

AN ACT

ENTITLED, An Act to establish escrow funds to pay claims brought against tobacco product manufacturers.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. The Legislature finds the following:

- (1) Cigarette smoking presents serious public health concerns to the State of South Dakota and to the citizens of the state. The surgeon general of the United States 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; and
- (4) On November 23, 1998, major United States tobacco product manufacturers entered into a settlement agreement, entitled, 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 therein, to pay substantial sums to the state, tied in part to their volume of sales; to fund a national foundation devoted to the interests of public health; and to make substantial changes in their advertising and marketing practices and corporate culture, with the intention of reducing underage smoking.

Section 2. In enacting this Act, it is the intention of the Legislature that:

- (1) 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 of South Dakota to the extent that such manufacturers either determine to enter into a settlement with the state or are found culpable by the courts; and
- (2) It would be contrary to this policy of the State of South Dakota 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.

Section 3. Terms used in this Act mean:

- (1) "Adjusted for inflation," increased in accordance with the formula for inflation adjustment set forth in the Master Settlement Agreement;
- (2) "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. 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 or more, and the term, person, means an individual, partnership, committee, association, corporation, or any other organization or group of persons;
- (3) "Allocable share," allocable share as that term is defined in the Master Settlement Agreement;
- (4) "Master Settlement Agreement," the settlement agreement, and related documents, entered

into on November 23, 1998, by the State of South Dakota and major United States tobacco product manufacturers which is filed as part of the court record in *State of South Dakota, et al. v. Philip Morris, Inc., et al.*, Civ. No. 98-65, Sixth Judicial Circuit, Hughes County;

- (5) "Qualified escrow fund," 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 where such arrangement requires that the financial institution hold the escrowed funds' 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 funds' principal except as consistent with section 8 of this Act;
- (6) "Released claims," released claims as that term is defined in the Master Settlement Agreement;
- (7) "Releasing parties," releasing parties as that term is defined in the Master Settlement Agreement.

Section 4. For the purposes of this Act, the term, 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;
- (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) of

this definition.

The term, cigarette, includes, roll-your-own, meaning 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, 0.09 ounces of roll-your-own tobacco constitutes one individual cigarette.

Section 5. For the purposes of this Act, the term, tobacco product manufacturer, means an entity that, on or after July 1, 1999, directly, and not exclusively through any affiliate:

- (1) Manufactures cigarettes anywhere which the manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer. However, any entity that manufactures cigarettes that it intends to be sold in the United States is not a tobacco product manufacturer under this subdivision if the cigarettes are sold in the United States exclusively through an importer that 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 subsections II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and if 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 does not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within subdivision (1), (2), or (3).

Section 6. For the purposes of this Act, the term, units sold, means the number of individual cigarettes sold in the state 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 bearing the excise tax stamp or imprint of the state, or on roll-your-own tobacco. The secretary of revenue shall promulgate, pursuant to chapter 1-26, such rules as are necessary to obtain information from any licensee, licensed under the authority of the Department of Revenue, to ascertain the amount of state excise tax paid on the cigarettes of such tobacco product manufacturer for each year. The Department of Revenue may provide information obtained pursuant to this section as is necessary for a tobacco product manufacturer to compute its escrow payment under section 7 of this Act.

Section 7. Any tobacco product manufacturer selling cigarettes to consumers within the state, on or after July 1, 1999, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, 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) Place into a qualified escrow fund by April fifteenth of the year following the year in question the following amounts, as such amounts are adjusted for inflation:
 - (a) For 1999: \$.0094241 per unit sold after the date of enactment of this Act;
 - (b) For 2000: \$.0104712 per unit sold;
 - (c) For each of 2001 and 2002: \$.0136125 per unit sold;
 - (d) For each of 2003 through 2006: \$.0167539 per unit sold;
 - (e) For each of 2007 and each year thereafter: \$.0188482 per unit sold.

Section 8. A tobacco product manufacturer that places funds into escrow pursuant to subdivision (2) of section 7 of this Act 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 the state. Funds shall be released from escrow under this subdivision 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 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 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; or
- (3) To the extent not released from escrow under subdivision (1) or (2) of this section, funds shall be released from escrow and revert back to such tobacco product manufacturer twenty-five years after the date on which they were placed into escrow.

Section 9. Each tobacco product manufacturer that elects to place funds into escrow shall annually certify its compliance with section 7 of this Act to the attorney general. The attorney general may bring a civil action on behalf of the State of South Dakota against any tobacco product manufacturer that fails to place into escrow the funds required. Any tobacco product manufacturer that fails in any year to place into escrow the funds required by section 7 of this Act shall:

- (1) Within fifteen days place such funds into escrow as shall bring it into compliance with section 7 of this Act. The court, upon a finding of a violation of section 7 of this Act, may impose a civil penalty to be paid to the state general fund in an amount not to exceed five percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent of the original amount improperly

withheld from escrow;

- (2) In the case of a knowing violation, within fifteen days place such funds into escrow as shall bring it into compliance with section 7 of this Act. The court, upon a finding of a knowing violation of section 7 of this Act, may impose a civil penalty to be paid to the state general fund in an amount not to exceed fifteen percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent of the original amount improperly withheld from escrow; and
- (3) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the state, whether directly or through a distributor, retailer, or similar intermediary, for a period not to exceed two years.

Section 10. Each failure to make an annual deposit required under section 7 of this Act constitutes a separate violation.

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I certify that the attached Act
originated in the

SENATE as Bill No. 28

Secretary of the Senate

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President of the Senate

Attest:

Secretary of the Senate

Speaker of the House

Attest:

Chief Clerk

Senate Bill No. 28

File No. _____

Chapter No. _____

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Received at this Executive Office
this _____ day of _____ ,

19____ at _____ M.

By _____
for the Governor

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The attached Act is hereby
approved this _____ day of
_____, A.D., 19____

Governor

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STATE OF SOUTH DAKOTA,
SS.

Office of the Secretary of State

Filed _____, 19____
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State