

First Regular Session 111th General Assembly (1999)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 1998 General Assembly.

HOUSE ENROLLED ACT No. 1870

AN ACT to amend the Indiana Code concerning trade regulations; consumer sales and credit.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 24-3-3 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]:

Chapter 3. Qualified Escrow Fund for Tobacco Product Manufacturers

Sec. 1. The General Assembly makes the following findings:

- (1) Cigarette smoking presents serious public health concerns to the state and to the citizens of Indiana. The Surgeon General has determined that smoking causes lung cancer, heart disease, and other serious diseases, and that there are hundreds of thousands of tobacco related deaths in the United States each year. These diseases most often do not appear until many years after the person in question begins smoking.**
- (2) Cigarette smoking also presents serious financial concerns for the state. Under certain health care programs, the state may have a legal obligation to provide medical assistance to eligible persons for health conditions associated with cigarette smoking, and those persons may have a legal entitlement to receive such medical assistance.**

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(3) Under these programs, the state pays millions of dollars each year to provide medical assistance for these persons for health conditions associated with cigarette smoking.

(4) It is the policy of the state that financial burdens imposed on the state by cigarette smoking be borne by tobacco product manufacturers rather than by the state to the extent that such manufacturers either determine to enter into a settlement with the state or are found culpable by the courts.

(5) On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement", with the state. The Master Settlement Agreement obligates these manufacturers, in return for a release of past, present, and certain future claims against them as described in the Master Settlement Agreement, to:

(A) pay substantial sums to the state (tied in part to their volume of sales);

(B) fund a national foundation devoted to the interests of public health; and

(C) make substantial changes in their advertising and marketing practices and corporate culture, with the intention of reducing underage smoking.

(6) It would be contrary to the policy of the state if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short term profits in the years before liability may arise without ensuring that the state will have an eventual source of recovery from them if they are proven to have acted culpably. It is thus in the interest of the state to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short term profits and then becoming judgment proof before liability may arise.

Sec. 2. As used in this chapter, "adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement.

Sec. 3. As used in this chapter, "affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns", "is owned", and "ownership" mean ownership of an equity interest, or the equivalent thereof, of ten percent (10%) or more, and the

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term "person" means an individual, partnership, committee, association, corporation, or any other organization or group of persons.

Sec. 4. As used in this chapter, "allocable share" means Allocable Share as that term is defined in the Master Settlement Agreement.

Sec. 5. As used in this chapter, "cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains:

- (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco;
- (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or
- (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subdivision (1).

The term "cigarette" includes "roll-your-own" tobacco (i.e., any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette", nine-hundredths (0.09) of an ounce of "roll-your-own" tobacco constitutes one (1) individual "cigarette".

Sec. 6. As used in this chapter, "Master Settlement Agreement" means the settlement agreement (and related documents) entered into on November 23, 1998, by the state and leading United States tobacco product manufacturers.

Sec. 7. As used in this chapter, "qualified escrow fund" means an escrow arrangement with a federally or state chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least one billion dollars (\$1,000,000,000) where the arrangement requires that the financial institution hold the escrowed fund's principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the fund's principal except as consistent with this chapter.

Sec. 8. As used in this chapter, "released claims" means

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Released Claims as that term is defined in the Master Settlement Agreement.

Sec. 9. As used in this chapter, "releasing parties" means **Releasing Parties** as that term is defined in the Master Settlement Agreement.

Sec. 10. As used in this chapter, "tobacco product manufacturer" means an entity that after June 30, 1999, directly (and not exclusively through any affiliate):

- (1) manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the Master Settlement Agreement) that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);
- (2) is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or
- (3) becomes a successor of an entity described in subdivision (1) or (2).

The term "tobacco product manufacturer" does not include an affiliate of a tobacco product manufacturer unless the affiliate itself falls within subdivision (1), (2), or (3).

Sec. 11. As used in this chapter, "units sold" means the number of individual cigarettes sold in Indiana by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the state on packs (or "roll-your-own" tobacco containers) bearing the excise tax stamp of the state. The department of state revenue shall, in the manner provided by IC 4-22-2, adopt rules that are necessary to ascertain the amount of state excise tax paid on the cigarettes of such tobacco product manufacturer for each year.

Sec. 12. Any tobacco product manufacturer selling cigarettes to consumers within Indiana (whether directly or through a



distributor, retailer, or similar intermediary or intermediaries) after June 30, 1999, shall do one (1) of the following:

- (1) 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
- (2) 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):
 - (A) 1999, \$0.0094241 per unit sold after June 30, 1999.
 - (B) 2000, \$0.0104712 per unit sold.
 - (C) For each of 2001 and 2002, \$0.0136125 per unit sold.
 - (D) For each of 2003 through 2006, \$0.0167539 per unit sold.
 - (E) For each of 2007 and each year thereafter, \$0.0188482 per unit sold.

Sec. 13. A tobacco product manufacturer that places funds into escrow under section 12(2) of this chapter shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

- (1) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the state or any releasing party located or residing in Indiana. Funds shall be released from escrow under this subdivision:
 - (A) in the order in which they were placed into escrow; and
 - (B) only to the extent and at the time necessary to make payments required under such a judgment or settlement.
- (2) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow in a particular year was greater than the state's allocable share of the total payments that the manufacturer would have been required to make in that year under the Master Settlement Agreement (as determined pursuant to section IX(i)(2) of the Master Settlement Agreement, and before any of the adjustments or offsets described in section IX(i)(3) of that Agreement other than the Inflation Adjustment) had it been a participating manufacturer, the excess shall be released from escrow and revert back to the tobacco product manufacturer.
- (3) To the extent not released from escrow under subdivision

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(1) or (2), funds shall be released from escrow and revert back to such tobacco product manufacturer twenty-five (25) years after the date on which the funds were placed into escrow.

Sec. 14. (a) Each tobacco product manufacturer that elects to place funds into escrow under section 12(2) of this chapter shall annually certify to the attorney general that it is in compliance with this chapter. The attorney general may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under section 12 and section 13 of this chapter. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under section 12(2) of this chapter shall:

(1) Be required within fifteen (15) days to place sufficient funds into escrow to bring it into compliance with this chapter. The court, upon a finding of a violation of section 12(2) of this chapter, may also impose a civil penalty to be paid to the state general fund in an amount not to exceed five percent (5%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent (100%) of the original amount improperly withheld from escrow.

(2) In the case of a knowing violation, be required within fifteen (15) days to place sufficient funds into escrow to bring it into compliance with section 12(2) of this chapter. The court, upon a finding of a knowing violation of section 12(2) of this chapter, may also impose a civil penalty to be paid to the state general fund in an amount not to exceed fifteen percent (15%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent (300%) of the original amount improperly withheld from escrow.

(3) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within Indiana (whether directly or through a distributor, retailer or similar intermediary) for a period not to exceed two (2) years.

(b) Each failure to make an annual deposit required under section 12(2) of this chapter constitutes a separate violation.

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