

IC 24-3-3

Chapter 3. Qualified Escrow Fund for Tobacco Product Manufacturers

IC 24-3-3-1

Findings regarding cigarette smoking

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.

(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.

As added by P.L.223-1999, SEC.1.

IC 24-3-3-2

"Adjusted for inflation" defined

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.

As added by P.L.223-1999, SEC.1.

IC 24-3-3-3

"Affiliate" defined

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

As added by P.L.223-1999, SEC.1.

IC 24-3-3-4

"Allocable share" defined

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

As added by P.L.223-1999, SEC.1.

IC 24-3-3-5

"Cigarette" defined

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".
As added by P.L.223-1999, SEC.1.

IC 24-3-3-6

"Master Settlement Agreement" defined

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.

As added by P.L.223-1999, SEC.1.

IC 24-3-3-7

"Qualified escrow fund" defined

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.

As added by P.L.223-1999, SEC.1.

IC 24-3-3-8

"Released claims" defined

Sec. 8. As used in this chapter, "released claims" means Released Claims as that term is defined in the Master Settlement Agreement.

As added by P.L.223-1999, SEC.1.

IC 24-3-3-9

"Releasing parties" defined

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

As added by P.L.223-1999, SEC.1.

IC 24-3-3-10

"Tobacco product manufacturer" defined

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).

As added by P.L.223-1999, SEC.1.

IC 24-3-3-11

"Units sold" defined

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.

As added by P.L.223-1999, SEC.1.

IC 24-3-3-12

Tobacco product manufacturers required to become participating manufacturer or place money in qualified escrow fund

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.

As added by P.L.223-1999, SEC.1.

IC 24-3-3-13

Interest paid and release of escrow funds; severability

Sec. 13. (a) Subsection (b) applies unless and until all or any part of subsection (b) is held to be unconstitutional or otherwise unenforceable. If all or any part of subsection (b) or the application of all or any part of subsection (b) to a person, an entity, or a circumstance is held to be unconstitutional or invalid by a court, the unconstitutionality or invalidity does not affect other provisions of this chapter, and subsection (c) controls. Subsection (c) applies unless and until all or any part of subsection (c) is held to be unconstitutional or otherwise unenforceable. If all or any part of subsection (c) or the application of all or any part of subsection (c) to a person, an entity, or a circumstance is held to be unconstitutional or invalid by a court, the unconstitutionality or invalidity does not affect other provisions of this chapter, and subsection (d) controls.

(b) 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. The funds shall be released from escrow only under the following circumstances:

(1) To pay a judgment or settlement on any released claim brought against the 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 the tobacco product manufacturer is required to place in escrow on account of units sold in Indiana in a particular year exceeds the master settlement agreement payments the tobacco product manufacturer would have been required to make on account of units sold in Indiana if the tobacco product manufacturer were a participating manufacturer, as determined under section IX(i) of the master settlement agreement and after final determination of all adjustments, the excess payments shall be released from escrow and shall revert to the tobacco product manufacturer.

(3) To the extent not released from escrow under subdivision (1) or (2), funds shall be released from escrow and revert back to the tobacco product manufacturer twenty-five (25) years after the date on which the funds were placed into escrow.

(c) This subsection applies only if subsection (b) is held to be unconstitutional or otherwise unenforceable. A tobacco product manufacturer that places funds into escrow under section 12(2) of this chapter shall receive the interest or other appreciation on the funds as earned. The funds shall be released from escrow only under the following circumstances:

(1) To pay a judgment or settlement on any released claim

brought against the 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 not released from escrow under subdivision (1), funds shall be released from escrow and revert back to the tobacco product manufacturer twenty-five (25) years after the date on which the funds were placed into escrow.

(d) This subsection applies only if subsections (b) and (c) are held to be unconstitutional or otherwise unenforceable. 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 (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.

As added by P.L.223-1999, SEC.1. Amended by P.L.252-2003, SEC.15.

IC 24-3-3-14

Certification of compliance with chapter; failure to make annual deposit

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.

As added by P.L.223-1999, SEC.1.