

SECOND REGULAR SESSION

SENATE BILL NO. 884

95TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR SCHAEFER.

Read 1st time February 3, 2010, and ordered printed.

TERRY L. SPIELER, Secretary.

4831S.011

AN ACT

To repeal section 196.1003, RSMo, and to enact in lieu thereof seven new sections relating to the tobacco master settlement agreement, with penalty provisions and an emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Section 196.1003, RSMo, is repealed and seven new sections enacted in lieu thereof, to be known as sections 196.1003, 196.1020, 196.1023, 196.1026, 196.1029, 196.1032, and 196.1035, to read as follows:

196.1003. Requirements.

Any tobacco product manufacturer selling cigarettes to consumers within the State (whether directly or through a distributor, retailer or similar intermediary or intermediaries) after the date of enactment of this Act shall do one of the following:

(a) become a participating manufacturer (as that term is defined in section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or

(b) (1) place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation)--

1999: \$.0094241 per unit sold after the date of enactment of this Act;

2000: \$.0104712 per unit sold;

for each of 2001 and 2002: \$.0136125 per unit sold;

for each of 2003 through 2006: \$.0167539 per unit sold;

for each of 2007 and each year thereafter: \$.0188482 per unit sold.

(2) A tobacco product manufacturer that places funds into escrow

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

18 pursuant to paragraph (1) shall receive the interest or other appreciation on such
19 funds as earned. Such funds themselves shall be released from escrow only under
20 the following circumstances--

21 (A) to pay a judgment or settlement on any released claim brought against
22 such tobacco product manufacturer by the State or any releasing party located or
23 residing in the State. Funds shall be released from escrow under this
24 subparagraph (i) in the order in which they were placed into escrow and (ii) only
25 to the extent and at the time necessary to make payments required under such
26 judgment or settlement;

27 (B) to the extent that a tobacco product manufacturer establishes that the
28 amount it was required to place into escrow in a particular year was greater than
29 the [State's allocable share of the total payments that such manufacturer would
30 have been required to make in that year under the Master Settlement Agreement
31 (as determined pursuant to section IX(i)(2) of the Master Settlement Agreement,
32 and before any of the adjustments or offsets described in section IX(i)(3) of that
33 Agreement other than the Inflation Adjustment)] **Master Settlement**
34 **Agreement payments, as determined under section IX(I) of that**
35 **Agreement including after final determination of all adjustments, that**
36 **such manufacturer would have been required to make on account of**
37 **such units sold** had it been a participating manufacturer, the excess shall be
38 released from escrow and revert back to such tobacco product manufacturer; or

39 (C) to the extent not released from escrow under subparagraphs (A) or (B),
40 funds shall be released from escrow and revert back to such tobacco product
41 manufacturer twenty-five years after the date on which they were placed into
42 escrow.

43 (3) Each tobacco product manufacturer that elects to place funds into
44 escrow pursuant to this subsection shall annually certify to the Attorney General
45 that it is in compliance with this subsection. The Attorney General may bring a
46 civil action on behalf of the State against any tobacco product manufacturer that
47 fails to place into escrow the funds required under this section. Any tobacco
48 product manufacturer that fails in any year to place into escrow the funds
49 required under this section shall--

50 (A) be required within 15 days to place such funds into escrow as shall
51 bring it into compliance with this section. The court, upon a finding of a violation
52 of this subsection, may impose a civil penalty to be paid to the State's general
53 revenue fund in an amount not to exceed 5 percent of the amount improperly

54 withheld from escrow per day of the violation and in a total amount not to exceed
55 100 percent of the original amount improperly withheld from escrow;

56 (B) in the case of a knowing violation, be required within 15 days to place
57 such funds into escrow as shall bring it into compliance with this section. The
58 court, upon a finding of a knowing violation of this subsection, may impose a civil
59 penalty to be paid to the State's general revenue fund in an amount not to exceed
60 15 percent of the amount improperly withheld from escrow per day of the
61 violation and in a total amount not to exceed 300 percent of the original amount
62 improperly withheld from escrow; and

63 (C) in the case of a second knowing violation, be prohibited from selling
64 cigarettes to consumers within the State (whether directly or through a
65 distributor, retailer or similar intermediary) for a period not to exceed 2 years.

66 Each failure to make an annual deposit required under this section shall
67 constitute a separate violation. Any tobacco product manufacturer that violates
68 the provisions of this section shall pay the State's cost and attorney's fees
69 incurred during a successful prosecution under this section.

196.1020. As used in sections 196.1020 to 196.1035, the following
2 **terms mean:**

3 (1) "Brand family", all styles of cigarettes sold under the same
4 trademark and differentiated from one another by means of additional
5 modifiers or descriptors, including but not limited to "menthol", "lights",
6 "kings", and "100s", and includes any brand name alone or in conjunction
7 with any other word trademark, logo, symbol, motto, selling message,
8 recognizable pattern of colors, or any other indicia of product
9 identification identical or similar to, or identifiable with, a previously
10 known brand of cigarettes;

11 (2) "Cigarette", the same meaning as such term is defined in
12 section 196.1000;

13 (3) "Director", the director of the Missouri department of
14 revenue;

15 (4) "Master settlement agreement", the same meaning as such
16 term is defined in section 196.1000;

17 (5) "Nonparticipating manufacturer", any tobacco product
18 manufacturer that is not a participating manufacturer;

19 (6) "Participating manufacturer", the same meaning as such term
20 is defined in section II(jj) of the master settlement agreement and all

21 amendments thereto;

22 (7) "Qualified escrow fund", the same meaning as such term is
23 defined in section 196.1000;

24 (8) "Stamping agent", a person who is authorized to affix tax
25 stamps to packages or other containers or cigarettes under chapter 149
26 or any person who is required to pay the tax imposed under section
27 149.160 on other tobacco products;

28 (9) "Tobacco product manufacturer", the same meaning as such
29 term is defined in section 196.1000;

30 (10) "Units sold", the same meaning as such term is defined in
31 section 196.1000.

196.1023. 1. Every tobacco product manufacturer whose
2 cigarettes are sold in this state, whether directly or through a
3 distributor, retailer, or similar intermediary or intermediaries, shall
4 execute and deliver on a form prescribed by the director a certification
5 to the director no later than the thirtieth day of April each year
6 certifying, under penalty of perjury, that as of the date of such
7 certification such tobacco product manufacturer is a participating
8 manufacturer or is in full compliance with section 196.1003.

9 (1) A participating manufacturer shall include in its certification
10 a list of its brand families. The participating manufacturer shall
11 update such list thirty calendar days prior to any addition to or
12 modification of its brand families by executing and delivering a
13 supplemental certification to the director.

14 (2) A nonparticipating manufacturer shall include in its
15 certification:

16 (a) A list of all of its brand families and the number of units sold
17 for each brand family that were sold in the state during the preceding
18 calendar year;

19 (b) A list of all of its brand families that have been sold in the
20 state at any time during the current calendar year, which shall
21 indicate, by an asterisk, any brand family sold in the state during the
22 preceding calendar year that is no longer being sold in the state as of
23 the date of such certification; and

24 (c) The name and address of any other manufacturer of such
25 brand families in the preceding or current calendar year.

26 The nonparticipating manufacturer shall update such list thirty

27 calendar days prior to any addition to or modification of its brand
28 families by executing and delivering a supplemental certification to the
29 director.

30 (3) For a nonparticipating manufacturer, such certification shall
31 further certify:

32 (a) That such nonparticipating manufacturer is registered to do
33 business in the state or has appointed a resident agent for service of
34 process and provided notice thereof as required in subsection 1 of
35 section 196.1023;

36 (b) That such nonparticipating manufacturer has established,
37 and continues to maintain, a qualified escrow fund and has executed a
38 qualified escrow agreement, governing the qualified escrow fund,
39 which has been reviewed and approved by the director;

40 (c) That such nonparticipating manufacturer is in full
41 compliance with sections 196.1003 and 196.1020 to 196.1035 and any
42 rules promulgated thereunder;

43 (d) The name, address, and telephone number of the financial
44 institution where the nonparticipating manufacturer has established
45 such qualified escrow fund required under section 196.1003 and all
46 rules promulgated thereunder;

47 (e) The account number of such qualified escrow fund and any
48 subaccount number for the state;

49 (f) The amount such nonparticipating manufacturer placed in
50 such fund for cigarettes sold in the state during the preceding calendar
51 year;

52 (g) The date and amount of each such deposit, and such evidence
53 or verification as may be deemed necessary by the director to confirm
54 the foregoing; and

55 (h) The amount and date of any withdrawal or transfer of funds
56 the nonparticipating manufacturer made, at any time, from such fund
57 or from any other qualified escrow fund into which it ever made escrow
58 payments under section 196.1003 and all rules promulgated thereunder.

59 (4) A tobacco product manufacturer shall not include a brand
60 family in its certification unless:

61 (a) In the case of a participating manufacturer, such
62 participating manufacturer affirms that the brand family is deemed to
63 be its cigarettes for purposes of calculating its payments under the

64 master settlement agreement for the relevant year, in the volume and
65 shares determined under the master settlement agreement; and

66 (b) In the case of a nonparticipating manufacturer, such
67 nonparticipating manufacturer affirms that the brand family is deemed
68 to be its cigarettes for purposes of section 196.1003.

69 Nothing in this section shall be construed as limiting, or otherwise
70 affecting, the state's right to maintain that a brand family constitutes
71 cigarettes of a different tobacco product manufacturer for purposes of
72 calculating payments under the master settlement agreement or for
73 purposes of section 196.1003.

74 (5) Tobacco product manufacturers shall maintain all invoices
75 and documentation of sales and other such information relied upon for
76 such certification for a period of five years, unless otherwise required
77 by law to maintain them for a greater period of time.

78 2. By July 1, 2011, the director shall develop and make available
79 for public inspection, or publish on its website, a directory listing of all
80 tobacco product manufacturers that have provided current and
81 accurate certifications in compliance with the requirements of
82 subsection 1 of this section and all brand families listed in such
83 certifications, except:

84 (1) The director shall not include, or retain, in such directory the
85 name or brand families of any nonparticipating manufacturer that fails
86 to provide the required certification, or whose certification the
87 director determines is not in compliance with subdivisions (2) and (3)
88 of subsection 1 of this section, unless the director has determined that
89 such violation has been cured to the satisfaction of the director;

90 (2) Neither a tobacco product manufacturer, nor brand family
91 shall be included, or retained, in the directory if the director
92 concludes, in the case of a nonparticipating manufacturer that:

93 (a) Any escrow payment required under section 196.1003 for any
94 period, for any brand family, whether or not listed by such
95 nonparticipating manufacturer has not been fully paid into a qualified
96 escrow fund governed by a qualified escrow agreement approved by the
97 director; or

98 (b) Any outstanding final judgment, including interest thereon,
99 for violations of section 196.1003 has not been fully satisfied for such
100 brand family and such manufacturer;

101 **(3) Every stamping agent shall provide, and update as necessary,**
102 **an electronic mail address to the director for the purpose of receiving**
103 **any notifications that may be required by sections 196.1020 to 196.1035.**

104 **3. It shall be unlawful for any person to:**

105 **(1) Affix a stamp to a package or other container of cigarettes**
106 **of a tobacco product manufacturer or brand family not included in the**
107 **directory; or**

108 **(2) Sell, offer, or possess for sale in this state, or import for**
109 **personal consumption in this state, cigarettes of a tobacco product**
110 **manufacturer or brand family not included in the directory.**

196.1026. 1. Any nonresident or foreign nonparticipating
2 **manufacturer not registered to do business in this state as a foreign**
3 **corporation or business entity shall, as a condition precedent to having**
4 **its brand families listed or retained in the directory, appoint, and**
5 **continually engage without interruption the services of, an agent in**
6 **this state to act as agent for the service of process on whom all process,**
7 **and any action or proceeding against it concerning, or arising out of,**
8 **the enforcement of sections 196.1003 and 196.1020 to 196.1035 may be**
9 **served in any manner authorized by law. Such service shall constitute**
10 **legal and valid service of process on the nonparticipating**
11 **manufacturer. The nonparticipating manufacturer shall provide the**
12 **name, address, phone number, and proof of the appointment and**
13 **availability of such agent to the satisfaction of the director.**

14 **2. The nonparticipating manufacturer shall provide notice to the**
15 **director thirty calendar days prior to termination of the authority of**
16 **an agent and shall further provide proof, to the satisfaction of the**
17 **director, of the appointment of a new agent no less than five calendar**
18 **days prior to the termination of an existing agent appointment. In the**
19 **event an agent terminates an agency appointment, the nonparticipating**
20 **manufacturer shall notify the director of the termination within five**
21 **calendar days and shall include proof, to the satisfaction of the**
22 **director, of the appointment of a new agent.**

23 **3. Any nonparticipating manufacturer whose cigarettes are sold**
24 **in this state and who has not appointed and engaged an agent as herein**
25 **required shall be deemed to have appointed the secretary of state as**
26 **such agent and may be proceeded against in courts of this state by**
27 **service of process upon the secretary of state. However, the**

28 appointment of the secretary of state as such agent shall not satisfy the
29 condition precedent for having the brand families of the
30 nonparticipating manufacturer included, or retained, in the directory.

196.1029. 1. Not later than twenty days after the end of each
2 calendar quarter and more frequently if so directed by the director,
3 each stamping agent shall submit such information as the director
4 requires to facilitate compliance with sections 196.1020 to 196.1035,
5 including but not limited to:

6 (1) A list by brand family of the total number of cigarettes; or

7 (2) In the case of roll your own, the equivalent stick count for
8 which the stamping agent affixed stamps during the previous calendar
9 quarter or otherwise paid the tax due for such cigarettes.

10 The stamping agent shall maintain and make available to the director
11 all invoices and documentation of sales of all nonparticipating
12 manufacturer cigarettes and any other information relied upon in
13 reporting to the director for a period of five years.

14 2. The director shall disclose to the attorney general any
15 information received under sections 196.1020 to 196.1035 which is
16 requested by the attorney general for purposes of determining
17 compliance with and enforcing the provisions of sections 196.1020 to
18 196.1035. The director and attorney general shall share with each other
19 information received under sections 196.1003 and 196.1020 to 196.1035,
20 or corresponding laws of other states.

21 3. The director may, at any time, require, from the
22 nonparticipating manufacturer proof from the financial institution, in
23 which such manufacturer has established a qualified escrow fund for
24 the purpose of compliance with section 196.1003, of the amount of
25 money in such fund exclusive of interest, and the amount and date of
26 each deposit to such fund, and the amount and date of each withdrawal
27 from such fund.

28 4. In addition to any other information required to be submitted
29 under sections 196.1020 to 196.1035, the director may require a
30 stamping agent or tobacco product manufacturer to submit any
31 additional information, including but not limited to samples of the
32 packaging or labeling of each brand family, as is necessary to enable
33 the director to determine whether a tobacco product manufacturer is
34 in compliance with sections 196.1020 to 196.1035.

196.1032. 1. In addition to, or in lieu of, any other civil or
2 criminal remedy provided by law, upon a determination that a
3 stamping agent or any person has violated subsection 3 of section
4 196.1023 or any regulation adopted under subsection 3 of section
5 196.1023, the director may revoke or suspend the license of any
6 stamping agent in the manner provided in subsection 3 of section
7 149.035. Each stamp affixed and each sale, or offer to sell, cigarettes in
8 violation of subsection 3 of section 196.1023 shall constitute a separate
9 violation. Upon a determination of a violation of subsection 3 of
10 section 196.1023 or any regulations adopted thereunder, the director
11 may impose a civil penalty in an amount not to exceed the greater of
12 five hundred percent of the retail value of the cigarettes or five
13 thousand dollars for each such violation.

14 2. Any cigarettes that have been sold, offered for sale, or
15 possessed for sale in this state in violation of subsection 3 of section
16 196.1023 shall be deemed contraband and such cigarettes shall be
17 subject to seizure and forfeiture as provided in chapter 149 and all
18 such cigarettes so seized and forfeited shall be destroyed and not
19 resold.

20 3. The attorney general, on behalf of the director, may seek an
21 injunction to restrain a threatened or actual violation of subsection 3
22 of section 196.1023, or subsection 1 or 4 of section 196.1029 by a
23 stamping agent and to compel a stamping agent to comply with such
24 provisions. In any action brought under this section, the state shall be
25 entitled to recover the costs of investigation and action including
26 reasonable attorney fees.

27 4. It shall be unlawful for a person to sell or distribute
28 cigarettes, or acquire, hold, own, possess, transport, import, or cause
29 to be imported, cigarettes that the person knows or should know are
30 intended for distribution or sale in the state in violation of subsection
31 3 of section 196.1023. A violation of this subsection shall be a class A
32 misdemeanor.

33 5. A person who violates subsection 3 of section 196.1023 shall be
34 deemed to have engaged in an unfair practice in violation of section
35 407.020.

196.1035. 1. A determination of the director not to list, or to
2 remove from the directory, a brand family or tobacco product

3 manufacturer shall be subject to review under chapter 621.

4 2. No person shall be issued, or granted a renewal of, a license
5 under chapter 149 unless such person has certified, in writing and
6 under the penalty of perjury, that such person will comply fully with
7 sections 196.1020 to 196.1035.

8 3. For the calendar year 2010, if the effective date of sections
9 196.1020 to 196.1035 is later than March 16, 2010:

10 (1) The first report of stamping agents required in subsection 1
11 of section 196.1029 shall be due thirty calendar days after such effective
12 date;

13 (2) The certification by a tobacco product manufacturer
14 described in subsection 1 of section 196.1023 shall be due forty-five
15 calendar days after such effective date; and

16 (3) The directory described in subsection 2 of section 196.1023
17 shall be published, or made available, within one hundred thirty-five
18 calendar days after such effective date.

19 4. The director may promulgate rules necessary to effect the
20 purpose of sections 196.1020 to 196.1035. Any rule or portion of a rule,
21 as that term is defined in section 536.010 that is created under the
22 authority delegated in this section shall become effective only if it
23 complies with and is subject to all of the provisions of chapter 536, and,
24 if applicable, section 536.028. This section and chapter 536 are
25 nonseverable and if any of the powers vested with the general assembly
26 pursuant to chapter 536, to review, to delay the effective date, or to
27 disapprove and annul a rule are subsequently held unconstitutional,
28 then the grant of rulemaking authority and any rule proposed or
29 adopted after August 28, 2010, shall be invalid and void.

30 5. In any action brought by the state to enforce sections 196.1020
31 to 196.1035, the state shall be entitled to recover the costs of
32 investigation and action including expert witness fees and reasonable
33 attorney fees.

34 6. There is hereby created in the state treasury the "Tobacco
35 Control Special Fund", which shall consist of money collected under
36 this section. The state treasurer shall be custodian of the fund and may
37 approve disbursements from the fund in accordance with sections
38 30.170 and 30.180. Upon appropriation, money in the fund shall be used
39 solely for the administration of this section. Any moneys remaining in

40 the fund at the end of the biennium shall revert to the credit of the
41 general revenue fund. The state treasurer shall invest moneys in the
42 fund in the same manner as other funds are invested. Any interest and
43 moneys earned on such investments shall be credited to the fund.

44 7. If a court of competent jurisdiction determines that a person
45 has violated sections 196.1020 to 196.1035, such court shall order any
46 profits, gains, gross receipts, or other benefits from such violation be
47 disgorged and paid to the state treasurer for deposit in the "Tobacco
48 Control Special Fund". Unless otherwise expressly provided, the
49 remedies or penalties provided by sections 196.1020 to 196.1035 are
50 cumulative to each other and to the remedies or penalties available
51 under all other laws of this state.

52 8. If a court of competent jurisdiction finds that the provisions
53 of sections 196.1003 and 196.1020 to 196.1035 conflict and cannot be
54 harmonized, the provisions of section 196.1003 shall control. If any
55 section or portion of a section in sections 196.1020 to 196.1035 causes
56 section 196.1003 to no longer constitute a qualifying or model statute,
57 as those terms are defined in the master settlement agreement, that
58 portion of sections 196.1020 to 196.1035 shall be invalid.

Section B. Because immediate action is necessary to protect the economic
2 welfare of the citizens of this state, section A of this act is deemed necessary for
3 the immediate preservation of the public health, welfare, peace, and safety, and
4 is hereby declared to be an emergency act within the meaning of the constitution,
5 and section A of this act shall be in full force and effect upon its passage and
6 approval.

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