

AN ACT in relation to tobacco product manufacturers.

Be it enacted by the People of the State of Illinois,
represented in the General Assembly:

Section 1. Short title. This Act may be cited as the Tobacco Products Manufacturers' Escrow Enforcement Act of 2003.

Section 5. Findings; purpose. The General Assembly finds that violations of the Tobacco Product Manufacturers' Escrow Act threaten the integrity of the tobacco Master Settlement Agreement, the fiscal soundness of the State, and the public health. The General Assembly finds that enacting procedural enhancements will help prevent violations and aid the enforcement of the Tobacco Product Manufacturers' Escrow Act and thereby safeguard the Master Settlement Agreement, the fiscal soundness of the State, and the public health. The provisions of this Act are not intended to and shall not be interpreted to amend the Tobacco Product Manufacturers' Escrow Act.

Section 10. Definitions. As used in this Act:

"Brand family" means all styles of cigarettes sold under the same trade mark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, menthol, lights, kings, and 100s and includes any 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.

"Cigarette" has the same meaning in Section 10 of the Escrow Act.

"Director" means the Director of Revenue.

"Distributor" has the same meaning prescribed in Section 1 of the Cigarette Tax Act, Section 1 of the Cigarette Use Tax Act, and, in addition, means a distributor of roll-your-own tobacco in accordance with Section 10-5 of the Tobacco Products Tax Act of 1995, as appropriate.

"Escrow Act" means the Tobacco Product Manufacturers' Escrow Act.

"Non-participating manufacturer" means any Tobacco Product Manufacturer that is not a participating manufacturer.

"Participating manufacturer" has the meaning given that term in Section II(jj) of the Master Settlement Agreement and all amendments thereto.

"Qualified escrow fund" has the same meaning as that term is defined in Section 10 of the Escrow Act.

"Tobacco product manufacturer" has the same meaning as that term is defined in Section 10 of the Escrow Act.

"Units sold" has the same meaning as that term is defined in Section 10 of the Escrow Act.

Section 15. Certifications; directory; tax stamps.

(a) Every tobacco product manufacturer whose cigarettes are sold in this State whether directly or through a distributor, retailer, or similar intermediary or intermediaries shall execute and deliver on a form prescribed by the Attorney General a certification to the Attorney General, no later than the thirtieth day of April each year, certifying under penalty of perjury that, as of the date of the certification, the tobacco product manufacturer either:

(i) is a participating manufacturer and has generally performed its financial obligations under the Master Settlement Agreement; or (ii) is in full compliance with the Escrow Act, including all quarterly installment payments.

(1) A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update the list 30 days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General.

(2) A non-participating manufacturer shall include in its certification a complete list of all of its brand families: (i) separately listing brand families of cigarettes and the number of units sold for each brand family that were sold in the State during the preceding calendar year; (ii) listing all of its brand families that have been sold in the State at any time during the current calendar year; (iii) indicating by an asterisk, any brand family sold in the State during the preceding calendar year that is no longer being sold in the State as of the date of the certification; and (iv) identifying by name and address any other manufacturer of the brand families in the preceding calendar year. The non-participating manufacturer shall update the list 30 days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General.

(3) In the case of a non-participating manufacturer, the certification shall further certify:

(A) that the non-participating manufacturer is registered to do business in this State or has appointed a resident agent for service of process and provided notice thereof as required by item 4 of subsection (a) of this Section;

(B) that the non-participating manufacturer has (i) established and continues to maintain a qualified escrow fund as that term is defined in Section 10 of the Escrow Act, and (ii) executed a

qualified escrow agreement that has been reviewed and approved by the Attorney General and that governs the qualified escrow fund;

(C) that the non-participating manufacturer is in full compliance with the Escrow Act and this Act, and any regulations promulgated pursuant thereto;

(D) the name, address and telephone number of the financial institution where the non-participating manufacturer has established the qualified escrow fund required pursuant to Section 15 of the Escrow Act and all regulations promulgated thereto;

(E) the account number of the qualified escrow fund and sub-account number for this State;

(F) the amount the non-participating manufacturer placed in the fund for cigarettes sold in the State during the preceding calendar year, including the dates and amount of each deposit, and such evidence or verification as may be deemed necessary by the Attorney General to confirm the foregoing; and

(G) the amounts of and dates of any withdrawal or transfer of funds the non-participating manufacturer made at any time from the fund or from any other qualified escrow fund into which it ever made escrow payments pursuant to Section 15 of the Escrow Act and all regulations promulgated thereto.

(4) A tobacco product manufacturer may not include a brand family in its certification unless: (i) in the case of a participating manufacturer, the participating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of calculating its payments under the master settlement agreement for the relevant year, in the volume and shares determined

pursuant to the master settlement agreement; and (ii) in the case of a non-participating manufacturer, the non-participating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of Section 15 of the Escrow Act.

Nothing in this Section shall be construed as limiting or otherwise affecting the State's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the master settlement agreement or for purposes of Section 15 of the Escrow Act.

(5) The tobacco product manufacturers shall maintain all invoices and documentation of sales and other information relied upon for certification for a period of 5 years, unless otherwise required by law to maintain them for a greater period of time.

(b) Not later than 6 months after the effective date of this Act, the Attorney General shall develop and make available for public inspection, through publishing on its website, a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (a) of Section 15 and all brand families that are listed in the certifications, except for the following:

(1) The Attorney General shall not include or retain in the directory the name or brand families of any non-participating manufacturer that fails to provide the required certification or whose certification the Attorney General determines is not in compliance with subsections (a)(2) or (a)(3) of Section 15, unless the Attorney General has determined that the violation has been cured to the satisfaction of the Attorney General.

(2) Neither a tobacco product manufacturer nor

brand family shall be included or retained in the directory if the Attorney General concludes that: (i) in the case of a non-participating manufacturer all escrow payments required pursuant to Section 15 of the Escrow Act for any period for any brand family, whether or not listed by the non-participating manufacturer, have not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the Attorney General; or (ii) all outstanding final judgments, including interest thereon, for violations of Section 15 of the Escrow Act have not been fully satisfied for that brand family and manufacturer.

(c) The Attorney General shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand families to keep the directory in conformity with the requirements of this Act.

(d) Every distributor shall provide and update as necessary an electronic mail address to the Attorney General for the purpose of receiving any notifications as may be required by this Act.

(e) It shall be unlawful for any person: (i) to affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory or to sell, offer, or possess for sale in this State; or (ii) import for personal consumption in this State, cigarettes of a tobacco product manufacturer or brand family not included in the directory.

Section 20. Agent for service of process.

(a) Any non-resident or foreign non-participating manufacturer that has not registered to do business in this State as a foreign corporation or business entity shall, as a condition precedent to having its brand families listed or retained in the directory, appoint and continually engage

without interruption the services of an agent in this State to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of this Act and the Escrow Act, may be served in any manner authorized by law. The service shall constitute legal and valid service of process on the non-participating manufacturer. The non-participating manufacturer shall provide the name, address, phone number, and proof of the appointment and availability of the agent to and to the satisfaction of the Director and Attorney General.

(b) The non-participating manufacturer shall provide notice to the Director and Attorney General 30 calendar days prior to termination of the authority of an agent and shall further provide proof to the satisfaction of the Attorney General of the appointment of a new agent no less than 5 calendar days prior to the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the non-participating manufacturer shall notify the Director and Attorney General of the termination within 5 calendar days and shall include proof to the satisfaction of the Attorney General of the appointment of a new agent.

(c) Any non-participating manufacturer whose products are sold in this State, without appointing or designating an agent as herein required shall be deemed to have appointed the Secretary of State as the agent and may be proceeded against in courts of this State by service of process upon the Secretary of State; however, the appointment of the Secretary of State as an agent shall not satisfy the condition precedent to having its brand families listed or retained in the directory.

Section 25. Reporting of information; escrow installments.

(a) Not later than 20 days after the end of each

calendar quarter, and more frequently if so directed by the Attorney General, each distributor shall submit the information as the Attorney General requires to facilitate compliance with this Act, including, but not limited to, a list by brand family of the total number of cigarettes or in the case of roll-your-own, the equivalent stick count for which the distributor affixed stamps during the previous calendar quarter or otherwise paid the tax due for these cigarettes. The distributor shall maintain, and make available to the Attorney General, all invoices and documentation of sales of all non-participating manufacturer cigarettes and any other information relied upon in reporting to the Attorney General for a period of 5 years.

(b) The Director is authorized to disclose to the Attorney General any information received under this Act and requested by the Attorney General for purposes of determining compliance with and enforcing the provisions of this Act. The Director and Attorney General shall share with each other the information received under this Act, and may share the information with other federal, State, or local agencies only for purposes of enforcement of this Act, the Escrow Act, or corresponding laws of other states.

(c) The Attorney General may require at any time, from the non-participating manufacturer, proof from the financial institution in which the manufacturer has established a qualified escrow fund for the purpose of compliance with the Escrow Act of the amount of money in the fund being held on behalf of the State and the dates of deposits, and listing the amounts of all withdrawals from the fund and the dates thereof.

(d) In addition to the information required to be submitted pursuant to this Act, the Attorney General may require a distributor or tobacco product manufacturer to submit any additional information including, but not limited

to, samples of the packaging or labeling of each brand family, as is necessary to enable the Attorney General to determine whether a tobacco product manufacturer is in compliance with this Act.

(e) To promote compliance with the provisions of this Act, the Attorney General may promulgate regulations requiring a tobacco product manufacturer subject to the requirements of subsection (a)(2) of Section 15 to make the escrow deposits required in quarterly installments during the year in which the sales covered by the deposits are made. The Attorney General may require production of information sufficient to enable the Attorney General to determine the adequacy of the amount of the installment deposit.

Section 30. Penalties and other remedies.

(a) In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a distributor has violated subsection (c) of Section 15 or any regulation adopted pursuant thereto, the Director may revoke or suspend the license of any stamping agent in the manner provided by Section 6 of the Cigarette Tax Act, Section 6 of the Cigarette Use Tax Act, or Section 10-25 of the Tobacco Products Tax Act of 1995, as appropriate. Each stamp affixed and each offer to sell cigarettes in violation of subsection (c) of Section 15 shall constitute a separate violation. For each violation, the Director may also impose a civil penalty in an amount not to exceed the greater of 500% of the retail value of the cigarettes sold or \$5,000 upon a determination of violation of subsection (c) of Section 15 or any regulations adopted pursuant thereto.

(b) Any cigarettes that have been sold, offered for sale, or possessed for sale in this State, or imported for personal consumption in this State in violation of subsection (c) of Section 15 shall be subject to seizure and forfeiture

as provided in Sections 18, 18a, and 20 of the Cigarette Tax Act and Sections 24, 25, 25a and 26 of the Cigarette Use Tax Act, and all cigarettes so seized and forfeited shall be destroyed and not resold.

(c) The Attorney General may seek an injunction to restrain a threatened or actual violation of subsection (c) of Section 15, subsection (a) of Section 25, or subsection (d) of Section 25 by a stamping agent and to compel the stamping agent to comply with such subsections. In any action brought pursuant to this Section, the State shall be entitled to recover the costs of investigation, costs of the action, and reasonable attorney fees.

(d) It shall be unlawful for a person to: (i) sell or distribute cigarettes; or (ii) acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the State in violation of subsection (c) of Section 15. A violation of this Section shall be a Class 2 felony.

(e) A person who violates subsection (c) of Section 15 engages in an unfair and deceptive trade practice in violation of the Uniform Deceptive Trade Practices Act.

Section 35. Miscellaneous provisions.

(a) A determination of the Attorney General to not list or to remove from the directory a brand family or tobacco product manufacturer shall be subject to review in the manner prescribed by rule.

(b) No person shall be issued a license or granted a renewal of a license to act as a distributor unless the person has certified in writing, under penalty of perjury, that the person will comply fully with this Act.

(c) The Attorney General may promulgate rules necessary to effect the purposes of this Act.

(d) In any action brought by the State to enforce this Act, the State shall be entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney fees.

(e) If a court determines that a person has violated this Act, the court shall order any profits, gain, gross receipts, or other benefit from the violation to be disgorged and paid to the General Revenue Fund.

(f) Unless otherwise expressly provided the remedies or penalties provided by this Act are cumulative to each other and to the remedies or penalties available under all other laws of this State.

Section 40. Severability.

(a) If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application.

(b) If a court of competent jurisdiction finds that the provisions of this Act and of the Escrow Act conflict and cannot be harmonized, then the provisions of the Escrow Act shall control.

(c) If any Section, subsection, subdivision, paragraph, sentence, clause, or phrase of this Act (excluding the amendatory provisions of Section 300) causes the Escrow Act to no longer constitute a qualifying or model statute, as those terms are defined in the Master Settlement Agreement, then that portion of this Act shall not be valid.

(30 ILCS 169/Act rep.)

Section 200. The Tobacco Products Manufacturers' Escrow Enforcement Act is repealed.

Section 300. The Tobacco Product Manufacturers' Escrow Act is amended by changing Section 15 and by adding Section 20 as follows:

(30 ILCS 168/15)

Sec. 15. Requirements.

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

(i) For 1999: \$0.0094241 per unit sold after the effective date of this Act;

(ii) For 2000: \$0.0104712 per unit sold;

(iii) For each of 2001 and 2002: \$0.0136125 per unit sold;

(iv) For each of 2003 through 2006: \$0.0167539 per unit sold;

(v) For each of 2007 and each year thereafter: \$0.0188482 per unit sold.

(B) A tobacco product manufacturer that places funds into escrow pursuant to subdivision (a)(2)(A) shall receive the interest or other appreciation on the funds as earned. The funds themselves shall be released from escrow only under the following

circumstances:

(i) 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 the State. Funds shall be released from escrow under this subdivision (a)(2)(B)(i): (I) in the order in which they were placed into escrow; and (II) only to the extent and at the time necessary to make payments required under such judgment or settlement;

(ii) to the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the State in a particular year was greater than the Master Settlement Agreement payments, as determined pursuant to Section IX(i) of that Agreement, including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold the State's-allocable-share-of-the--total--payments that-such-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 such tobacco product manufacturer; or

(iii) to the extent not released from escrow under subdivisions (a)(2)(B)(i) or

(a)(2)(B)(ii), funds shall be released from escrow and revert back to such tobacco product manufacturer 25 years after the date on which they were placed into escrow.

(C) Each tobacco product manufacturer that elects to place funds into escrow pursuant to this subdivision (a)(2) shall annually certify to the Attorney General that it is in compliance with this subdivision (a)(2). The Attorney General may bring a civil action on behalf of the State of Illinois against any tobacco product manufacturer that fails to place into escrow the funds required under this subdivision (a)(2). Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this subdivision (a)(2) shall:

(i) be required within 15 days to place such funds into escrow as shall bring it into compliance with this Section. The court, upon a finding of a violation of this subdivision (a)(2), may impose a civil penalty to be paid into the General Revenue Fund in an amount not to exceed 5% of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 100% of the original amount improperly withheld from escrow;

(ii) in the case of a knowing violation, be required within 15 days to place such funds into escrow as shall bring it into compliance with this Section. The court, upon a finding of a knowing violation of this subdivision (a)(2), may impose a civil penalty to be paid into the General Revenue Fund in an amount not to exceed 15% of the amount improperly withheld

from escrow per day of the violation and in a total amount not to exceed 300% of the original amount improperly withheld from escrow; and

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

(b) Each failure to make an annual deposit required under this Section shall constitute a separate violation. If a tobacco product manufacturer is successfully prosecuted by the Attorney General for a violation of subdivision (a)(2), the tobacco product manufacturer must pay, in addition to any fine imposed by a court, the State's costs and attorney's fees incurred in the prosecution.

(Source: P.A. 91-41, eff. 6-30-99.)

(30 ILCS 168/20 new)

Sec. 20. If this amendatory Act of the 93rd General Assembly or any portion of the amendment to subdivision (2)(B)(ii) of subsection (a) of Section 15 made by this amendatory Act of the 93rd General Assembly is held by a court of competent jurisdiction to be unconstitutional, then such subdivision (2)(B)(ii) of subsection (a) of Section 15 shall be deemed to be repealed in its entirety. If subdivision (2)(B)(ii) of subsection (a) of Section 15 shall thereafter be held by a court of competent jurisdiction to be unconstitutional, then this amendatory Act of the 93rd General Assembly shall be deemed repealed and subdivision (2)(B)(ii) of subsection (a) of Section 15 shall be restored as if no such amendments had been made. Neither any holding of unconstitutionality nor the repeal of subdivision (2)(B)(ii) of subsection (a) of Section 15 shall affect,

impair, or invalidate any other portion of Section 15 or the application of such Section to any other person or circumstance, and such remaining portions of Section 15 shall at all times continue in full force and effect.