signed or completed. The submission of a certification constitutes a sworn statement or affirmation that the information submitted is accurate as of the date of the submission to the best of the TPM's knowledge, information and belief.
- (3) A TPM submitting an initial certification shall refrain from selling or shipping any brand families or styles into the Commonwealth that do not appear on the directory until the initial certification is approved and such brand families and styles appear on the directory.
- (4) In addition to the documents and information required to be submitted with a certification, a TPM submitting an initial certification shall include photographs and diagrams of the manufacturing facility where its brand families are manufactured, including both interior and exterior photographs of the premises.
- (5) In addition to the documents and information required to be submitted with a certification, an NPM submitting an initial certification shall submit a fully executed copy of the model escrow agreement, including any amendments or attachments. A copy of the Pennsylvania model escrow agreement is available on the Attorney General's website.

(b) Annual Certification. A TPM that is currently included on the directory shall submit an annual certification in order to remain on the directory.

- (1) An annual certification must be completed and signed on or after April 15 and submitted to the Attorney General no later than April 30.

- (2) Where an NPM submits an annual certification after April 30 or where an NPM fails to deposit escrow for the prior sales year, whether to accept such certification shall be within the Attorney General's sole discretion.
 - (3) An NPM that is required to submit a quarterly certification for the first quarter of a given year shall not be required to submit an annual certification by April 30 of that year. Otherwise, the NPM shall be required to submit annual certifications to remain on the directory going forward.
- (c) Quarterly Certification. An NPM that has submitted an initial certification that was approved by the Attorney General or is otherwise required to submit quarterly certifications shall submit quarterly certifications and make corresponding escrow deposits.
 - (1) Quarterly certifications and escrow deposits shall be submitted and made by May 15 for the first quarter, August 15 for the second quarter, November 15 for the third quarter, and February 15 of the following year for the fourth quarter.
 - (2) An NPM shall submit quarterly certifications and make quarterly escrow deposits for any calendar quarter within which the 364 days following the NPM's initial sale into the Commonwealth fall. The NPM shall provide TES with documentary evidence of such initial sales sufficient to establish the date such sales occurred. For purposes of this subsection, no initial sale shall be considered to have occurred prior to inclusion of the NPM on the directory.
 - (3) An NPM's brand family may be removed from the directory if it does not first sell that brand family in this Commonwealth within 365 days from the date the brand family was added to the directory.
- (d) Non-Directory Certification. An NPM that does not seek to appear or remain on the directory which either appeared on the directory or sold its brand families in this Commonwealth during the prior calendar year shall submit a non-directory certification to the Attorney General. A non-directory certification shall be completed and signed on or after April 15 and submitted to the Attorney General no later than April 30 for any year in which the NPM's brand families were sold in the Commonwealth for which an annual certification was not otherwise submitted.
- (e) Supplemental Certification. A TPM that has filed a certification based upon information that is no longer accurate or complete shall submit a supplemental certification to correct or complete such information.
 - (1) A supplemental certification shall be submitted to the Attorney General no later than 30 days after the information became inaccurate or incomplete.
 - (2) A TPM seeking to add to the directory a brand family or to add a style to a brand family that already appears on the directory shall submit a supplemental certification to add such brand family or style to the directory. The TPM may not sell such brand styles within the Commonwealth until the brand family or style is listed on the directory.

§ 902.3. Certification Submission.

- (a) Document Format. The Attorney General may prescribe document format requirements related to documents submitted to TES, including without limitation documents required to be completed and/or submitted with certifications. The Attorney General may treat a TPM's failure to comply with any document format requirement prescribed by the Attorney General, as to the noncompliant document, as the TPM's failure to include or produce the noncompliant document.
- (b) Required Information. This is not an exhaustive list of the information required to be submitted with certifications and is in addition to the requirements of the Acts and the certification forms. A person completing a certification should refer to the requirements of the Acts, the certification forms, the instructions and checklist accompanying the certification form, and the provisions of this Part.
 - (1) A TPM submitting a certification to the Attorney General other than a supplemental certification shall include a complete list of all of the TPM's brand families and styles manufactured in or imported into the United States during the prior and current calendar year on a form prescribed by the Attorney General, notwithstanding whether such brand families and styles are intended to be sold within the United States.
 - (2) An NPM submitting a certification to the Attorney General other than a supplemental certification shall include with the certification:
 - (i) A sales report including the NPM's sales of cigarettes belonging to the NPM's brand families within the United States during the time period to which the certification applies. Such sales report shall include, at a minimum, the following information for each transaction:
 - (A) Number of individual cigarettes or the equivalent number of sticks of RYO sold, by brand family.
 - (B) Date of the sale.
 - (C) Seller's name and address.
 - (D) Recipient's name and address.
 - (E) Name and address of the carrier delivering the cigarettes to the recipient.
 - (F) Invoice number or equivalent identifier.
 - (G) FET and SET payment status, including which state's SET had been paid, if any.

- (ii) All reports and information required to be submitted pursuant to the PACT Act by the NPM in any U.S. jurisdiction for sales or shipments that occurred during the time period to which the certification applies.
 - (iii) All federal excise tax returns submitted to the U.S. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB), on TTB form 5210.5, relating to sales or shipments that occurred during the time period to which the certification applies.
 - (iv) A complete list of its importers into the United States that sell cigarettes into the Commonwealth and the brand families sold by those importers, including the importer's name, address, phone number, and email address.
 - (v) A notarized declaration from each of its importers completed and signed separately by each importer on a form prescribed by the Attorney General as required by Section 304(b)(4) of the TPMDA, 35 P.S. § 5702.304(b)(4).
 - (vi) The bond required by Section 313 of the TPMDA, 35 P.S. § 5702.313, on a form prescribed by the Attorney General, including a copy of the power of attorney appointing and authorizing the surety's attorney-in-fact to execute bonds on behalf of the surety. If a bond is already in place and the bond amount is not required to be increased, the NPM shall instead produce written verification from the surety confirming that the bond is still in effect.
 - (vii) An NPM located on Native American Lands or outside the United States shall produce as part of its certification the documents and information required by subsections (4)(i), (ii), (iii), and (iv) above relating to sales and shipments made by the NPM's importer during the time period to which the certification applies.
- (3) The Attorney General may request additional documents and information from a TPM as the Attorney General deems necessary to ensure compliance with the Acts and this Part. Such additional documents and information includes, but is not limited to, bills of lading and invoices evidencing sales and shipments of cigarettes belonging to the NPM's brand families.
- (c) Alternative Production of PACT Act Information and FET Returns. An NPM may satisfy the requirements of subsections (b)(4)(ii) and (iii) above by submitting such information on a monthly basis throughout the prior calendar year.
- (1) An NPM submitting information under this section shall do so within ten days of submitting such information to the United States Treasury or such other State or Territory.
 - (2) In any case, an NPM shall submit to the United States Treasury a valid request or consent under Section 6103(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended, authorizing the Federal Alcohol and Tobacco Tax and Trade Bureau and, in

the case of a foreign NPM, the United States Customs and Border Protection, to disclose the NPM's and its importer's FET Returns to the Attorney General.

- (3) In the case of an NPM located outside the United States, the NPM must additionally submit the required information from that NPM's importer to satisfy the requirements of subsections (b)(3)(iii) and (iv) above.
 - (4) An NPM that produces information pursuant to this subsection has an ongoing obligation to submit additional information within 30 days after such information is amended or found by the NPM to be inaccurate or incomplete.
- (d) **Packaging Images.** In addition to submission required by a certification, a TPM shall submit packaging images to TES through the Attorney General's website whenever the packs, cartons, tins, pouches, or other packaging of any brand family or style changes in appearance, including temporary promotional imagery or packaging, plastic cellophane wraps, or any other packaging component sold to consumers containing cigarettes. Submission of packaging images pursuant to this subsection is only necessary for those brand families and styles for which packaging has changed.
- (1) For purposes of the TPM's obligations under the Acts and this Part, packaging image submissions shall constitute supplemental certifications.
 - (2) Each style of cigarette must include an image of a pack and an image of a carton of that style of cigarette. Each style of RYO tobacco must include an image of each type of RYO tobacco container (i.e. tin, pouch) and each size of each container, provided, however, that each size does not need to be provided if the only appreciable difference between the images is the size or weight listed on the packaging.
 - (3) A TPM must submit required packaging as color images in PDF, JPG, or PNG file formats, including views of each side of the packaging with the Universal Product Code (UPC) clearly visible.
 - (4) Except for promotional packaging images, TPMs are advised that the most recent versions of packaging images relating to every style within their brand families are published through the Attorney General's directory webpage. TPMs should keep this in mind when preparing such images for submission and remove any confidential or proprietary information prior to submission.
- (e) **Representations.** By submitting a certification to the Attorney General, a TPM and the individual signing the certification on its behalf make the following representations under penalty of perjury and subject to the penalties of 18 Pa.C.S. §4904, relating to unsworn falsification to authorities:
- (1) The TPM and its certification are currently compliant with the Acts and this Part.
 - (2) Except for instances of noncompliance that a TPM discloses in its certification, the TPM has been compliant with the Acts and this Part during the current and prior calendar year.

- (3) The TPM has provided all required documents and information with its certification, and all documents and information submitted with its certification are complete and accurate.
- (4) The brand families and styles included in the certification for listing on the directory are compliant with the provisions of the Food, Drug, and Cosmetic Act (21 U.S.C. §§ 301 - 399i, as amended) and any associated regulations, and are not the subject of a marketing denial order, a non-substantial equivalence order, or any other federal order prohibiting their sale or marketing in the United States.
- (5) The TPM has disclosed all of its brand families in the certification and those brand families shall be deemed its cigarettes for purposes of enforcement of the Acts and this Part.
- (6) With respect to all brand families and styles included in the certification for listing on the directory, the TPM:
 - (i) Is the TPM of such brand families and styles;
 - (ii) Is the current trademark owner of such brand families or is licensed or otherwise authorized by the current trademark owner to manufacture such brand families;
 - (iii) Has obtained all required tobacco-related licenses issued by the Department, if any;
 - (iv) Is current with their monthly PACT Act filings to the Department and is otherwise compliant with its obligations under the PACT Act;
 - (v) Has identified all manufacturing and storage facilities by location and has provided photographs of such facilities, and any new or relocated manufacturing facilities have been disclosed in the certification with updated photographs and diagrams;
- (7) Except for RYO brand families, with respect to all brand families and styles included in the certification for listing on the directory, the TPM:
 - (i) Has received approval for required Cigarette health warnings and has submitted current ingredient listings as required by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§1331 – 1341, and any applicable federal regulations.
 - (ii) Has received a current Cigarette Manufacturer Certificate for Fire Safe Cigarettes from the Department.
 - (iii) Included with its certification cigarette ignition propensity laboratory tests for each brand style included in the certification that were conducted less than three years prior to the date the certification was submitted.

- (8) With respect to Certifications submitted by an NPM, that the NPM:
- (i) Has established and continuously maintains a qualified escrow fund that is subject to the terms of a current qualified escrow agreement, that qualified escrow agreement is on file with the Attorney General, and it complies with the Attorney General's current requirements for qualified escrow agreements.
 - (ii) Has been the only TPM distributing brand styles belonging to its brand families into the United States over the current and prior calendar year. If another TPM has done so at any point during the current or prior calendar year, the NPM has disclosed that fact in the certification.
 - (iii) Has disclosed all of its affiliates and all business and storage locations of such affiliates.
 - (iv) Acknowledges responsibility for the conduct of any importer of its brand families into the United States and that such importer's noncompliance with the TPMDA shall constitute grounds for removal of the NPM's brand families from the directory.
- (9) By submitting a supplemental certification to the Attorney General, a TPM and the individual signing the Supplemental Certification on its behalf certify under penalty of perjury that:
- (i) All statements contained in subsection (1) above are true; and
 - (ii) All documents and information necessary to correct, supplement, or otherwise modify the applicable certification have been included with the supplemental certification.
- (f) Attachment to Certification Forms. The Attorney General shall attach a document containing the applicable representations listed in subsection (e) above to the certification forms by posting such documents to the certification webpages.
- (g) Inconsistencies Construed Against the TPM. Inconsistencies between documents or information submitted or representations made by a TPM to the Attorney General may be construed against the TPM, at the Attorney General's discretion.

Chapter 903. The Directory

§ 903.1. Administration.

- (a) Publishing and Maintenance. The Attorney General is empowered by the TPMDA to develop and publish the directory and to take steps to update the directory, correct mistakes, add or remove TPMs or brand families or styles, and to make other changes necessary to ensure compliance with the TPMDA.

- (1) The directory shall consist of the TPMs, brand families, and styles which have been approved by the Attorney General for inclusion on the directory.
 - (2) Cigarettes sold, transferred, or intended for sale in this Commonwealth belonging to a TPM, brand family, or brand style not appearing on the directory shall constitute contraband pursuant to the TPMDA.
- (b) Brand Family Designation. Each cigarette the Attorney General approves for inclusion on the directory shall list the name of the TPM, brand family, and brand style. Individual brand styles should be submitted to the Attorney General including the following characteristics, as applicable:
- (1) Style name.
 - (2) Menthol status.
 - (3) Filter status (if non-filtered).
 - (4) Pack type (e.g. box, soft pack, etc.).
 - (5) Size (other than “king,” e.g. 100s, 120s, etc.).
- (c) Brand Family Ownership. To ensure proper enforcement and administration of the TSAA and the MSA, the directory may not list a brand family or style as belonging to more than one TPM at a time.
- (1) A TPM should give TES as much advance notice as possible of a brand family transfer to another TPM. Such notice will help avoid unnecessary interim removals of the brand family in question.
 - (2) Notwithstanding the existence of separate trademarks for a brand style and a brand family, the brand style may belong to the brand family if it otherwise constitutes a style of that brand family pursuant to the definition of “brand family” in the TPMDA.

§ 903.2. Grounds for Denial of Inclusion on or Removal from the Directory.

- (a) MSA-Related Legislation. The terms used in this section shall be defined as follows:
- (1) *Complementary Legislation* – A State statute substantially in the form of the Model Complementary Legislation proposed by the National Association of Attorneys General in December of 2002. The TPMDA is the Commonwealth’s Complementary Legislation.
 - (2) *Qualifying Statute* – As that term is defined by the MSA. The TSAA is the Commonwealth’s Qualifying Statute.

(b) **Mandatory Grounds.** The Attorney General shall reject a TPM's certification or deny some or all of its brand family(ies) or style(s) inclusion on or remove some or all of its brand family(ies) or style(s) from the directory when any of the following apply:

- (1) The person submitting the certification is determined not to be the TPM of a brand family or style included within its certification or currently listed on the directory. The Attorney General may accept the certification as to the remaining brand family(ies) or style(s), if any, if the Attorney General deems such acceptance appropriate on its own merits and in light of the initial inclusion of the rejected brand family(ies) or style(s).
- (2) The TPM fails to submit a required certification within the timeframes provided by the Acts or this Part.
- (3) The TPM fails to include the documents and information requested by the applicable certification form.
- (4) The TPM fails to respond fully to any requests by the Attorney General for additional information pursuant to TPMDA Section 306(e) within the timeframe specified by the Attorney General, which timeframe shall be at least 5 calendar days from the date of the request.
- (5) The TPM has an outstanding final, non-appealable judgment that has not been satisfied which is related to a violation of the MSA, the Acts, any other state's Qualifying Statute or Complementary Legislation, or any state or federal statutes relating to SET or FET imposed upon cigarettes.
- (6) The TPM is prohibited from selling a brand family or style in Pennsylvania by any applicable federal or state law or order.
- (7) There is an injunction in effect against the TPM, a predecessor of the TPM or a previous TPM, with respect to sales by the TPM or sales of a Brand Family or style.
- (8) In addition to the grounds listed above, the Attorney General shall reject an NPM's certification and deny its brand family(ies) inclusion on or remove its brand family(ies) from the directory if any of the following apply:
 - (i) The NPM is not current on the escrow required to be deposited into its QEF established for the benefit of the Commonwealth for any period for any brand family, including deposits required from TPMs and brand families it has acquired and persons that have formerly or concurrently manufactured any of the NPM's brand families, and the NPM has failed to cure its failure to deposit escrow by the timelines provided by Section 10(b) of this Part.
 - (ii) The Commonwealth or Attorney General has executed upon a bond under Section 313 of the TPMDA due to the NPM's failure to timely deposit escrow as required. This ground for exclusion or removal from the directory shall remain notwithstanding whether the NPM's escrow obligations and other

costs were fully covered by the amount recovered by the Commonwealth or Attorney General under the bond.

(c) Discretionary Grounds. The Attorney General may reject a TPM's certification and deny its brand family(ies) inclusion on or remove its brand family(ies) from the directory if any of the following apply:

- (1) The TPM made a misrepresentation, a false statement of fact, or omitted, concealed, or otherwise failed to disclose material information through its submission of a certification, a response to an information request from the Attorney General, or any other documents or information submitted to the Attorney General or the Commonwealth related to the Acts or this Part.
- (2) The TPM fails to submit a certification by the date required by the Acts on two or more occasions within the current or past five calendar years.
- (3) The TPM's current or prior certifications have been rejected by any state or the TPM or its brand families have been involuntarily denied inclusion on or removed from the tobacco product directory of another state.
- (4) The TPM is not currently compliant with any federal, state or local laws concerning cigarettes or bearing upon the TPM's ability to make MSA payments or deposit required escrow, other states' Qualifying Statutes or Complementary Legislation, or MSA payments due.
- (5) The TPM shares common management or ownership with a current or former TPM or other person that has failed to satisfy its legal obligations to the Commonwealth, the federal government, or any state or local government concerning SET or MSA payments due.
- (6) The TPM, a predecessor or affiliate of the TPM, or a previous TPM of a brand family owned by the TPM is the subject of litigation related to violations of any tobacco-related federal, state or local law.
- (7) The TPM is owned, managed or operated (in whole or in part) by a person with a current or prior interest in a current or former TPM that is not compliant or has not complied with any tobacco-related federal, state or local law or is the subject of litigation for alleged non-compliance with such laws.
- (8) The TPM or an affiliate has failed to pay all or part of any final, non-appealable judgment in any jurisdiction related to the TPM's failure to comply with any Qualifying Statute, Complementary Legislation, or other federal, state, or local tobacco-related laws, including the TPM's failure to pay any civil penalties, interest, costs or attorney fees.
- (9) The TPM fails to timely disclose to the Attorney General the existence of another manufacturer of its brand families or styles, a change in its brand families or styles, or a brand family or style transfer.

- (10) A brand family or style of the TPM is shipped to retailers in the Commonwealth, sold, or offered for sale in the Commonwealth during any period of time in which the brand family or style is not listed on the directory.
- (11) The Attorney General may consider any other facts or circumstances relevant to whether the TPM's certification should be rejected or whether the TPM or any of its brand families or styles should be removed from or denied listing on the directory, including but not limited to the TPM's compliance with the Acts and any other state, federal, or local tobacco-related laws.
- (12) In addition to the grounds listed above, the Attorney General may reject an NPM's certification and deny its brand family(ies) inclusion on or remove its brand family(ies) from the directory if any of the following apply:
- (i) On two or more occasions within the past five sales years, there is a difference between the units sold reported by the NPM on an annual or quarterly certification and the units sold reported by distributors by the greater of (A) 100,000 units sold or (B) 5% of the higher of the NPM's or CSAs' reported units sold. Each certification submitted containing such a difference shall constitute a separate occasion.
 - (ii) On two or more occasions within the past five sales years, there is a difference between the number of cigarettes reported by the NPM on its federal excise tax returns as "removed subject to tax" and the number of cigarettes reported as shipped by the NPM on its PACT Act reports collectively for all jurisdictions by the greater of (A) 250,000 units sold or (B) 5% of the higher of the amounts reported by the NPM on its federal excise tax returns and its PACT Act reports collectively for all jurisdictions. Each certification submitted containing such a difference shall constitute a separate occasion.
 - (A) An NPM may avoid this ground only if it demonstrates to the Attorney General that such discrepancy is not due to contraband sales or shipments.
 - (B) It shall be within the Attorney General's sole discretion to determine whether the NPM has adequately established that the discrepancy is not due to contraband sales or shipments.
 - (C) The Attorney General may request that the NPM produce any documents and information the Attorney General deems necessary to make such determination.
 - (iii) The NPM fails to deposit escrow by the date provided by the Acts.
 - (iv) In the case of an NPM required to submit quarterly certifications, the NPM failed to submit the quarterly certification and deposit escrow by the date required for the prior quarter.

- (v) For any of the current or past five sales years or past 24 sales quarters, the NPM fails to deposit escrow when due for sales in another state.
 - (vi) The NPM or its importer fails to appoint and continually engage an agent for service of process as required by Section 305 of the TPMDA.
 - (vii) The relationship with an NPM's or its importer's agent for service of process appointed pursuant to Section 305 of the TPMDA is terminated and the NPM or importer (a) fails to notify the Attorney General at least 30 days prior to such termination or (b) fails to provide proof of the appointment of a new agent for service of process at least five days prior to the termination of the existing agent.
 - (viii) The NPM's or its importer's agent for service of process terminates the appointment and the NPM fails to notify the Attorney General and provide proof of appointment of a new agent for service of process within five days of such termination.
 - (ix) The NPM fails to comply with section 313 of the TPMDA (35 P.S. § 5702.313) (relating to surety bonds requirements) or fails to comply with the Attorney General's notice to update its surety bond as provided by Section 9 of this Part.
 - (x) The NPM fails to include with the certification a complete list of its importers into the United States that sell cigarettes into the Commonwealth, including all NPM brand families sold by each importer, the importer's name, importer permit number issued by the U.S. Department of Treasury Alcohol and Tobacco Tax and Trade Bureau, U.S. Customs ID number, address, designated contact person, phone number, and email address, and notarized declarations completed and signed by each importer on a form prescribed by the Attorney General.
 - (xi) The NPM has zero units sold in the Commonwealth for the prior and current calendar years.
 - (xii) An importer of cigarettes belonging to any of the NPM's brand families violates any requirements of the Acts or this Part.
 - (xiii) In the case of an NPM that is required to deposit escrow in addition to that which has already been deposited for the applicable time period, the NPM fails to deposit such additional required escrow by the date provided in a notice issued by the Attorney General. The circumstances to which this provision applies include but are not limited to additional escrow required for inflation adjustments, amended reports by CSAs, sales reports from a distributor, or records from the NPM's escrow agent.
- (d) Non-Exhaustive List. The grounds upon which the Attorney General may deny inclusion of or remove a TPM's brand families from the directory provided by subsections (b) and (c)

above are not an exhaustive list of the grounds upon which the Attorney General may deny listing or remove a listing from the directory.

Chapter 4. Maintenance and Submission of Information

§ 904.1. Record Retention and Production.

- (a) Generally. The TPMDA requires TPMs, CSAs, and OTP wholesalers to maintain sales records and information relied upon in a certification for five years from the date of the sale and empowers the Attorney General to require TPMs and CSAs to submit additional information as requested by the Attorney General. To ensure compliance with the record retention obligations of the TPMDA, TPMs and Dealers should implement and follow record retention and destruction policies.
- (b) Document Destruction. A TPM, CSA, or OTP wholesaler shall notify the Attorney General in writing at least 30 days prior to destroying (1) information relied upon in making a certification or (2) sales records. Such notification shall identify the type(s) of documents and the calendar months and years of the sales to which the documents relate.

§ 904.2. Document and Information Production.

- (a) Monthly Document Production. An NPM, importer of NPM cigarettes, CSA, or OTP wholesaler shall submit the following documents and information to the Attorney General no later than 20 days following the end of each month:
 - (1) Sales reports documenting cigarettes sold within the United States during the prior calendar month including, at a minimum, the following information:
 - (i) Number of individual cigarettes or the equivalent number of sticks of RYO sold, by brand family.
 - (ii) Date of the sale.
 - (iii) Seller's name and address.
 - (iv) Recipient's name and address.
 - (v) Name and address of the carrier delivering the cigarettes to the recipient.
 - (vi) Invoice number or equivalent identifier.
 - (vii) FET and SET payment status, including which state's SET had been paid, if any.
 - (2) Bills of lading documenting cigarettes sold in the Commonwealth during the prior calendar month.
 - (3) The information and any corresponding forms prescribed by the Department that the distributor was required to submit pursuant to TPMDA Section 306(b), including,

without limitation, Department forms DAS-95 and REV-1808. A distributor shall amend any such information that is no longer accurate within 20 days of the distributor becoming aware of such inaccuracy.

- (4) The distributor shall amend documents and information submitted under this subsection that are no longer accurate or complete or otherwise require amendment within 20 days of the distributor becoming aware of such inaccuracy or incompleteness.
- (5) In the case of an NPM or importer of NPM cigarettes:
 - (i) All reports and information required to be submitted pursuant to the PACT Act by the entity in any U.S. jurisdiction for sales or shipments that it made during the prior calendar month;
 - (ii) All federal excise tax returns submitted to the U.S. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB), on TTB form 5210.5, relating to sales or shipments that occurred during the month in question.
- (b) Ongoing Document Production. A TPM, importer, CSA, or OTP wholesaler shall submit the following information to the Attorney General on an ongoing basis:
 - (1) Information relating to sales or shipments of any contraband cigarettes, notwithstanding whether any brand family reflected in such documents or information belongs to the TPM or is sold or shipped by the CSA or OTP wholesaler.
 - (2) Information relating to the person's failure to maintain sales records or information relied upon in a certification for at least five years or the person's failure to notify the Attorney General at least 30 days prior to destroying such records or information.
 - (3) The address(es) of the entity's business and storage location(s).
- (c) Law Enforcement Investigations or Criminal Actions. A TPM appearing on the directory shall disclose to the Attorney General any tobacco-related enforcement actions of which (i) they have knowledge and (ii) they or any of their parent, subsidiary, sister, or other associated entities or affiliates, or any of their officers, owners, board members, or partners are the subject of the enforcement action.
 - (1) A TPM shall have a continuing obligation to disclose such enforcement actions, including without limitation civil, criminal, or administrative actions or investigations before or initiated by any federal, state, local, tribal, foreign, or international agency or body.
 - (2) A TPM shall make such disclosure in writing to the Attorney General as part of a certification within 30 days of the TPM receiving notice of such enforcement action.

- (d) Ongoing Request. This section constitutes the Attorney General's ongoing request for the information listed above to ensure compliance with the Acts and this Part. Failure to disclose such information shall constitute a violation of Section 306(e) of the TPMDA (35 P.S. § 5702.306(e)).
- (e) Additional Information. The Attorney General may request additional information from a TPM, distributor, or retailer related to sales of cigarettes or RYO within the United States. Such request may specify the date by which such information must be produced to the Attorney General, and may include, without limitation, invoices and bills of lading related to such sales, any other documentation of sales, and any information necessary to enable the Attorney General to determine any person's compliance with the Acts and this Part.

Chapter 5. Qualified Escrow Funds

§ 905.1. Administration.

- (a) Escrow Refund Requests. Escrow may only be refunded if the NPM demonstrates to the Attorney General that the requested refund is authorized by the TSAA and that the NPM is eligible for such a refund. An NPM making such a request shall:
 - (1) Submit an affidavit signed by the executive officer of the NPM responsible for escrow compliance setting forth the officer's authority to bind and act on behalf of the NPM and demonstrating the facts supporting the request;
 - (2) Account for all units sold and escrow deposited for the sales year for which the NPM alleges that excess funds were deposited in their QEF and each subsequent year in which the NPM sold cigarettes within the Commonwealth;
 - (3) Submit all invoices, shipping records, and other evidence demonstrating compliance with the TSAA and supporting the escrow refund request for the sales year at issue; and
 - (4) Any other documents or information the Attorney General deems necessary to ensure that the requested refund is authorized by the TSAA and that the NPM is eligible for the requested release.
 - (5) A refund of escrow for overstatement of units sold or computational errors shall not constitute a "release" of escrow for purposes of subsection 5674(b) of the TSAA (35 P.S. § 5674(b)).
 - (6) Whether to grant a request for a refund of escrow shall be in the Attorney General's sole discretion. But in no case may a refund be granted more than one year following the date of the alleged over-deposit.
 - (7) Applying an overpayment of escrow funds to a future sales year is not authorized by the TSAA and shall not be permitted.

(b) Transfers of Qualified Escrow Funds. An NPM may transfer its reversionary interest in QEF principal to:

- (1) An NPM certified in Pennsylvania if both NPMs have fully funded their respective QEFs in accordance with 35 P.S. § 5674(a)(2);
- (2) A TPM that is a successor of the NPM and that is responsible for the liabilities of the predecessor NPM as they relate to the QEF, escrow owed by the predecessor NPM, and any released claims that may be asserted against the predecessor NPM; or
- (3) Any other person, provided the NPM is fully compliant with its required escrow principal, the other entity is not affiliated with nor is it a person that has failed to timely deposit required escrow for sales in the Commonwealth, and the Attorney General has expressly permitted such transfer in writing. Whether to grant such a transfer under this subsection 905.1(b)(3) shall be within the Attorney General's sole discretion.
- (4) In any case, the transferee shall have the same obligations as the original NPM under the TSAA and this Part.

(c) Abandonment of Qualified Escrow Funds. If an escrow agent holding funds of an NPM establishes to the Attorney General's satisfaction that the NPM abandoned its QEF and resigns as the escrow agent, the escrow agent may continue to service the escrow account under a qualified escrow agreement previously approved by the Attorney General prior to the NPM's abandonment of the escrow account. In determining whether the QEF has been abandoned, the Attorney General shall consider the following guidelines and procedures:

- (1) The Commonwealth is a third party beneficiary to all qualified escrow agreements and to all QEFs.
- (2) Factors that the Attorney General may consider in determining whether the escrow account has been abandoned include, but are not limited to:
 - (i) The duration of time without communication from the NPM;
 - (ii) Whether the NPM has unpaid fees or costs, and the amount of such fees and costs;
 - (iii) The Attorney General's and the escrow agent's efforts to communicate with the NPM, including notices sent to the last known address of the NPM regarding abandonment of such account.
- (3) A notice of abandonment shall be sent by the escrow agent or the Attorney General mailed to the last known address of the NPM at least 30 days prior to the Attorney General determining that the QEF is abandoned.
- (4) If the Attorney General determines that a QEF has been abandoned, as third party beneficiary to the escrow agreement and the QEF, the Attorney General may

authorize the escrow agent to transfer the QEF to an escrow account maintained by the Attorney General. An NPM or other entity claiming rights to the QEF shall not be entitled to recover interest accrued after such determination or on account at the time of such determination.

- (5) Notice of the Attorney General's determination shall be sent by the Attorney General and the escrow agent to the last known address of the NPM, with notification that such funds will be subject to escheatment and release to the Commonwealth if not the subject of a judgment or settlement of a released claim within 25 years from the date of deposit. Such notice shall be copied to the NPM's agent for service of process, if any.
 - (6) Following the Attorney General's determination of abandonment and the passing of 25 years from the date of deposit without a judgment or settlement of a released claim, if the NPM has not replied to the Attorney General's or the escrow agent's notices or otherwise made their location and contact information known by contacting the Attorney General, the Attorney General may release such funds to the Commonwealth.
- (d) Process for Refunds, Releases, Transfers, and Determinations of Abandonment. When making a determination relating to an escrow refund, release, transfer request or abandonment of a QEF:
- (1) The Attorney General may request additional information from the NPM, the escrow agent, or any other interested person in order to make such a determination.
 - (2) The Attorney General shall make such determination within 60 days after all necessary information is submitted, including additional information requested by the Attorney General.
 - (3) The Attorney General shall send notice of such determination to the escrow agent and NPM. In the case of an abandonment determination, such notice shall be sent to the escrow agent and, the last known address of the NPM, and to the Secretary of the Commonwealth.

§ 905.2. Qualified Escrow Agreements.

- (a) Releasing Parties. For purposes of the Acts and this Part, the term "releasing parties" shall be defined as provided in the MSA. Without limitation, "releasing parties" includes the Commonwealth, the Office of Attorney General, and the Attorney General acting in their official capacity.
- (b) Model Escrow Agreement. The Attorney General shall publish on their website an approved qualified escrow agreement for use by NPMs and their escrow agents for establishing and maintaining qualified escrow funds. The Attorney General may modify the model escrow agreement from time-to-time, as appropriate, and may require NPMs and their escrow agents to execute a new qualified escrow agreement with such modified terms.

- (c) Preapproval. Any deviation, amendments, or other changes to a qualified escrow agreement that differ from the model escrow agreement may only be permitted with the prior written approval of the Attorney General. Approval of terms that vary from the published approved qualified escrow agreement are subject to the Attorney General's discretion.

§ 905.3. Escrow Agents.

- (a) Non-Affiliate. An escrow agent holding a QEF may not be an affiliate of or affiliated with a TPM.
- (b) Mergers and Acquisitions. An NPM and its escrow agent shall notify the Attorney General at least 45 days before the escrow agent merges with or is acquired by another entity. The Attorney General may require the NPM to execute a new qualified escrow agreement using the most recent version of the model escrow agreement.
- (c) Transfers of Qualified Escrow Funds. An NPM may transfer its QEF to another escrow agent subject to the terms of a qualified escrow agreement that has been provided to and approved by the Attorney General prior to the transfer of the QEF.
- (d) Resignation. An escrow agent that resigns from its duties as they relate to a QEF shall continue to hold and service the QEF pursuant to the terms of the applicable qualified escrow agreement until a new qualified escrow agreement is executed and the new escrow agent is ready to accept transfer of the QEF.

§ 905.4. Escrow Release Requests.

- (a) Generally. Funds deposited by an NPM into a QEF shall be released from escrow only:
 - (1) To pay a judgment or settlement on any released claim brought against the NPM by the Commonwealth or any releasing party located or residing in the Commonwealth. Such funds shall be released only to the extent and at the time necessary to make payments required under such judgment or settlement.
 - (2) To the extent an NPM establishes that the amount it was required to place into escrow was greater than the MSA payments, as determined by Section IX(i) of the MSA, that the NPM would have been required to make had it been a PM, the excess shall revert back to the NPM.
 - (3) To the extent the funds were not released under subsection (i)(A) or (B) above, the remaining funds shall revert back to the NPM 25 years after the date on which they were placed into escrow.
- (b) Court Order or Settlement. Funds may be released from a QEF under subsection (a)(1) above only pursuant to a court order or a valid, fully executed settlement agreement. The order or agreement shall be forwarded to the escrow agent, who shall promptly release the funds to the Attorney General or the releasing party (as the case may be) in the order in which the funds were placed in escrow, and only in the amount specified in the order or agreement.

(c) Release for Deposits that Exceed MSA Payment Amounts. Funds may be released from a QEF under subsection (a)(2) above only upon submission to the Attorney General of an affidavit signed by the executive officer of the NPM responsible for escrow compliance setting forth the officer's authority to bind and act on behalf of the NPM and other documentary evidence demonstrating the facts supporting the request, demonstrating that the NPM:

- (1) Has fully funded its QEF in accordance with 35 P.S. §5674(a)(2) for all years for which it has been required to deposit escrow;
- (2) Is current on all escrow obligations and any penalties, fees and costs, for any period for any brand family, including those of any predecessor TPM;
- (3) Has placed amounts into its QEF greater than it would have paid had it been a PM under the MSA; and
- (4) Has accurately apportioned its cigarettes sold in the Commonwealth by distributor and brand family for the sales year at issue.
- (5) The Attorney General shall review such evidence and, if the Attorney General determines that the evidence demonstrates that the NPM is entitled to a release of such funds, the Attorney General and the NPM will, by joint letter, direct the escrow agent to release funds from the QEF to the NPM for the period(s) in which the applicable deposits were made.

(d) 25 Year Release. Funds may be released from a QEF under subsection (a)(3) above only upon submission to the Attorney General of an affidavit signed by the executive officer of the NPM responsible for escrow compliance setting forth the officer's authority to bind and act on behalf of the NPM and other documentary evidence demonstrating the facts supporting the request, demonstrating that the NPM:

- (1) Has fully funded its QEF in accordance with 35 P.S. §5674(a)(2) for all years for which it has been required to deposit escrow;
- (2) Is current on all escrow obligations and any penalties, fees and costs for any period and for any brand family, including those of any predecessor TPM;
- (3) Has no outstanding released claims, judgments, or settlement obligations asserted against the NPM that have not been satisfied; and
- (4) Placed the funds more than 25 years prior to the date of the request for release and the funds are not needed to pay any judgment or settlement to the Commonwealth or a releasing party.
- (5) The Attorney General shall review such evidence and, if the Attorney General determines that the evidence demonstrates that the NPM is entitled to a release of such funds, the Attorney General and the NPM will, by joint letter, direct the escrow

agent to release funds from the QEF to the NPM for the period(s) subject to the 25-year release.

Chapter 6. Surety Bonds

§ 906.1. Bond Requirements.

- (a) Generally. To ensure nonparticipating manufacturer compliance with the Acts, proper and timely escrow deposits as required by Section 4 of the TSAA, and to promote the express public health policies of the Commonwealth, a nonparticipating manufacturer shall post the surety bond required by Section 313 of the TPMDA. The required surety bond shall be:
- (1) Conditioned on the nonparticipating manufacturer's or its importer's performance of the requirements of the Acts.
 - (2) Posted using the bond form prescribed by the Attorney General.
 - (3) Signed by the nonparticipating manufacturer and the corporate surety.
 - (4) Notarized.
 - (5) Delivered to the Attorney General no later than 21 days prior to the first day of each calendar quarter if the bond amount is adjusted. For the sake of clarity:
 - (i) 21 days prior to the first day of the first calendar quarter is December 10.
 - (ii) 21 days prior to the first day of the second calendar quarter is March 10.
 - (iii) 21 days prior to the first day of the third calendar quarter is June 9.
 - (iv) 21 days prior to the first day of the fourth calendar quarter is September 9.
 - (6) Adjusted at least 21 days prior to every calendar quarter if the required amount of the bond increases as provided by Section 313 of the TPMDA or if the Attorney General determines that the NPM's escrow obligations exceed or may increase beyond the current bond amount.
 - (7) Reviewed by the Attorney General on a quarterly basis to determine whether the amount of the bond is sufficient. If the Attorney General determines that the amount of the bond is insufficient, the Attorney General shall notify the NPM in writing and demand an updated bond within 30 days.
 - (8) In an amount at least the greater of:
 - (i) \$25,000.
 - (ii) For an NPM that deposits escrow annually, the highest collective amount of escrow owed in this Commonwealth by the NPM or its predecessor for any four consecutive calendar quarters out of the past 12 calendar quarters.

(iii) For an NPM that deposits escrow quarterly, the highest amount of escrow owed for sales in the Commonwealth by the NPM or its predecessor for any of the past 12 calendar quarters.

(iv) For an NPM that, at the time of its application, is not included on the directory and is applying for initial inclusion or re-inclusion on the directory (i.e. submitting an initial certification), an amount determined by the Attorney General to adequately protect the Commonwealth's interest in enforcing the Acts. The Attorney General may consider any factors the Attorney General deems pertinent to such determination.

(b) Non-Affiliate. An affiliate of a TPM may not serve as a corporate surety to post a bond required by Section 313 of the TPMDA (35 P.S. § 5702.313) for any NPM.

§ 906.2. Bond Execution.

(a) Generally. The Attorney General may execute and draw upon the bond to recover unpaid escrow obligations, civil penalties, costs, fees, disgorgement of profits, and any other monetary damages or obligations resulting from the principal's, its predecessor's, or its importer's failure to comply with the Acts.

(b) Timing. Execution of a bond shall be subject to section 907.2 of this Part (providing for notice and opportunity to cure), except that notice of the Attorney General's determination shall be sent to the NPM, its importer(s), and the surety on the bond, and the Attorney General may execute the bond no earlier than 15 days after the date of such notice.

(c) Recovery. Amounts recovered on a bond shall be applied first to recover delinquent escrow, then to recover civil penalties and all other costs and obligations authorized by the TSAA. Amounts due that are above the amount recovered on the bond shall remain due from the NPM and its importer(s).

(d) Effect of Execution. Delinquent escrow recovered by executing a bond shall reduce the amount of escrow due from the NPM by the dollar amount collected, but such recovery shall not excuse an NPM's failure to timely deposit escrow as required by the TSAA.

Chapter 7. Enforcement

§ 907.1. Enforcement Generally.

(a) Enforcement Power. The Attorney General is empowered by the General Assembly to enforce the Acts.

(b) Seizure of Contraband. Contraband cigarettes are subject to seizure by and forfeiture to the Attorney General and the Department.

(c) Inspection. A TPM's, distributor's, or cigarette retailer's business premises, inventory, and records shall be subject to physical inspection by the Attorney General to ensure compliance with the Acts.

- (d) Personal Jurisdiction. A TPM whose brand families have been sold in the Commonwealth and its affiliates and importers shall be subject to personal jurisdiction within the Commonwealth with respect to actions related to the Acts or this Part.
- (e) Litigation. The Attorney General may initiate litigation to enforce, and may seek injunctive relief to prevent a threatened or actual violation of, the Acts and this Part. In such action, the Attorney General shall be entitled to the equitable and monetary relief provided by the Acts including, as applicable, costs of investigation, costs of litigation, attorney fees, disgorgement of profits, civil penalties, or any other monetary recovery allowed by the Acts.

§ 907.2. Notice and Opportunity to Cure.

- (a) Notice of Determination. If the Attorney General determines that a TPM or its brand family or style is to be excluded or removed from the directory, or to exclude an entity because the entity is not a TPM, the Attorney General shall send a written notice of deficiency to the TPM or entity specifying the factual and legal basis upon which the Attorney General's determination is based and the date by which attempts to cure the deficiency, including documentation of completion of the cure, must be submitted to the Attorney General. Such date shall be at least seven calendar days from the date of the notice of deficiency. The notice of deficiency may also specify actions that the TPM or entity must take to cure the deficiency.
- (b) Delivery. The Attorney General shall send such written notice via electronic mail and U.S. mail to the addresses provided by the TPM or entity on their most recent certification for their designated contact with copy to their legal representative, if any. In the case of an NPM, the Attorney General shall also electronically copy the notice to the NPM's resident agent for service of process and importer, if any.
- (c) Deficiencies Cured. If the Attorney General determines the deficiencies have been cured, the Attorney General shall notify the TPM in writing of the determination.
- (d) Failure to Cure. If the Attorney General determines that any of the deficiencies have not been cured or documentation of completion has not been submitted by the date specified in the notice of deficiency, the Attorney General may take any necessary actions pursuant to 35 P.S. § 5702.301. Unless the Attorney General has otherwise notified the TPM that all deficiencies have been cured, the 21 day appeal period provided by Section 310 of the TPMDA (35 P.S. § 5702.310) shall begin to run the day after the date specified in the notice of deficiency.
- (e) Extension of Time. The Attorney General may, for any reason and at the Attorney General's discretion, extend any time period provided by this Part.
- (f) Notice of Removal from the Directory. A notice of pending changes to the directory shall be published to the directory immediately after the TPM's opportunity to cure has expired pursuant to subsection 907.2(a). The TPM or brand family shall not be removed until 21 days following publication of such notice.

- (g) Consistency with the TPMDA. The Attorney General does not intend for this Part to provide for any adjudicatory or evidentiary hearings beyond a TPM's opportunity to appeal the Attorney General's determination to the Commonwealth Court as provided by Section 310 of the TPMDA (35 P.S. § 5702.310).
- (h) Review of Determinations. The TPMDA provides for a TPM's due process rights by allowing the TPM to appeal a determination to exclude or remove a brand family or the TPM from the directory by filing a petition for review with the Commonwealth Court within 21 days of the determination. 35 P.S. § 5702.310. No person other than the TPM that was denied certification, removed from the directory, or whose brand families were removed from the directory may appeal such determinations by the Attorney General.

§ 907.3. Burden of Proof.

- (a) TPM Burden of Proof. A TPM shall bear the burden of proving:
 - (1) A brand family constitutes cigarettes of the TPM, or that any brand family or style constitutes cigarettes of a different TPM.
 - (2) That the TPM and its Brand Families are compliant with the Acts for every calendar year or quarter in which:
 - (i) The TPM, its predecessor(s), or any prior owner(s) of the TPM sold cigarettes into the Commonwealth.
 - (ii) Any predecessor or prior owner of the TPM's brand families sold such brand families into the Commonwealth.
 - (iii) The TPM's brand families or their predecessor brands were sold into the Commonwealth.
 - (3) The number of units sold in the Commonwealth for each of the TPM's brand families for any particular calendar month, quarter, or year.
 - (4) The amount of escrow funds deposited by the TPM into a QEF for the benefit of the Commonwealth.
 - (5) That the TPM is entitled to a release of funds from a QEF pursuant to 35 P.S. § 5674.
- (b) CSA and OTP Wholesaler Burden of Proof. A CSA or OTP wholesaler shall bear the burden of proving:
 - (1) That it has not engaged in any of the activities declared unlawful by Section 302 of the TPMDA (35 P.S. § 5702.302).
 - (2) That it has complied with the reporting and document retention and submission requirements provided by Section 306 of the TPMDA (35 P.S. § 5702.306).

- (3) That a particular product does not constitute contraband under Section 307 of the TPMDA (35 P.S. § 5702.307).
- (4) The accuracy of its business records and reports submitted to the Commonwealth.
- (c) All Venues. A TPM, CSA, or OTP wholesaler shall bear such burden of proof at all times and in all circumstances, including without limitation submission and review of certifications, the Attorney General's issuance of a written notice pursuant to this Chapter, curing deficiencies pursuant to such notice, and judicial review of the Attorney General's determinations or actions with respect to maintaining the directory. A TPM's, CSA's, or OTP wholesaler's burden of proof described in subsection (a) or (b) above is consistent with and does not supersede any evidentiary burdens imposed by the Acts and the laws of the Commonwealth.

§ 907.4. Notice of Appointment and Termination of Agent for Service of Process.

- (a) NPM Appointment. An NPM located outside the Commonwealth shall appoint and continually engage a person located within the Commonwealth to serve as a resident agent for service of process as provided by Section 305 of the TPMDA.
- (b) Importer Appointment. An importer of an NPM's brand families that are sold in the Commonwealth shall appoint and continually engage a person located within the Commonwealth to serve as a resident agent for service of process as provided by Section 305 of the TPMDA.
- (c) Additional Information. The Attorney General may request additional information about the resident agent to determine the NPM's or importer's compliance with the TPMDA, the existence, location, and availability of the resident agent, and any other information the Attorney General deems relevant.
- (d) Availability of Agent. The "availability" of the resident agent as referenced in Section 305(a) of the TPMDA means their business hours and the days, times, and manners in which the Attorney General can contact the resident agent.
- (e) Engagement after Removal from the Directory. An NPM that has been removed from the Directory and an importer of such NPM should continue to engage a resident agent. An NPM that appears or has appeared on the directory and an importer of such NPM's brand families that does not continually engage a resident agent for service of process shall be deemed to have appointed the Secretary of the Commonwealth as its agent for service of process and may be proceeded against in the courts of this Commonwealth by service upon the Secretary of the Commonwealth. The appointment of the Secretary of the Commonwealth under this Section shall not serve as a condition precedent for including or retaining the NPM or its brand families on the directory.