

No. 2000-54

## AN ACT

SB 1243

Requiring certain tobacco product manufacturers to place certain moneys into an escrow fund; conferring powers and duties upon the Attorney General and the Department of Revenue; and imposing penalties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the Tobacco Settlement Agreement Act.

Section 2. Declaration of policy.

The General Assembly finds and declares as follows:

(1) Cigarette smoking presents serious public health concerns to the Commonwealth and to the citizens of this Commonwealth. 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 Commonwealth. Under certain health care programs, the Commonwealth may provide medical assistance to eligible persons for health conditions associated with cigarette smoking, and those persons may be eligible to receive such medical assistance.

(3) Under the health care programs described in paragraph (2), the Commonwealth pays millions of dollars each year to provide medical assistance for these persons for health conditions associated with cigarette smoking.

(4) Financial burdens imposed on the Commonwealth by cigarette smoking should be borne by tobacco product manufacturers rather than by the Commonwealth to the extent that such manufacturers either determine to enter into a settlement with the Commonwealth 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 Commonwealth. The Master Settlement Agreement obligates these manufacturers, in return for a release of past, present and certain future claims against those manufacturers as described therein, to:

(i) Pay substantial sums to the Commonwealth, tied in part to those manufacturers' volume of sales.

(ii) Fund a national foundation devoted to the interests of public health.

(iii) Make substantial changes in the manufacturers' advertising and marketing practices and corporate culture with the intention of reducing underage smoking.

(6) It would be contrary to the policy of the Commonwealth if tobacco product manufacturers who decide not to enter into the Master Settlement Agreement or similar settlement were able to use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the Commonwealth will have a source of recovery from these manufacturers if they are found to have acted culpably. It is thus in the interest of the Commonwealth to require that these manufacturers establish a reserve fund to guarantee a source of compensation and to prevent these manufacturers from deriving large, short-term profits and then becoming judgment proof before liability may arise.

### Section 3. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section:

"Adjusted for inflation." Increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement.

"Affiliate." A person who, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this definition, the terms "owns," "is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, of 10% or more.

"Allocable share." As that term is defined in the Master Settlement Agreement.

"Cigarette." Any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use and consists of or contains any of the following:

(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.

(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 clause (1).

(4) Any "roll-your-own," which means 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," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette."

"Master Settlement Agreement." The settlement agreement and related documents entered into on November 23, 1998, by the Commonwealth and leading United States tobacco product manufacturers in the action entitled *Commonwealth v. Philip Morris, et al.*, Philadelphia County, April term, 1997, No.2443, January 13, 1999.

"Person." Any individual, unincorporated association, company, corporation, limited liability corporation, joint stock company, group, committee, agency, syndicate, trust or trustee, receiver, fiduciary, partnership or conservator. Whenever used in any section of this act to establish or impose penalties, the word "person" when applied to a partnership, unincorporated association or other joint venture means the partners or members thereof and when applied to a corporation means all officers and directors thereof.

"Qualified escrow fund." An escrow arrangement with a federally chartered or State-chartered financial institution that has no affiliation with any tobacco product manufacturer and has assets of at least \$1,000,000,000 in which the escrow arrangement:

(1) requires that the financial institution hold the principal of the escrowed funds for the benefit of releasing parties; and

(2) prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing or directing the use of the principal of the funds except as consistent with section 4.

"Released claims." As that term is defined in the Master Settlement Agreement.

"Releasing parties." As that term is defined in the Master Settlement Agreement.

"Sell" or "sold." The term includes sales made directly or through a distributor, retailer or similar intermediary.

"Tobacco product manufacturer."

(1) A person that after the date of enactment of this act directly and not exclusively through any affiliate:

(i) 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 the 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 the 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 the cigarettes does not market or advertise the cigarettes in the United States);

(ii) 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

(iii) becomes a successor of a person described in subparagraph (i) or (ii).

(2) The term shall not include an affiliate of a tobacco product manufacturer unless the affiliate itself falls under paragraph (1)(i), (ii) or (iii).

“Units sold.” The number of individual cigarettes sold in this Commonwealth by the applicable tobacco product manufacturer during the year in question, as measured by taxes collected by the Commonwealth on packs, or “roll-your-own” tobacco containers, bearing the tax stamp of the Commonwealth required under section 1215 of the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971. The Department of Revenue shall promulgate such regulations as are necessary to ascertain the amount of State tax paid on the cigarettes of such tobacco product manufacturer for each year.

#### Section 4. Requirements.

(a) General rule.—Any tobacco product manufacturer that sells cigarettes to consumers within this Commonwealth after the effective date of this act shall do one of the following:

(1) Become a participating manufacturer as defined in the Master Settlement Agreement and generally perform its financial obligations under the Master Settlement Agreement.

(2) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts, as the amounts are adjusted for inflation:

(i) 2000 - \$.0104712 per unit sold after the effective date of this act.

(ii) For each of 2001 and 2002 - \$.0136125 per unit sold.

(iii) For each of 2003 through 2006 - \$.0167539 per unit sold.

(iv) For each of 2007 and each year thereafter - \$.0188482 per unit sold.

(b) Funds in escrow.—A tobacco product manufacturer that places funds into escrow under subsection (a)(2) shall receive the interest or other appreciation on such funds as earned. The 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 Commonwealth or any releasing party located or residing in this Commonwealth. Funds shall be released from escrow under this paragraph in the order in which they were placed into escrow and only to the extent and at the time necessary to make payments required under such 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 Commonwealth's allocable share of the total payments that the manufacturer would have been required to make in that year under the Master Settlement Agreement had it been a participating manufacturer, as such payments are 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 the Master Settlement Agreement other than the inflation adjustment, the excess shall be released from escrow and revert back to such tobacco product manufacturer.

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

(c) Certification.—Each tobacco product manufacturer that decides to place funds into escrow under subsection (a)(2) shall annually certify to the Attorney General that it is in compliance with subsection (a). The Commonwealth may bring a civil action against any tobacco product manufacturer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this section shall:

(1) Be required within 15 days after a finding of a violation by the court to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a violation of subsection (a)(2), (b) or (c), may impose a civil penalty to be paid to the General Fund of the Commonwealth in an amount not to exceed 5% of the amount improperly withheld from escrow per day of the violation, not to exceed 100% of the original amount improperly withheld from escrow for that year.

(2) In the case of a knowing violation, be required to place the funds into escrow within 15 days after a finding of a violation by the court to bring the tobacco product manufacturer into compliance with subsections (a)(2), (b) and (c). The court, upon a finding of a knowing violation of subsection (a)(2), (b) or (c), may impose a civil penalty to be paid to the General Fund of the Commonwealth not to exceed 15% of the amount improperly withheld from escrow per day of the violation. The total amount of a civil penalty under this paragraph shall not exceed 300% of the original amount improperly withheld from escrow for that year.

(3) In the case of a second knowing violation of subsection (a)(2), (b) or (c), be prohibited from selling cigarettes to consumers within this Commonwealth for a period not to exceed two years. For purposes of this section, each year that the tobacco product manufacturer fails to place funds in escrow as required by subsections (a) and (b) shall constitute a separate offense.

(d) Fees and costs.—The Commonwealth shall receive reimbursement from the tobacco product manufacturer for fees and costs, including attorney fees, incurred in the enforcement of this section.

Section 5. Public inspection.

The Attorney General will make the Master Settlement Agreement available for public inspection under 1 Pa. Code § 3.13(b) (relating to contents of Bulletin).

Section 6. Effective date.

This act shall take effect immediately.

APPROVED—The 22nd day of June, A.D. 2000.

THOMAS J. RIDGE