

2003 SENATE BILL 245

September 10, 2003 – Introduced by Senators S. FITZGERALD, KEDZIE, LASSA, BRESKE and WELCH, cosponsored by Representatives VRAKAS, NISCHKE, JESKEWITZ, RHOADES, M. LEHMAN, VAN ROY, LADWIG, NASS, TAYLOR, BIES and MCCORMICK. Referred to Committee on Judiciary, Corrections and Privacy.

1 **AN ACT to amend** 895.10 (2) (b) 2. b.; and **to create** 895.12 of the statutes;
2 **relating to:** tobacco settlement agreement enforcement and providing
3 penalties.

Analysis by the Legislative Reference Bureau

Under current law, every tobacco product manufacturer selling cigarettes to consumers is required either to make payments to the state based on the number of cigarettes sold in the state under the master tobacco settlement agreement or to place a certain amount of money into an escrow account based on the number of cigarettes that are sold. Tobacco product manufacturers that place money into an escrow account are entitled to receive interest on the money. That money may be released from escrow to pay a judgment on any claim brought against the tobacco product manufacturer by the state or certain other parties. The money may also be released to the tobacco product manufacturer if the amount that was placed in escrow in a particular year was greater than the manufacturer would have had to pay under the master settlement agreement in that year.

Current law requires tobacco product manufacturers who place money in escrow to certify annually to the attorney general that the manufacturer has placed the required amount into an escrow account and has removed money from that account only as allowed under current law.

This bill requires every tobacco product manufacturer who places money in escrow to execute a detailed certification showing that the manufacturer is in full compliance with the requirement to place moneys in escrow based on the number of

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cigarettes that are sold. The bill requires the detailed certification to include a list of the manufacturer's cigarette brand names, updated at least 30 days before any change in the brand names, the number of cigarettes of each brand sold annually, a list of any brands of cigarettes that are no longer being sold in the state, and the name and address of any other manufacturer of the same brand of cigarettes. The certification must also include a statement that the manufacturer is registered to do business in this state or has appointed an agent for service of process, the name and address of the financial institution where the escrow account is located, and the amount and date of any deposit, withdrawal, or transfer from the escrow account.

The bill further requires the attorney general to make available for public inspection a directory of all tobacco product manufacturers that have provided current and accurate certifications. The bill prohibits the inclusion in the directory of any manufacturer that is not in compliance with the certification requirements and any manufacturer that has not registered to do business in this state or that has not provided an agent for the service of process. The bill also prohibits the affixing of a tax stamp on any cigarettes or the sale of any cigarettes of a tobacco product manufacturer that is not included in the directory.

The bill requires distributors of cigarettes to report quarterly to the Department of Revenue (department) the information that the department needs to determine compliance with the provisions of this bill. The distributors must maintain and make available to the department invoices and documentation of sales of all cigarettes produced by tobacco product manufacturers that are required to establish an escrow account. The department is required to provide this information to the attorney general. The bill authorizes the attorney general to request information from the manufacturers to verify their compliance.

The bill authorizes the department to take various punitive actions against any person that fails to comply with the bill's requirements, including revocation of the license of a cigarette distributor, seizure of cigarettes, and imposition of forfeitures. The attorney general is authorized by the bill to seek an injunction to restrain a violation of the bill's requirements. Under the bill, if a court determines that a person has violated the provisions of this bill, the court is required to order that any profits, gains, gross receipts, or other benefits resulting from the violation be paid to the state. In addition the bill provides that the costs of investigation, witness fees, court costs, and attorney fees may be recovered in any action brought by the state to enforce the provisions of this bill.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

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1 895.10 **(2)** (b) 2. b. To the extent that a tobacco product manufacturer
2 establishes that the amount it was required to place into escrow on account of the
3 units sold in a particular year was greater than the state's allocable share of the total
4 payments that the manufacturer would have been required to make in that year
5 under the master settlement agreement had it been a participating manufacturer,
6 as those payments are determined under section IX (i) (2) of the master settlement
7 agreement and before any of the adjustments or offsets described in section IX (i) (3)
8 of that agreement other than the inflation adjustment master settlement agreement
9 payments, as determined under section IX (i) of that agreement including after the
10 final determination of all adjustments, that the manufacturer would have been
11 required to make on account of such units sold had it been a participating
12 manufacturer, the excess shall be released from escrow and revert to that tobacco
13 product manufacturer.

14 **SECTION 2.** 895.12 of the statutes is created to read:

15 **895.12 Certification under the tobacco settlement agreement.**

16 **(1) DEFINITIONS.** In this section:

17 (a) "Brand family" means all styles of cigarettes sold under the same trademark
18 and differentiated from one another by means of additional modifiers or descriptors,
19 including "menthol," "lights," "kings," and "100s," and includes any brand name,
20 alone or in conjunction with any other word; trademark; logo; symbol; motto; selling
21 message; recognizable pattern of colors; or other indicia of product identification
22 identical or similar to, or identifiable with, a previously known brand of cigarettes.

23 (b) "Cigarette" has the meaning given in s. 895.10 (1) (d).

24 (c) "Department" means the department of revenue.

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1 (d) “Distributor” means a person that is authorized to affix tax stamps to
2 packages or other containers of cigarettes under subch. II of ch. 139 or any person
3 that is required to pay the tax imposed on tobacco products under subch. III of ch.
4 139.

5 (e) “Master settlement agreement” has the meaning given in s. 895.10 (1) (e).

6 (f) “Nonparticipating manufacturer” means any tobacco product manufacturer
7 that is not a participating manufacturer.

8 (g) “Participating manufacturer” has the meaning given in section II (jj) of the
9 master settlement agreement.

10 (h) “Qualified escrow fund” has the meaning given in s. 895.10 (1) (f).

11 (j) “Tobacco product manufacturer” has the meaning given in s. 895.10 (1) (i).

12 (k) “Units sold” has the meaning given in s. 895.10 (1) (j).

13 **(2)** CERTIFICATIONS; DIRECTORY; TAX STAMPS.

14 (a) *Certification.* 1. Every tobacco product manufacturer whose cigarettes are
15 sold in this state, whether directly or through a distributor, retailer, or similar
16 intermediary or intermediaries, shall execute and deliver in the manner prescribed
17 by the attorney general a certification to the department and attorney general, no
18 later than the 30th day of April each year, certifying that as of that date the tobacco
19 product manufacturer is either a participating manufacturer or is in full compliance
20 with s. 895.10 (2) (b).

21 2. A participating manufacturer shall include in its certification a list of its
22 brand families. The participating manufacturer shall update that list at least 30
23 calendar days prior to any addition to or modification of its brand families by
24 executing and delivering a supplemental certification to the department and
25 attorney general.

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1 3. A nonparticipating manufacturer shall include all of the following in its
2 certification:

3 a. A list of all of its brand families and the number of units sold for each brand
4 family that were sold in the state during the preceding calendar year.

5 b. A list of all of its brand families that have been sold in the state at any time
6 during the current calendar year.

7 c. A list of any brand families sold in the state during the preceding calendar
8 year that are no longer being sold in the state as of the date of such certification.

9 d. The name and address of any other manufacturer of the brand families in
10 the preceding or current calendar year.

11 4. The nonparticipating manufacturer shall update the list under subd. 3. at
12 least 30 calendar days before any addition to or modification of its brand families by
13 executing and delivering a supplemental certification to the department and
14 attorney general.

15 5. The nonparticipating manufacturer shall further certify all of the following:

16 a. That the nonparticipating manufacturer is registered to do business in the
17 state or has appointed an agent for service of process and provided notice of that
18 appointment as required by sub. (3).

19 b. That the nonparticipating manufacturer has established and continues to
20 maintain a qualified escrow fund and has executed a qualified escrow agreement
21 that has been reviewed and approved by the attorney general and that governs the
22 qualified escrow fund.

23 c. That the nonparticipating manufacturer is in full compliance with this
24 section and s. 895.10.

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1 d. The name, address, and telephone number of the financial institution where
2 the nonparticipating manufacturer has established the qualified escrow fund
3 required under s. 895.10 (2) (b).

4 e. The account number of the qualified escrow fund and any subaccount
5 number for the state.

6 f. The amount the nonparticipating manufacturer placed into the fund for
7 cigarettes sold in the state during the preceding calendar year, the date and amount
8 of each deposit, and any evidence or verification as required by the attorney general.

9 g. The amount and date of any withdrawal or transfer of funds the
10 nonparticipating manufacturer made at any time from the fund or from any other
11 qualified escrow fund into which it ever made escrow payments under s. 895.10 (2)
12 (b).

13 6. A participating manufacturer may not include a brand family in its
14 certification unless the participating manufacturer affirms that the brand family
15 constitutes its cigarettes for purposes of calculating its payments under the master
16 settlement agreement for the relevant year, in the volume and shares determined
17 under the master settlement agreement.

18 7. A nonparticipating manufacturer may not include a brand family in its
19 certification unless it affirms that the brand family constitutes its cigarettes for
20 purposes of s. 895.10.

21 8. Nothing in this section shall be construed as limiting or otherwise affecting
22 the state's right to maintain that a brand family constitutes cigarettes of a different
23 tobacco product manufacturer for purposes of calculating payments under the
24 master settlement agreement or for purposes of s. 895.10.

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1 9. Tobacco product manufacturers shall maintain all invoices and
2 documentation of sales and other such information relied upon for the certification
3 under subd. 5. for a period of 5 years, unless otherwise required by law to maintain
4 them for a greater period of time.

5 (b) *Directory of cigarettes approved for stamping and sale.* Not later than the
6 first day of the 4th month after the effective date of this paragraph [revisor inserts
7 date], the attorney general shall develop and make available for public inspection a
8 directory listing all tobacco product manufacturers that have provided current and
9 accurate certifications conforming to the requirements of par. (a) and all brand
10 families that are listed in the certifications, except as follows:

11 1. The attorney general shall not include or retain in the directory the name
12 or brand families of any nonparticipating manufacturer that has failed to provide the
13 required certification or whose certification the attorney general determines is not
14 in compliance with par. (a) 3. to 5., unless the attorney general has determined that
15 the violation has been cured.

16 2. Neither a tobacco product manufacturer nor brand family may be included
17 or retained in the directory if the attorney general concludes, in the case of a
18 nonparticipating manufacturer, that any of the following apply:

19 a. An escrow payment required under s. 895.10 (2) (b) for any period for any
20 brand family, whether or not listed by such nonparticipating manufacturer, has not
21 been fully paid into a qualified escrow fund governed by a qualified escrow
22 agreement that has been approved by the attorney general.

23 b. Any outstanding final judgment, including interest on that judgment, for a
24 violation of s. 895.10 has not been fully satisfied for the brand family or
25 manufacturer.

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1 3. The attorney general shall update the directory as necessary to correct
2 mistakes and to add or remove a tobacco product manufacturer or brand family to
3 keep the directory in conformity with the requirements under this paragraph.

4 4. Every distributor shall provide and update as necessary an electronic mail
5 address to the attorney general for the purpose of receiving any notifications as may
6 be required under this section.

7 (c) *Prohibition against stamping or sale of cigarettes not in the directory.* It shall
8 be unlawful for any person to affix a stamp to a package or other container of
9 cigarettes of a tobacco product manufacturer or brand family not included in the
10 directory or to sell, or offer or possess for sale, in this state cigarettes of a tobacco
11 product manufacturer or brand family not included in the directory.

12 **(3)** AGENT FOR SERVICE OF PROCESS. (a) *Requirement for agent for service of*
13 *process.* Any nonresident or foreign nonparticipating manufacturer that has not
14 registered to do business in this state as a foreign corporation or business entity
15 shall, as a condition precedent to having its brand families included or retained in
16 the directory under sub. (2) (b), appoint and continually engage the services of an
17 agent in this state to act as agent for the service of process on whom all processes,
18 and any action or proceeding against it concerning or arising out of the enforcement
19 of this section and s. 895.10, may be served in any manner authorized by law. That
20 service shall constitute legal and valid service of process on the nonparticipating
21 manufacturer. The nonparticipating manufacturer shall provide the name, address,
22 phone number, and proof of the appointment and availability of the agent to the
23 attorney general.

24 (b) *Notification of termination of agent.* The nonparticipating manufacturer
25 shall provide notice to the department and attorney general 30 calendar days before

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1 termination of the authority of an agent under par. (a) and shall provide proof to the
2 satisfaction of the attorney general of the appointment of a new agent no less than
3 5 calendar days before the termination of an existing agent appointment. In the
4 event an agent terminates an agency appointment, the nonparticipating
5 manufacturer shall notify the department and attorney general of that termination
6 within 5 calendar days and shall include proof to the satisfaction of the attorney
7 general of the appointment of a new agent.

8 (c) *Service on secretary of state.* Any nonparticipating manufacturer whose
9 cigarettes are sold in this state, who has not appointed and engaged an agent as
10 required in this subsection, shall be considered to have appointed the secretary of
11 state as that agent and may be proceeded against in courts of this state by service
12 of process upon the secretary of state provided, however, that the appointment of the
13 secretary of state as that agent does not satisfy the condition precedent for having
14 the brand families of the nonparticipating manufacturer included or retained in the
15 directory under sub. (2) (b).

16 **(4) REPORTING OF INFORMATION; ESCROW INSTALLMENTS.** (a) *Reporting by*
17 *distributors.* Not later than 20 calendar days after the end of each calendar quarter,
18 and more frequently if so directed by the department, each distributor shall submit
19 a report that includes any information that the department requires to facilitate
20 compliance with this section, including a list by brand family of the total number of
21 cigarettes, or, in the case of roll-your-own tobacco, the equivalent stick count, for
22 which the distributor affixed stamps during the previous calendar quarter or
23 otherwise paid the tax due for those cigarettes. The distributor shall maintain, and
24 make available to the department, all invoices and documentation of sales of all

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1 nonparticipating manufacturer cigarettes and any other information relied upon in
2 reporting to the department for a period of 5 years.

3 (b) *Disclosure of information.* The department is authorized to disclose to the
4 attorney general any information received under this section and requested by the
5 attorney general for purposes of determining compliance with and enforcing the
6 provisions of this section. The department and attorney general shall share with
7 each other the information received under this section, and may share such
8 information with other federal, state, or local agencies only for purposes of
9 enforcement of this section, s. 895.10, or corresponding laws of other states.

10 (c) *Verification of qualified escrow fund.* The attorney general may require at
11 any time from the nonparticipating manufacturer proof, from the financial
12 institution in which the manufacturer has established a qualified escrow fund for the
13 purpose of compliance with s. 895.10, of the amount of money in that fund, exclusive
14 of interest, the amount and date of each deposit into the fund, and the amount and
15 date of each withdrawal from the fund.

16 (d) *Requests for additional information.* In addition to the information
17 required to be submitted under par. (c), the attorney general may require a
18 distributor or tobacco product manufacturer to submit any additional information,
19 including samples of the packaging or labeling of each brand family, as is necessary
20 to enable the attorney general to determine whether a tobacco product manufacturer
21 is in compliance with this section.

22 (e) *Quarterly escrow installments.* To promote compliance with this section, the
23 attorney general may promulgate rules requiring a tobacco product manufacturer
24 subject to the requirements of sub. (2) (a) 3. to make the escrow deposits required in
25 quarterly installments during the year in which the sales covered by such deposits

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1 are made. The attorney general may require production of information sufficient to
2 enable the attorney general to determine the adequacy of the amount of the
3 installment deposit.

4 (5) PENALTIES AND OTHER REMEDIES. (a) *License revocation and civil penalty.*
5 Upon a determination that a distributor has violated sub. (2) (c), the department may
6 revoke or suspend the license of the distributor in the manner provided under s.
7 139.44 (4) and (7). Each stamp affixed and each sale of cigarettes or offer or
8 possession to sell cigarettes in violation of sub. (2) (c) shall constitute a separate
9 violation. For each violation the department may also impose a forfeiture in an
10 amount not to exceed the greater of 500% of the retail value of the cigarettes or
11 \$5,000.

12 (b) *Contraband and seizure.* Any cigarettes that have been sold, offered for
13 sale, or possessed for sale, in this state, in violation of sub. (2) (c) shall be deemed
14 contraband and such cigarettes shall be subject to seizure as provided under s.
15 139.40. All cigarettes that are seized shall be destroyed and not resold.

16 (c) *Injunction.* The attorney general, on behalf of the department, may seek an
17 injunction to restrain a threatened or actual violation of sub. (2) (c) or failure to
18 comply with sub. (4) (a) or (d) by a distributor and to compel the distributor to comply
19 with those subsections.

20 (d) *Unlawful sale and distribution.* It shall be unlawful for a person to sell or
21 distribute cigarettes or acquire, hold, own, possess, transport, import, or cause to be
22 imported cigarettes that the person knows or should know are intended for
23 distribution or sale in the state in violation of sub. (2) (c). Section 139.44 (7), as it
24 applies to violations under subchs. II and III of ch. 139, applies to a violation of this
25 paragraph.

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1 (e) *Unfair and deceptive trade practice.* A person who violates sub. (2) (c)
2 engages in an unfair and deceptive trade practice in violation of s. 100.20.

3 **(6) NOTICE AND REVIEW OF DETERMINATION.** A determination of the attorney
4 general to not include or to remove from the directory under sub. (2) (b) a brand
5 family or tobacco product manufacturer shall be subject to review in the manner
6 prescribed under ch. 227.

7 **(7) APPLICANTS FOR LICENSES.** No person shall be issued a license or granted a
8 renewal of a license to act as a distributor unless that person has certified in writing
9 that the person will comply fully with this section.

10 **(8) DATES.** For the year 2003, the first report of distributors required by sub.
11 (4) (a) shall be due 30 calendar days after the effective date of this subsection ...
12 [revisor inserts date]; the certifications by a tobacco product manufacturer described
13 in sub. (2) (a) shall be due 45 calendar days after that date; and the directory
14 described in sub. (2) (b) shall be published or made available within 90 calendar days
15 after that date.

16 **(9) PROMULGATION OF RULES.** The attorney general may promulgate rules
17 necessary to effect the purposes of this section.

18 **(10) RECOVERY OF COSTS AND FEES BY ATTORNEY GENERAL.** In any action brought
19 by the state to enforce this section, including an action under sub. (5) (c) the state
20 shall be entitled to recover the costs of investigation and prosecution expert witness
21 fees, court costs, and reasonable attorney fees.

22 **(11) TRANSFER OF PROFITS FOR VIOLATIONS.** If a court determines that a person
23 has violated this section, the court shall order any profits, gain, gross receipts, or
24 other benefit from the violation to be transferred and paid to the state. Unless

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1 otherwise expressly provided, the remedies or penalties provided by this section are
2 cumulative.

3 **(12) CONSTRUCTION.** If a court finds that the provisions of this section and of
4 s. 895.10 conflict and cannot be harmonized, then the provisions of s. 895.10 shall
5 control. If any part of this section causes s. 895.10 to no longer constitute a qualifying
6 or model statute, as those terms are defined in the master settlement agreement,
7 then that portion of this section is not valid.

8 (END)