

2003 DRAFTING REQUEST

Bill

Received: **01/29/2003**

Received By: **rnelson2**

Wanted: **As time permits**

Identical to LRB:

For: **Daniel Vrakas (608) 266-3007**

By/Representing: **Bonnie**

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters:

Subject: **Courts - miscellaneous**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Vrakas@legis.state.wi.us**

Carbon copy (CC:) to: **joseph.kreye@legis.state.wi.us**

Pre Topic:

No specific pre topic given

Topic:

Tobacco settlement model language

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rnelson2 03/05/2003	wjackson 04/01/2003		_____			
/P1			chaskett 04/02/2003	_____			
/P2	rnelson2	wjackson	jfrantze	_____	lemery		

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/2	rnelson2 06/27/2003	wjackson 06/30/2003	rschluet 06/30/2003	_____	lemery 06/30/2003		State
/3	rnelson2 07/03/2003	wjackson 07/07/2003	rschluet 07/07/2003	_____	sbasford 07/07/2003	lemery 08/04/2003	

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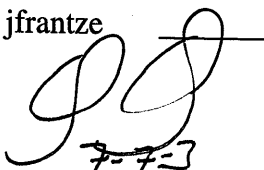
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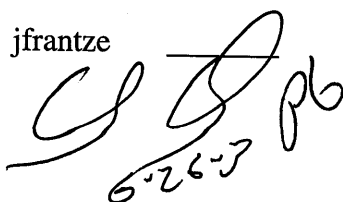
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			<i>Jb 5/13</i>	<i>Self 5/13</i>			

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1/1	rnelson2	/p1 WLj 4/1	/p1 4/2	4/2 rs/cph			
		/p2 WLj 4/4	cph 4/4				

FE Sent For:

4/4

4/4
<END>
4/4

Bill Request Form

Legislative Reference Bureau
100 N. Hamilton Street
Legal Section 266-3561

Use of this form is optional. It is often better to talk directly with the LRB attorney who will draft the bill.
Use this form only for bill draft requests. Attach more pages if necessary.

Date January 29th 2003

Legislator, agency, or other person requesting this draft Vrakas

Person submitting request (name and phone number) Bonnie, 266-3007

Persons to contact for questions about this draft (names and phone numbers) Bonnie 266-3007

Describe the problem, including any helpful examples. How do you want to solve the problem?

tobacco settlement - ~~see~~ see attached
model legislation

Please attach a copy of any correspondence or other material that may help us. If you know of any statute sections that might be affected, list them or provide a marked-up copy.

You may attach a marked-up copy of any LRB draft or provide its number (e.g., 1999 LRB-2345/1 or 1997 AB-67).

Requests are confidential unless stated otherwise. May we tell others that we are working on this for you? YES NO

If yes: Anyone who asks? YES NO
 Any legislator? YES NO

Only the following persons _____

Do you consider this request urgent? YES If yes, please indicate why _____

Should we give this request priority over any pending request of this legislator, agency, or person?

YES NO

MODEL COMPLEMENTARY LEGISLATION

[Bracketed provisions may be modified to meet state specific needs or conform to existing language.]

Section 1. Findings & Purpose

[The General Assembly] [Legislature] finds that violations of [the Model Statute] threaten the integrity of the tobacco Master Settlement Agreement, the fiscal soundness of the state, and the public health. The legislature finds that enacting procedural enhancements will [help prevent violations] [aid the enforcement] of the Model Statute and thereby safeguard the Master Settlement Agreement, the fiscal soundness of the state, and the public health.]

Section 2. Definitions

- (a) "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.
- (b) "Cigarette" has the same meaning as in [relevant provision from model statute].
- (c) "Commissioner" means the duly appointed or elected head of the agency responsible for collection of the excise tax on Cigarettes.

or ["Director" means the Director of the Department of Revenue];

or ["Department" means the Department of Revenue for the State of].
- (d) ["Distributor" means a person, wherever resident or located, who purchases non-tax-paid Cigarettes and stores, sells, or otherwise disposes of the Cigarettes. *(This language or similar may be necessary for non-stamping states.)*]
- (e) "Master Settlement Agreement" has the same meaning as in [relevant provision from Model Statute].
- (f) "Non-participating Manufacturer" means any Tobacco Product Manufacturer that is not a Participating Manufacturer.
- (g) "Participating Manufacturer" has the meaning given that term in Section II(jj) of the Master Settlement Agreement and all amendments thereto.

- (h) “Qualified Escrow Fund” has the same meaning as that term is defined in [the Model Statute].
- (i) “Stamping Agent” [“Distributor”] [Or similar such title that conforms to existing taxing and licensing language] means a person that is authorized to affix tax stamps to packages or other containers or Cigarettes under [insert citation to tax code] or any person that is required to pay the [excise tax or tobacco tax imposed pursuant to [insert statutory cite]] on Cigarettes.
- (j) “Tobacco Product Manufacturer” has the same meaning as that term is defined in [the Model Statute].
- (k) “Units Sold” has the same meaning as that term is defined in [the Model Statute].

Section 3. Certifications; Directory; Tax Stamps

- (a) CERTIFICATION. 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 [or in the manner] prescribed by the [Attorney General / Commissioner] a certification to the Commissioner and Attorney General, no later than the thirtieth day of April each year, certifying [under penalty of perjury] that, as of the date of such certification, such Tobacco Product Manufacturer either: is a Participating Manufacturer; or is in full compliance with [Model Statute citation] [including all quarterly installment payments required by [insert appropriate citation or rule]].
 - (1) A Participating Manufacturer shall include in its certification a list of its Brand Families. The Participating Manufacturer shall update such list thirty calendar days prior to any addition to or modification of its Brand Families by executing and delivering a supplemental certification to the Attorney General and [Commissioner].
 - (2) A Non-Participating Manufacturer shall include in its certification, (i) a list of all of its Brand Families and the number of Units Sold for each Brand Family that were sold in the State during the preceding calendar year, (ii) a list of 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 such certification, and (iv) identifying by name and address any other manufacturer of such Brand Families in the preceding or current calendar year. The Non-Participating Manufacturer shall update such list thirty calendar days prior to any addition to or modification of its Brand Families by executing and delivering a supplemental certification to the Attorney General and [Commissioner].

- (3) In the case of a Non-Participating Manufacturer, such certification shall further certify:
- (A) That such Non-Participating Manufacturer is registered to do business in the state or has appointed a [resident] agent for service of process and provided notice thereof as required by Section 4.
 - (B) That such Non-Participating Manufacturer (i) has established and continues to maintain a Qualified Escrow Fund, and (ii) has executed a qualified escrow agreement that has been reviewed and approved by the [Commissioner and/or the Attorney General] and that governs the Qualified Escrow Fund.
 - (C) That such Non-Participating Manufacturer is in full compliance with [the Model Statute] and this [Act], and any regulations promulgated pursuant thereto;
 - (D) (i) the name, address and telephone number of the financial institution where the Non-Participating Manufacturer has established such Qualified Escrow Fund required pursuant to [insert Model Statute citation] and all regulations promulgated thereto; (ii) the account number of such Qualified Escrow Fund and any sub-account number for [the state]; (iii) the amount such Non-Participating Manufacturer placed in such fund for Cigarettes sold in the State during the preceding calendar year, the date and amount of each such deposit, and such evidence or verification as may be deemed necessary by the [Commissioner / Attorney General] to confirm the foregoing; and (iv) the amount and date of any withdrawal or transfer of funds the Non-Participating Manufacturer made at any time from such fund or from any other Qualified Escrow Fund into which it ever made escrow payments pursuant to [Model Statute provision] 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, said 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, said Non-Participating Manufacturer affirms that the Brand Family is to be deemed to be its cigarettes for purposes of [Model Statute citation]. 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 [Model Statute citation].

- (5) Tobacco Product Manufacturers shall maintain all invoices and documentation of sales and other such information relied upon for such certification for a period of five years, unless otherwise required by law to maintain them for a greater period of time.
- (b) **DIRECTORY OF CIGARETTES APPROVED FOR STAMPING AND SALE.** Not later than ___ the [Commissioner / Attorney General] shall develop and [make available for public inspection] [publish on its website] a directory listing all Tobacco Product Manufacturers that have provided current and accurate certifications conforming to the requirements of subsection 3(a) and all Brand Families that are listed in such certifications (the "Directory"), except as noted below.
- (1) The [Commissioner] [Attorney General] shall not include or retain in such Directory the name or Brand Families of any Non-Participating Manufacturer that has failed to provide the required certification or whose certification the [Commissioner] [Attorney General] determines is not in compliance with subsections 3(a)(2) and (3), unless the [Commissioner] [Attorney General] has determined that such violation has been cured to the satisfaction of the [Commissioner] [Attorney General].
 - (2) Neither a Tobacco Product Manufacturer nor Brand Family shall be included or retained in the Directory if the [Attorney General] [Commissioner] concludes, in the case of a Non-Participating Manufacturer, that (i) any escrow payment required pursuant to [Model Statute provision] for any period for any Brand Family, whether or not listed by such Non-Participating Manufacturer, has 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) any outstanding final judgment, including interest thereon, for a violation of [Model Statute] has not been fully satisfied for such Brand Family or such manufacturer.
 - (3) The [Commissioner / Attorney General] shall update the Directory as necessary in order to correct mistakes and to add or remove a Tobacco Product Manufacturer or Brand Family to keep the Directory in conformity with the requirements of this [Act].
 - (4) Every [Stamping Agent] [Distributor] shall provide and update as necessary an electronic mail address to the [Commissioner/ Attorney General] for the purpose of receiving any notifications as may be required by this [Act].
- (c) **PROHIBITION AGAINST STAMPING OR SALE [OR IMPORT] OF CIGARETTES NOT IN THE DIRECTORY.** It shall be unlawful for any person (1) 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, (2) to sell, offer, or possess for sale, in this State, [or import for personal consumption in this State], Cigarettes of a Tobacco Product Manufacturer or Brand Family not included in the Directory.

Section 4. Agent for Service of Process.

- (a) REQUIREMENT FOR AGENT FOR SERVICE OF PROCESS. Any non-resident or foreign Non-Participating Manufacturer that has not registered to do business in the state as a foreign corporation or business entity shall, as a condition precedent to having its Brand Families included or retained in the Directory, appoint and continually engage without interruption the services of an agent in this State [in the United States] 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 the Act and [Model Statute], may be served in any manner authorized by law. Such 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 such agent to and to the satisfaction of the Commissioner and Attorney General.
- (b) The Non-Participating Manufacturer shall provide notice to the Commissioner and Attorney General thirty 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 five 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 Commissioner and Attorney General of said termination within five 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 Cigarettes are sold in this state, who has not appointed and engaged an agent as herein required, shall be deemed to have appointed the Secretary of State as such agent and may be proceeded against in courts of this state by service of process upon the Secretary of State; provided, however, that the appointment of the Secretary of State as such agent shall not satisfy the condition precedent for having the Brand Families of the Non-Participating Manufacturer included or retained in the Directory.]

Section 5. Reporting of Information; Escrow Installments.

- (a) REPORTING BY [STAMPING AGENTS] [DISTRIBUTORS]. Not later than 20 calendar days after the end of each calendar quarter, and more frequently if so directed by the [Commissioner / Attorney General], each [Stamping Agent] [Distributor] shall submit such information as the [Commissioner] [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 stamping agent [distributor] affixed stamps during the previous calendar [quarter] [month] or otherwise paid the tax due for such Cigarettes . The [Stamping Agent] [Distributor] shall maintain, and make available to the [Commissioner] [Attorney General], all invoices and documentation of sales of all Non-Participating Manufacturer Cigarettes and any other information relied upon in reporting to the [Commissioner] [Attorney General] for a period of 5 years.

- (b) **DISCLOSURE OF INFORMATION.** The [Commissioner] [Director] [Department] 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 Commissioner and Attorney General shall share with each other the information received under this Act, and may share such information with other federal, State or local agencies only for purposes of enforcement of this [Act], the [Model Statute], or corresponding laws of other states.
- (c) **VERIFICATION OF QUALIFIED ESCROW FUND.** The Attorney General may require at any time from the Non-Participating Manufacturer proof, from the financial institution in which such Manufacturer has established a Qualified Escrow Fund for the purpose of compliance with [the Model Statute], of the amount of money in such fund, exclusive of interest, the amount and date of each deposit to such fund, and the amount and date of each withdrawal from such fund.
- (d) **REQUESTS FOR ADDITIONAL INFORMATION.** In addition to the information required to be submitted pursuant to [], the [Commissioner/ Attorney General] may require a [stamping agent] [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) **[QUARTERLY] ESCROW INSTALLMENTS.** To promote compliance with this [Act], the [Commissioner / Attorney General] may promulgate regulations requiring a Tobacco Product Manufacturer subject to the requirements of subsection 3(a)(2) to make the escrow deposits required in [quarterly] installments during the year in which the sales covered by such deposits are made. The [Commissioner / Attorney General] may require production of information sufficient to enable the [Commissioner / Attorney General] to determine the adequacy of the amount of the installment deposit.

Section 6. Penalties and Other Remedies.

- (a) **LICENSE REVOCATION AND CIVIL PENALTY.** In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a [stamping agent] [distributor] [any person] has violated subsection 3(c) or any regulation adopted pursuant to this [Act], the director may revoke or suspend the

license of the [stamping agent] [distributor] in the manner provided by [insert appropriate statute]. Each stamp affixed and each sale or offer to sell Cigarettes in violation of subsection 3(c) shall constitute a separate violation. [For each violation hereof,] [T]he [Commissioner] [Director] may also impose a civil penalty in an amount not to exceed the greater of 500% of the retail value of the Cigarettes or \$5,000 upon a determination of violation of subsection 3(c) or any regulations adopted pursuant thereto. Such penalty shall be imposed in the manner provided by [insert appropriate statute].

- (b) **CONTRABAND AND SEIZURE.** 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 3(c) shall be deemed contraband under [insert citation to state code] and such Cigarettes shall be subject to seizure and forfeiture as provided in such section, and all such Cigarettes so seized and forfeited shall be destroyed and not resold.
- (c) **INJUNCTION.** The Attorney General, on behalf of the [Commissioner], may seek an injunction to restrain a threatened or actual violation of subsection 3(c), 5(a) or 5(d) by a [Distributor] [stamping agent] and to compel the [Distributor] 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) **UNLAWFUL SALE AND DISTRIBUTION.** 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 3(c). A violation of this section shall be a [class xx misdemeanor];
- (e) **[UNFAIR AND DECEPTIVE TRADE PRACTICE.** A person who violates subsection 3(c) engages in an unfair and deceptive trade practice in violation of [insert relevant provision]].

Section 7. Miscellaneous Provisions.

- (a) **NOTICE AND REVIEW OF DETERMINATION.** A determination of the [Commissioner / Attorney General] to not include or to remove from the Directory a Brand Family or Tobacco Product Manufacturer shall be subject to review in the manner prescribed by [insert citation to State administrative procedures act].
- (b) **[APPLICANTS FOR LICENSES.** No person shall be issued a license or granted a renewal of a license to act as a [distributor] [stamping agent] unless such person has certified in writing, [under penalty of perjury,] that such person will comply fully with this section.]

- (c) DATES. For the year 2003, if the effective date of this [Act] is later than March 16, 2003, the first report of [distributors] [stamping agents] required by subsection 5(a) shall be due 30 calendar days after such effective date; the certifications by a Tobacco Product Manufacturer described in subsection 3(a) shall be due 45 calendar days after such effective date; and the Directory described in subsection 3(b) shall be published or made available within 90 calendar days after such effective date.
- (d) PROMULGATION OF REGULATIONS. The [Commissioner] [Attorney General] may promulgate regulations necessary to effect the purposes of this [Act].
- (e) RECOVERY OF COSTS AND FEES BY ATTORNEY GENERAL. 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.
- (f) DISGORGEMENT OF PROFITS FOR VIOLATIONS OF ACT. 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 State Treasurer for deposit in the Tobacco Control Special Fund, which is hereby created]. 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.
- (g) [REVENUE. Some states *may* need to specify here a revenue source to pay for implementation of this act].
- (h) EMERGENCY CLAUSE.
- (i) [CONSTRUCTION & SEVERABILITY: If a court of competent jurisdiction finds that the provisions of this [Act] and of [the Model Statute] conflict and cannot be harmonized, then such provisions of [the Model Statute] shall control. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this [Act] causes the [the Model Statute] 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. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this [Act] is for any reason held to be invalid, unlawful or unconstitutional, such decision shall not affect the validity of the remaining portions of this [Act] or any part thereof.]

RPN/JK:WLj

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

LPS:
"Stamping agent"
should be
"distributor."

LPS:
"Non-Participating"
should be
"nonparticipating".

1 AN ACT ^{GEN} ...; relating to: *tobacco settlement agreement enforcement*

Analysis by the Legislative Reference Bureau
Preliminary →

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

2

(END)

MODEL COMPLEMENTARY LEGISLATION

[Bracketed provisions may be modified to meet state specific needs or conform to existing language.]

Section # Findings & Purpose CR; 895012K Certification under the tobacco settlement agreement No 11

[The General Assembly] [Legislature] finds that violations of [the Model Statute] threaten the integrity of the tobacco Master Settlement Agreement, the fiscal soundness of the state, and the public health. The legislature finds that enacting procedural enhancements will [help prevent violations] [aid the enforcement] of the Model Statute and thereby safeguard the Master Settlement Agreement, the fiscal soundness of the state, and the public health.]

Section 2 (1) (c) Definitions In this section:

(a) "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 words, 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.

(b) "Cigarette" has the same meaning as in [relevant provision from model statute] given S. 895.10 (1) (d) ✓

(c) "Commissioner" means the duly appointed or elected head of the agency responsible for collection of the excise tax on Cigarettes.

or ["Director" means the Director of the Department of Revenue];

or "Department" means the Department of Revenue for the state ✓

(d) "Distributor" means a person, wherever resident or located, who purchases non-tax-paid Cigarettes and stores, sells, or otherwise disposes of the Cigarettes. ~~This language or similar may be necessary for non-stamping states.~~

(e) "Master Settlement Agreement" has the same meaning as in [relevant provision from Model Statute] given S. 895.10 (1) (e) ✓

(f) "Non-participating Manufacturer" means any Tobacco Product Manufacturer that is not a Participating Manufacturer.

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

use (1)(c) here instead *

Moved to C1(Cd)

- (h) "Qualified Escrow Fund" has the same meaning as that term is defined in the Model Statute 5. 895.10 (1)(A) ^{given}
- (i) "Stamping Agent" or "Distributor" ^{of} ~~or similar such title that conforms to existing taxing and licensing language~~ means a person that is authorized to affix tax stamps to packages or other containers of Cigarettes ^{subchapter of ch. 139} under ~~insert citation to tax code~~ or any person that is required to pay the ~~excise tax or tobacco~~ tax imposed ~~pursuant to~~ ^{given} ~~insert statutory cite~~ on ~~Cigarettes~~ ^{tobacco products under subchapter of ch. 139}
- (j) "Tobacco Product Manufacturer" has the same meaning as that term is defined in the Model Statute 5. 895.10 (1)(i) ^{given}
- (k) "Units Sold" has the same meaning as that term is defined in the Model Statute 5. 895.10 (1)(j) ^{given}

Section 3. (2) Certifications; Directory; Tax Stamps

(a) CERTIFICATION. 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 or in the manner prescribed by the Attorney General Commissioner a certification to the Commissioner and Attorney General, no later than the thirtieth ^{30th} day of April each year, certifying under penalty of perjury that, as of the date of such certification, such Tobacco Product Manufacturer either is a Participating Manufacturer or is in full compliance with Model Statute citation including all quarterly installment payments required by insert appropriate citation or rule 5. 895.10 (2)(b) ^{department}

2 A Participating Manufacturer shall include in its certification a list of its Brand Families. The Participating Manufacturer shall update such list thirty ³⁰ calendar days prior to any addition to or modification of its Brand Families by executing and delivering a supplemental certification to the Attorney General and Commissioner ^{department}

3 A Non-Participating Manufacturer shall include in its certification a list of all of its Brand Families and the number of Units Sold for each Brand Family that were sold in the State during the preceding calendar year (ii) a list of 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 such certification, and (iv) identifying by name and address any other manufacturer of such Brand Families in the preceding or current calendar year. The Non-Participating Manufacturer shall update such list thirty ³⁰ calendar days before any addition to or modification of its Brand Families by executing and delivering a supplemental certification to the Attorney General and Commissioner ^{department}

A 4

under subd. 3

- 1. P a. A
- 2. P b. A
- 3. P c. Any
- 4. P d. The

5. In the case of a Non-Participating Manufacturer, such certification shall ~~also~~ ^{also} certify: all of the following

(A) a. That such Non-Participating Manufacturer is registered to do business in the state or has appointed a resident agent for service of process and provided notice thereof as required by Section 895.10 ^{sub. (3) b}

(B) b. That such Non-Participating Manufacturer ~~has~~ ^{has} established and continues to maintain a Qualified Escrow Fund, and ~~has~~ ^{has} executed a qualified escrow agreement that has been reviewed and approved by the Commissioner and the Attorney General and that governs the Qualified Escrow Fund

(C) c. That such Non-Participating Manufacturer is in full compliance with [the Model Statute] and this [Act], and any regulations promulgated pursuant thereto 5. 895.10 section

(D) d. ~~the~~ ^{the} name, address, and telephone number of the financial institution where the Non-Participating Manufacturer has established such the Qualified Escrow Fund required pursuant to [insert Model Statute citation] and all regulations promulgated thereto; (i) the account number of such Qualified Escrow Fund and any sub-account number for the state; (ii) the amount such Non-Participating Manufacturer placed in such fund for Cigarettes sold in the State during the preceding calendar year, the date and amount of each such deposit, and such evidence or verification as may be deemed necessary by the Commissioner and Attorney General to confirm the foregoing; and (iv) the amount and date of any withdrawal or transfer of funds the Non-Participating Manufacturer made at any time from such fund or from any other Qualified Escrow Fund into which it ever made escrow payments pursuant to [Model Statute provision] and all regulations promulgated thereto 5. 895.10 (2)(b) v

0 P F. The

0 P G. The

(6) A Tobacco Product Manufacturer may not include a Brand Family in its certification unless (i) in the case of a Participating Manufacturer, said Participating Manufacturer affirms that the Brand Family is to be deemed to 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, said Non-Participating Manufacturer affirms that the Brand Family is to be deemed to be its cigarettes for purposes of [Model Statute citation]. 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

constitutes

0 P 70 A

5. 895.10

may not include a brand family in its certification unless it

under subd 5.

S. P95.10

for purposes of Model Statute citation

9. Tobacco Product Manufacturers shall maintain all invoices and documentation of sales and other such information relied upon for such the certification for a period of ~~five~~ 5 years, unless otherwise required by law to maintain them for a greater period of time.

PAR. STATO KAN (a)

(b) DIRECTORY OF CIGARETTES APPROVED FOR STAMPING AND SALE. Not later than ~~the~~ the ~~Commissioner~~ Attorney General shall develop and make available for public inspection ~~publish on its website~~ a directory listing all Tobacco Product Manufacturers that have provided current and accurate certifications conforming to the requirements of subsection 3(a) and all Brand Families that are listed in such certifications ~~the~~ Directory, except as ~~noted below~~ follows:

the first day of the 4th month after the effective date of this ~~act~~ ^{paragraph} ~~...~~ [revisor inserts date]

1. The ~~Commissioner~~ Attorney General shall not include or retain in such the Directory the name or Brand Families of any Non-Participating Manufacturer that has failed to provide the required certification or whose certification the ~~Commissioner~~ Attorney General determines is not in compliance with subsections 3(a)(2) and (3), unless the ~~Commissioner~~ Attorney General has determined that such violation has been cured to the satisfaction of the ~~Commissioner~~ Attorney General.

PAR STATO KAN (a) 30 to 30

under S. P95.10 (2)(b)

2. Neither a Tobacco Product Manufacturer nor Brand Family shall be included or retained in the Directory if the ~~Attorney General~~ ~~Commissioner~~ concludes, in the case of a Non-Participating Manufacturer, that ~~(a)~~ any escrow payment required pursuant to ~~Model Statute provision~~ for any period for any Brand Family, whether or not listed by such Non-Participating Manufacturer, has not been fully paid into a Qualified Escrow Fund governed by a qualified escrow agreement that has been approved by the Attorney General, ~~or (b)~~ outstanding final judgment, including interest thereon, for a violation of ~~Model Statute~~ has not been fully satisfied for such Brand Family or ~~such~~ manufacturer.

of the following apply Pa. An

OPb. Ang

S. P95.10

3. The ~~Commissioner~~ Attorney General shall update the Directory as necessary in order to correct mistakes and to add or remove a Tobacco Product Manufacturer or Brand Family to keep the Directory in conformity with the requirements of this ~~act~~ paragraph.

Leave for JK to fix

4. Every ~~Stamping Agent~~ Distributor shall provide and update as necessary an electronic mail address to the ~~Commissioner~~ Attorney General for the purpose of receiving any notifications as may be required by this ~~act~~ section.

(c) PROHIBITION AGAINST STAMPING OR SALE ~~OR IMPORT~~ OF CIGARETTES NOT IN THE DIRECTORY. It shall be unlawful for any person 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, ~~for import for personal consumption in this State,~~ Cigarettes of a Tobacco Product Manufacturer or Brand Family not included in the Directory.

~~Section 4~~ (3) Agent for Service of Process. (No ff) *(I not caps)*

under sub (2) (b)

(a) REQUIREMENT FOR AGENT FOR SERVICE OF PROCESS. 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 included or retained in the Directory, appoint and continually engage ~~without interruption~~ the services of an agent in this State ~~in the United States~~ 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 ~~the Act and Model Statute~~, may be served in any manner authorized by law. ~~Such~~ ^{that} 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 such agent to ~~and to the satisfaction of the Commissioner and Attorney General~~.

this section and s. 895.10

(b) The Non-Participating Manufacturer shall provide notice to the ~~Commissioner and Attorney General~~ ^{department} ~~thirty~~ ^{under par. (a)} 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 ~~five~~ ^{before} 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 ~~Commissioner and Attorney General~~ ^{department} of said ~~that~~ termination within ~~five~~ ^{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 Cigarettes are sold in this state, who has not appointed and engaged an agent as ~~herein~~ ^(in this subsection) required, shall be deemed to have appointed the Secretary of State as ~~such~~ ^{that} agent and may be proceeded against in courts of this state by service of process upon the Secretary of State ^{provided, however, that} the appointment of the Secretary of State as ~~such~~ ^{that} agent shall not satisfy the condition precedent for having the Brand Families of the Non-Participating Manufacturer included or retained in the Directory. ^{under sub. (2) (a)}

considered

~~Section 4~~ (4) Reporting of Information; Escrow Installments. (No ff) *(I not caps)*

department

(a) REPORTING BY ~~STAMPING AGENTS~~ ^{department} DISTRIBUTORS. Not later than 20 calendar days after the end of each calendar quarter, and more frequently if so directed by the ~~Commissioner~~ ^{department} Attorney General, each ~~Stamping Agent~~ ^{department} Distributor shall submit such information as the ~~Commissioner~~ ^{department} 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~~

Department

section

tobacco those
roll-your-own the equivalent stick count, for which the ~~stamping agent~~ distributor affixed stamps during the previous calendar ~~quarter~~ ~~month~~ or otherwise paid the tax due for such Cigarettes. The ~~Stamping Agent~~ ~~Distributor~~ shall maintain, and make available to the ~~Commissioner~~ ~~Attorney General~~, all invoices and documentation of sales of all ~~Non-Participating Manufacturer Cigarettes~~ and any other information relied upon in reporting to the ~~Commissioner~~ ~~Attorney General~~ for a period of 5 years.

- 9 section Department*
- (b) DISCLOSURE OF INFORMATION. The ~~Commissioner~~ ~~Director~~ Department 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 ~~Commissioner~~ and Attorney General shall share with each other the information received under this ~~Act~~, and may share such information with other federal, State or local agencies only for purposes of enforcement of this ~~Act~~, ~~the Model Statute~~, or corresponding laws of other states.
- section*
- (c) VERIFICATION OF QUALIFIED ESCROW FUND. The Attorney General may require at any time from the ~~Non-Participating Manufacturer~~ proof, from the financial institution in which ~~such~~ ~~Manufacturer~~ has established a Qualified Escrow Fund for the purpose of compliance with ~~the Model Statute~~, of the amount of money in ~~such~~ fund, exclusive of interest, the amount and date of each deposit to ~~such~~ fund, and the amount and date of each withdrawal from ~~such~~ fund.
- section*
- (d) REQUESTS FOR ADDITIONAL INFORMATION. In addition to the information required to be submitted ~~pursuant to~~, the ~~Commissioner~~ ~~Attorney General~~ may require a ~~Stamping agent~~ ~~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~~.
- section*
- (e) QUARTERLY ESCROW INSTALLMENTS. To promote compliance with this ~~Act~~, the ~~Commissioner~~ ~~Attorney General~~ may promulgate ~~regulations~~ requiring a Tobacco Product Manufacturer subject to the requirements of ~~subsection (a)(2)~~ to make the escrow deposits required in ~~quarterly~~ installments during the year in which the sales covered by such deposits are made. The ~~Commissioner~~ ~~Attorney General~~ may require production of information sufficient to enable the ~~Commissioner~~ ~~Attorney General~~ to determine the adequacy of the amount of the installment deposit.

(B)
(5)
Section 6.

Penalties and Other Remedies. *No ff* *sub. (2) (c)*

- (a) LICENSE REVOCATION AND CIVIL PENALTY. In addition to or in lieu of any other civil or criminal remedy ~~provided by law~~, upon a determination that a ~~Stamping agent~~ ~~distributor~~ ~~any person~~ has violated ~~subsection 3(c)~~ or any ~~regulation adopted pursuant to this Act~~, the ~~Director~~ Department may revoke or suspend the
- Department*

Subo (2) (c) ✓ the department
license of the ~~[stamping agent]~~ distributor in the manner provided by ~~[insert appropriate statute]~~. Each stamp affixed and each sale or offer to sell Cigarettes in violation of ~~subsection 3(e)~~ shall constitute a separate violation. For each violation hereof, ~~[The Commissioner]~~ ~~[Director]~~ may also impose a civil penalty in an amount not to exceed the greater of 500% of the retail value of the Cigarettes or \$5,000, upon a determination of violation of ~~subsection 3(e)~~ or any regulations adopted pursuant thereto. Such penalty shall be imposed in the manner provided by ~~[insert appropriate statute]~~. JK

(b) CONTRABAND AND SEIZURE. 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 3(e)~~ shall be deemed contraband ~~under [insert citation to state code]~~ and such Cigarettes shall be subject to seizure and forfeiture as provided in ~~such~~ section, and all such Cigarettes so seized and forfeited shall be destroyed and not resold. sub. (2) (c) ✓

(c) INJUNCTION. The Attorney General, on behalf of the ~~Commissioner~~ department, may seek an injunction to restrain a threatened or actual violation of ~~subsection 3(a), 3(a)-3(c)~~ by a ~~Distributor~~ ~~[stamping agent]~~ and to compel the ~~Distributor~~ ~~[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. department

(d) UNLAWFUL SALE AND DISTRIBUTION. It shall be unlawful for a person to ~~sell or distribute Cigarettes~~ or ~~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 3(e)~~. A violation of this section shall be a ~~Class A misdemeanor~~ ... [JK?] sub. (2) (c) ✓

(e) UNFAIR AND DECEPTIVE TRADE PRACTICE. A person who violates ~~subsection 3(e)~~ engages in an unfair and deceptive trade practice in violation of ~~[insert relevant provision]~~. sub. (2) (c) ✓

Section 7. Miscellaneous Provisions.

(6) NOTICE AND REVIEW OF DETERMINATION. A determination of the ~~Commissioner~~ Attorney General to not include or to remove from the Directory a Brand Family or Tobacco Product Manufacturer shall be subject to review in the manner prescribed by ~~[insert citation to State administrative procedures act]~~ under ch. 227 CS

(7) APPLICANTS FOR LICENSES. No person shall be issued a license or granted a renewal of a license to act as a ~~distributor~~ ~~[stamping agent]~~ unless such person has certified in writing, ~~under penalty of perjury~~, that ~~such~~ person will comply fully with this section. CS

sub. (2)(a)

sub of this section Revisor inserts date Sub. (4)(a)

(8) (P)

DATES. For the year 2003, if the effective date of this ~~Act~~ is later than March 16, 2003, the first report of ~~distributors~~ ~~stamping agents~~ required by ~~subsection 3(a)~~ shall be due 30 calendar days after such effective date; the certifications by a Tobacco Product Manufacturer described in ~~subsection 3(a)~~ shall be due 45 calendar days after such effective date; and the Directory described in ~~subsection 3(b)~~ shall be published or made available within 90 calendar days after such effective date.

(9) (B)

PROMULGATION OF REGULATIONS. The ~~Commissioner~~ ~~Attorney General~~ may promulgate regulations necessary to effect the purposes of this ~~Act~~ ~~Section~~.

(10) (B)

RECOVERY OF COSTS AND FEES BY ATTORNEY GENERAL. 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.

(11) (B)

DISGORGEMENT OF PROFITS FOR VIOLATIONS OF ACT. 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 State Treasurer for deposit in the Tobacco Control Special Fund, which is hereby created~~. 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

(g) [REVENUE. Some states may need to specify here a revenue source to pay for implementation of this act].

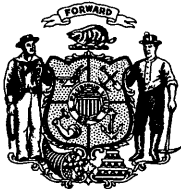
(h) EMERGENCY CLAUSE.

(12) (B)

CONSTRUCTION. If a court of competent jurisdiction finds that the provisions of this ~~Act~~ and of ~~the Model Statute~~ conflict and cannot be harmonized, then such provisions of ~~the Model Statute~~ shall control. If any ~~section, subsection, subdivision, paragraph, sentence, clause or phrase~~ of this ~~Act~~ causes ~~the Model Statute~~ 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. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this [Act] is for any reason held to be invalid, unlawful or unconstitutional, such decision shall not affect the validity of the remaining portions of this [Act] or any part thereof.

50895.00

(END)



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-1840/P1
RPN&JK:wlj:ab

2

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

REGEN

1 AN ACT *to create* 895.12 of the statutes; relating to: tobacco settlement
2 agreement enforcement *and providing penalties*

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

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

3 SECTION 1. 895.12 of the statutes is created to read:

4 **895.12 Certification under the tobacco settlement agreement.**

5 (1) DEFINITIONS. In this section:

6 (a) "Brand family" means all styles of cigarettes sold under the same trademark
7 and differentiated from one another by means of additional modifiers or descriptors,
8 including ~~but not limited to~~ "menthol," "lights," "kings," and "100s," and includes
9 any brand name, alone or in conjunction with any other word; trade mark; logo;
10 symbol; motto; selling message; recognizable pattern of colors; or other indicia of

SECTION 1

1 product identification identical or similar to, or identifiable with, a previously known
2 brand of cigarettes.

3 (b) “Cigarette” has the meaning given in s. 895.10 (1) (d).[✓]

4 (c) “Department” means the department of revenue.

5 (d) “Distributor” means a person that is authorized to affix tax stamps to
6 packages or other containers of cigarettes under subch. II of ch. 139[✓] or any person
7 that is required to pay the tax imposed on tobacco products under subch. III of ch.
8 139.[✓]

9 (e) “Master settlement agreement” has the meaning given in s. 895.10 (1) (e).[✓]

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

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

14 (h) “Qualified escrow fund” has the meaning given in s. 895.10 (1) (f).[✓]

15 (j) “Tobacco product manufacturer” has the meaning given in s. 895.10 (1) (i).[✓]

16 (k) “Units sold” has the meaning given in s. 895.10 (1) (j).[✓]

17 (2) CERTIFICATIONS; DIRECTORY; TAX STAMPS.

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

1 2. A participating manufacturer shall include in its certification a list of its
 2 brand families. The participating manufacturer shall update that list ^{at least} 30 calendar
 3 days prior to any addition to or modification of its brand families by executing and
 4 delivering a supplemental certification to the ^{department and} attorney general ^{and the department}.

5 3. A nonparticipating manufacturer shall include all of the following in its
 6 certification:

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

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

11 c. ^{A list of} Any brand family ^{ies} sold in the state during the preceding calendar year that
 12 ^{is} no longer being sold in the state as of the date of such certification.

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

15 4. The nonparticipating manufacturer shall update the list under subd. 3. ^{at least} 30
 16 calendar days before any addition to or modification of its brand families by
 17 executing and delivering a supplemental certification to the ^{department and} attorney general ^{and the}

18 ^{department}

19 5. The nonparticipating manufacturer shall ^{further} certify all of the following:

20 a. That the nonparticipating manufacturer is registered to do business in the
 21 state or has appointed an agent for service of process and provided notice of that
 22 appointment as required by sub. (3).[✓]

23 b. That the nonparticipating manufacturer has established and continues to
 24 maintain a qualified escrow fund, ^{and} has executed a qualified escrow agreement

1 that has been reviewed and approved by the attorney general and that governs the
2 qualified escrow fund.

3 c. That the nonparticipating manufacturer is in full compliance with ^{this section and} s. 895.10[✓]

4 ~~and this section~~

5 d. The name, address, and telephone number of the financial institution where
6 the nonparticipating manufacturer has established the qualified escrow fund
7 required under s. 895.10 (2) (b).[✓]

8 e. The account number of the qualified escrow fund and any subaccount
9 number for the state.

10 f. The amount the nonparticipating manufacturer placed ^{to} in the fund for
11 cigarettes sold in the state during the preceding calendar year, the date and amount
12 of each deposit, and any evidence or verification as required by the attorney general.

13 g. The amount and date of any withdrawal or transfer of funds the
14 nonparticipating manufacturer made at any time from the fund or from any other
15 qualified escrow fund into which it ever made escrow payments ^{under} pursuant ~~to~~ s. 895.10
16 (2) (b).[✓]

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

22 7. A nonparticipating manufacturer may not include a brand family in its
23 certification unless it affirms that the brand family constitutes its cigarettes for
24 purposes of s. 895.10.[✓]

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

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

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

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

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

23 a. An escrow payment required under s. 895.10 (2) (b) for any period for any
24 brand family, whether or not listed by such nonparticipating manufacturer, has not

1 been fully paid into a qualified escrow fund governed by a qualified escrow
2 agreement that has been approved by the attorney general.

3 b. Any outstanding final judgment, including interest ^{on that judgment} ~~thereon~~, for a violation
4 of s. 895.10 [↓] has not been fully satisfied for the brand family or manufacturer.

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

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

11 (c) *Prohibition against stamping or sale of cigarettes not in the directory.* It shall
12 be unlawful for any person to affix a stamp to a package or other container of
13 cigarettes of a tobacco product manufacturer or brand family not included in the
14 directory or to sell, ^{or} offer or possess for sale, in this state cigarettes of a tobacco
15 product manufacturer or brand family not included in the directory.

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

1 phone number, and proof of the appointment and availability of the agent to the
2 attorney general.

3 (b) ^{(1) Notification of termination of agent} The nonparticipating manufacturer shall provide notice to the department
4 and attorney general 30 calendar days ^{before} ~~prior to~~ termination of the authority of an
5 agent under par. (a) and shall provide proof to the satisfaction of the attorney general
6 of the appointment of a new agent no less than 5 calendar days before the
7 termination of an existing agent appointment. In the event an agent terminates an
8 agency appointment, the nonparticipating manufacturer shall notify the
9 department and attorney general of that termination within 5 calendar days and
10 shall include proof to the satisfaction of the attorney general of the appointment of
11 a new agent.

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

19 ^b
~~(a)~~.

20 (4) REPORTING OF INFORMATION; ESCROW INSTALLMENTS. (a) *Reporting by*
21 *distributors.* Not later than 20 calendar days after the end of each calendar quarter,
22 and more frequently if so directed by the department, each distributor shall submit
23 ^{a report that includes any} ~~such~~ information ^{as} ~~as~~ the department requires to facilitate compliance with this
24 section, including a list by brand family of the total number of cigarettes, or, in the
25 case of roll-your-own tobacco, the equivalent stick count, for which the distributor

SECTION 1

1 affixed stamps during the previous calendar quarter or otherwise paid the tax due
2 for those cigarettes. The distributor shall maintain, and make available to the
3 department, all invoices and documentation of sales of all nonparticipating
4 manufacturer cigarettes and any other information relied upon in reporting to the
5 department for a period of 5 years.

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

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

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

1 (e) *Quarterly escrow installments.* To promote compliance with this section, the
2 attorney general may promulgate rules requiring a tobacco product manufacturer
3 subject to the requirements of sub. (2) (a) 3. to make the escrow deposits required in
4 quarterly installments during the year in which the sales covered by such deposits
5 are made. The attorney general may require production of information sufficient to
6 enable the attorney general to determine the adequacy of the amount of the
7 installment deposit.

under s. 139.44 (4) and (7)

8 (5) PENALTIES AND OTHER REMEDIES.

9 (a) *License revocation and civil penalty.* In addition to or in lieu of any other
10 civil or criminal remedy upon a determination that a distributor has violated sub.
11 (2) (c), the department may revoke or suspend the license of the distributor in the
12 manner provided by ~~the~~ ^{the} ~~insert~~ ^{insert} appropriate statute. Each stamp affixed and each
13 sale or offer to sell cigarettes in violation of sub. (2) (c) shall constitute a separate
14 violation. For each violation the department may also impose a ~~civil penalty~~ ^{forfeiture} in an
15 amount not to exceed the greater of 500% of the retail value of the cigarettes or
16 \$5,000.

17 (b) *Contraband and seizure.* Any cigarettes that have been sold, offered for
18 sale, or possessed for sale, in this state, in violation of sub. (2) (c) shall be deemed
19 contraband and such cigarettes shall be subject to seizure and forfeiture as provided
20 in section ~~and~~ ^{and} all such cigarettes ^{that are} seized and forfeited shall be destroyed and
21 not resold. ^{under s. 139.40}

22 (c) *Injunction.* The attorney general, on behalf of the department, may seek an
23 injunction to restrain a threatened or actual violation of sub. (2) (c) or (4) (a) or (d) ^{failure to comply with}
24 by a distributor and to compel the distributor to comply with those subsections. ^{sub.}

No. 11

Section 139.44 (7) as it applies to violations under subchs. II and III of ch. 139, applies to a

any action brought under this section, the state shall be entitled to recover the costs of investigation and prosecutions, costs of the action, and reasonable attorney fees.

(d) *Unlawful sale and distribution.* It shall be unlawful for a person to sell or distribute cigarettes or 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 sub. (2) (c). A violation of this paragraph shall be a... [DK?]

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

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

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

(8) DATES. For the year 2003, if the effective date of this subsection is later than March 16, 2003, the first report of distributors required by sub. (4) (a) shall be due 30 calendar days after the effective date of this subsection [revisor inserts date]; the certifications by a tobacco product manufacturer described in sub. (2) (a) shall be due 45 calendar days after that effective date; and the directory described in sub. (2) (b) shall be published or made available within 90 calendar days after that effective date.

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

rules

1 (10) RECOVERY OF COSTS AND FEES BY ATTORNEY GENERAL. In any action brought
 2 by the state to enforce this section, ^{including an action under sub. (5)(c)} the state shall be entitled to recover the costs of
 3 investigation, ^{and prosecution} expert witness fees, ^{costs of the action} ~~costs of the action~~, and reasonable attorney fees.

4 (11) ~~DISBURSEMENT~~ ^{Transfer} OF PROFITS FOR VIOLATIONS. If a court determines that a
 5 person has violated this section, the court shall order any profits, gain, gross receipts,
 6 or other benefit from the violation to be ~~disbursed~~ ^{Transferred} and paid to the state. Unless
 7 otherwise expressly provided, the remedies or penalties provided by this section are
 8 cumulative ^{to each other} and to the remedies or penalties available under all other
 9 laws of this state.

10 (12) CONSTRUCTION. If a court finds that the provisions of this section and of s.
 11 895.10 conflict and cannot be harmonized, then the provisions of s. 895.10 shall
 12 control. If any part of this section causes s. 895.10 to no longer constitute a qualifying
 13 or model statute, as those terms are defined in the master settlement agreement,
 14 then that portion of this section is not valid.

15 (END)



Daniel P. Vrakas

Wisconsin State Representative

Majority Caucus Chair

Assembly Chair: Joint Survey Committee on Retirement Systems
Vice-Chair: Assembly Committee on Labor and Workforce Development
Member: State Building Commission

TO: Joe Kreye

FROM: Bonnie, Rep. Vrakas's office

RE: LRB 1840

DATE: May 8, 2003

Joe: Attached is the amendment that Kelly McDowell has requested. The change is the first page only, the rest is an explanation that I didn't know if you would need or not.

As we discussed on the phone, we would like to see this draft completed ASAP as we would like to get it out for co-sponsorship and get moving on this.

Call if you have any questions, 6-3007, but please know that I am on vacation all next week so if you have questions I would call Kelly McDowell at 259-1212, ext. 2. She works for Martin Schreiber and Associates and has requested us to work on this legislation for her. I am fairly certain you have talked with her about this already.

Thanx!!!

March, 2003

**CHANGES TO THE ALLOCABLE SHARE PROVISION
OF THE MODEL ESCROW STATUTE**

GETTING THE FACTS

WHY IS THIS LEGISLATION IMPORTANT?

Enactment of the proposed change to the Model Escrow Statute is necessary to prevent the undermining of cost shifting and reduction of teenage smoking goals of the Tobacco Master Settlement Agreement (MSA). The Model Escrow Statute was enacted to ensure that Settling States would receive the benefits of the MSA and that companies that refused to enter into the MSA would not thereby be able to profit unfairly from such refusal. A loophole in the current law has permitted some companies that refused to join the MSA to avoid any significant responsibility under the Model Escrow Statute. This amendment is designed to ensure that the Model Escrow Statutes operate evenhandedly as originally intended, thereby advancing the legitimate health and safety goals contemplated by the MSA.

REMIND ME ABOUT THE MSA. HOW DID WE GET HERE?

The MSA was executed on November 23, 1998 by 52 Settling States with the major tobacco companies and numerous smaller manufacturers (collectively known as "Participating Manufacturers" or "PMs"). The MSA provides that in exchange for the agreement of the PMs to make specified payments to the Settling States -- estimated to exceed \$200 billion through 2025 -- and their agreement to abide by extensive public health restrictions on the advertising, promotion and marketing of cigarettes, the Settling States agreed to release the PMs from claims by the States. Tobacco Product Manufacturers that did not sign the MSA ("Non-Participating Manufacturers" or "NPMs") were not released from potential State claims and did not undertake any of the payment obligations or agree to abide by the public health restrictions.

The MSA included a proposed "Model Statute" designed to prevent NPMs from taking advantage of the fact that they do not make payments under the MSA and are not bound by the public health, advertising and other MSA restrictions. The Model Statute requires all NPMs whose cigarettes are sold in a State to establish and annually fund a qualified escrow account in an amount determined by the sales volume in the State. Funds deposited in the escrow account are released to the NPM after 25 years if not used before then to pay a judgment in favor of the State against the NPM. All Settling States enacted a Model Escrow Statute.

WHAT ARE THE PURPOSES OF THE MODEL ESCROW STATUTE?

In the MSA the States released their claims against companies that joined the MSA and that thereby agreed to make MSA payments and abide by the public health provisions of the MSA. As noted, companies that chose not to join the MSA were not released from claims by the States. They do not make MSA payments and they are not required to abide by the public health provisions of the MSA. There was a concern, however, that NPMs could sell cigarettes in the States, take advantage of the fact that they did not have to bear the cost of making MSA payments or abide by the public health

provisions of the MSA, yet be unable to satisfy judgments that the States might eventually obtain for the costs imposed upon them as a result of these sales. The Model Escrow Statute is designed to ensure that there will be a fund available to satisfy State claims in the event the State obtains a judgment against an NPM. In addition, under the MSA, Settling States that enact and "diligently enforce" a Model Escrow Statute are not subject to certain potential downward adjustments to their MSA payments.

HOW DOES THE MODEL ESCROW STATUTE WORK?

The Model Escrow Statute requires an NPM to make escrow deposits on its cigarettes sold in a Settling State at a set figure per cigarette sold (approximately 1.5¢ for sales in 2002). As noted, the deposits remain the property of the NPM and the NPM earns currently-payable interest on them, but they must remain in escrow for twenty-five years in order to be available to meet potential State claims. In order to fairly estimate the sum necessary to satisfy any potential judgment a State may obtain, the NPM escrow obligation is calculated to approximate the MSA payment on a per-cigarette basis (and does so almost precisely).

HOW HAVE THE PURPOSES OF THE MODEL ESCROW STATUTE BEEN SUBVERTED BY THE CURRENT ALLOCABLE SHARE RELEASE PROVISION?

A provision of the Model Escrow Statute permits an NPM to obtain a release of funds from escrow "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 under the MSA...." Experience in several states has shown that this provision enables NPMs that concentrate their sales in a single state or a few states to obtain early releases of the great majority of their escrow deposits. This outcome was never contemplated and threatens to undermine the effectiveness of the Model Escrow Statutes. Escrow funds so minimized are not adequate to provide security to the States nor do they prevent unfair profit taking.

HOW DOES THE CURRENT ALLOCABLE SHARE RELEASE PROVISION SUBVERT THE PURPOSES OF THE MODEL STATUTE?

By way of example, consider an NPM that makes all its sales -- 100 million cigarettes -- in a state whose allocable share of MSA payments is two percent. Under the current statute, an NPM may be entitled to a release of the portion of its escrow deposit that exceeds the amount of what would have been the State's allocable share of the NPM's total MSA payment had it been an MSA participant. Under this example, because the NPM makes all its sales in a single State and because the escrow deposit per cigarette and the MSA payment per cigarette are approximately the same, the NPM's (hypothetical) total MSA payment is the same as its escrow deposit. However, because the State's allocable share of the total MSA payment is only two percent, under current law the NPM would be entitled to a release of its entire escrow deposit in excess of two percent. In other words, although the NPM sold 100 million cigarettes in the State, the amount it would have to leave in escrow would be based on only 2 million cigarettes. Accordingly, some NPMs that sell large numbers of cigarettes in a given State are not being required to keep significant funds in escrow in that State despite the volume of cigarette sales that continue to impose substantial health and other costs on that State. This outcome frustrates the fundamental objective of the Model Statute.

As the example demonstrates, the current provision permits an NPM that has geographically concentrated sales to obtain a refund of the vast majority of its escrow deposits. This allows the NPM to significantly lower the cost of its cigarettes, because the NPM is not escrowing its full share of the future healthcare burden that its product imposes on the State. In lowering the cost, the NPM presents a product that is very attractive to youth, who tend to be more price-sensitive than adults. People that start smoking as minors are much more likely to become daily smokers, and eventually become a healthcare burden on the State. Again, an outcome not intended by the Model Statute.

HOW DOES THE PROPOSED AMENDMENT REMEDY THE PROBLEM?

The proposed amendment to the Model Escrow Statute eliminates the unintended consequence of the original language that has compromised the law's effectiveness. The amendment is necessary to accomplish the fundamental purpose of the law: to ensure that every NPM is required to post escrows for sales of its cigarettes in the State that provide a meaningful fund from which the State can recover damages in the event it obtains a judgment against the NPM.

This first part of the amendment would limit releases from escrow accounts to any amounts paid into escrow in excess of the MSA payments **that the NPM would have been required to make as a PM on account of cigarettes sold in the State for a particular year.** Thus, under the amendment the MSA payments relevant to release would not be limited to a State's allocable share of the NPM's (hypothetical) total MSA payments, but rather would be the NPM's MSA payments on the same number of cigarettes as are sold in the State. In other words, under the above example where the NPM sells 100 million cigarettes in a State, the NPM under the amendment would be entitled to a release only to the extent that its escrow payment exceeded what would have been its MSA payment on these 100 million cigarettes.

WEREN'T STATES TOLD THEY WERE NOT SUPPOSED TO AMEND THE MODEL STATUTE?

NO. If a State's escrow statute contains a modification or addition to the Model Escrow Statute that is attached as an Exhibit to the MSA, the State's escrow statute may not serve to exempt the State from certain potential downward adjustments in MSA payments. The proposed amendment should not constitute such a modification or addition. In any event, the PMs with the greatest incentive to assert that the proposed amendment does constitute such a modification or addition because they pay the most under the MSA, i.e. the Original Participating Manufacturers ("OPMs") and the largest Subsequent Participating Manufacturers ("SPMs"), have all signed letters of assurance that the amendment will not affect the ability of the Model Escrow Statutes to protect the States from any potential downward adjustments in MSA payments. In fact, the amendment strengthens the Model Escrow Statute by eliminating the unintended means of allowing only certain NPMs to have an unfair competitive advantage.

The amendment is consistent with the purposes of the Model Escrow Statute: it sharply reduces the ability of an NPM to minimize its payments by concentrating its sales in one or two states and it sharply reduces the unintended disparity created by the current Model Escrow Statute.

WHAT HAPPENS IF THE AMENDMENT IS CHALLENGED AS UNCONSTITUTIONAL?

There is no significant risk of the proposed amendment being held unconstitutional. The Model Escrow Statute, or versions identical to it in other states, has been challenged in several lawsuits, and has consistently been upheld as a valid enactment. For example, in Star Scientific Inc. v. Beales, 278

F.3d 339 (4th Cir.), cert. denied, 123 S.Ct. 93 (2002), the Fourth Circuit Court of Appeals held that Virginia's statute was constitutional under the Equal Protection, Due Process, and Commerce Clauses. In none of these lawsuits has a court suggested that the aspect of the statute that the proposed legislation would amend is necessary to its constitutionality.

Moreover, in the unlikely event the amendment were challenged and struck down as unconstitutional, there exists a "back-up provision" which eliminates the paragraph dealing with the allocable share release in its entirety. Should the Model Escrow Statute thereafter be held to be unconstitutional because of the ABSENCE of the allocable share release paragraph, then the original Model Escrow Statute allocable share release language would be restored. As a result, in the extremely unlikely event that BOTH alternative changes (i.e., eliminating the loophole, and eliminating the release paragraph altogether) are held unconstitutional, the Statute would be restored to its original constitutionally upheld position. This "revival" provision is a general rule that exists in every state – namely if an unconstitutional amendment is passed, the law is restored to its prior condition. (Think of it this way: If you amend your assault statute, and the amendment is held to be unconstitutional, assault doesn't suddenly become legal. Rather, the law is restored to its original position, because the unconstitutional change is deemed to be a nullity.)

WILL PASSAGE OF THE AMENDMENT PUT AT RISK MY STATE'S MSA PAYMENTS?

NO. Passing the amendment will NOT jeopardize a State's MSA payments. The only parties that could make such a challenge are parties to the MSA. As noted, the parties that make the preponderance of the payments have signed letters of assurance that the amendment will not affect the salutary effect of the Model Escrow Statutes. Companies that want to maintain an unfair competitive advantage may try to scare States with misinformation so that they can continue to profit by exploiting the loophole in the current statute. States that enact the amendment will ensure that NPMs who sell in their States make escrow deposits as originally intended.

HOW WILL THIS AMENDMENT PROTECT PUBLIC HEALTH?

Studies have repeatedly demonstrated that cheap cigarettes are favored by youth, who tend to be more price-sensitive than adults. By ensuring that NPM cigarette prices include some of the cost burden imposed on the State, this amendment will maintain the price of NPM cigarettes at a higher level and help discourage another generation of minors from becoming addicted to cigarettes.

WILL THE PROPOSAL HAVE A FISCAL IMPACT?

The proposed amendment would likely be "revenue neutral." Escrow deposits do not constitute state revenues; they remain the property of the NPM. However, the legislation would likely result in a reduction in the administrative costs of enforcing the Model Escrow Statute because there would be fewer requests for releases from escrow for the State to process. Moreover, should the State obtain a judgment against an NPM to recover the health care costs imposed on the State by the NPM's products, the proposed legislation would enhance the State's ability to recover that judgment.

WHO SUPPORTS THE AMENDMENT?

The 52 Settling States under the MSA, all of the Original Participating Manufacturers and all of the largest Subsequent Participating Manufacturers. The proposed amendment has been endorsed by the Tobacco Committee of the National Association of Attorneys General.

THE FACTS ON THE ALLOCABLE SHARE AMENDMENT – [BILL #]

PURPOSE OF THE LEGISLATION

This bill would close a loophole in the Model Escrow Statute that has enabled NPMs to avoid making significant escrow payments.

WHY IS THIS LEGISLATION IMPORTANT?

The Model Escrow Statute was enacted to ensure that Settling States would receive the benefits of the MSA and to prevent companies that refused to enter into the MSA from profiting unfairly as a result. A loophole in the current law has permitted some companies that refused to join the MSA to avoid any significant responsibility under the State's Escrow Statute. This amendment is designed to ensure that the Model Escrow Statutes operate evenhandedly as intended, thereby advancing the legitimate health and safety goals contemplated by the MSA.

WHAT ARE THE PURPOSES OF THE MODEL ESCROW STATUTE?

Companies that chose not to join the MSA were not released from claims by the States -- they do not make MSA payments and are not required to abide by the public health provisions of the MSA. States were concerned that NPMs could take advantage of the fact that they did not have to bear the cost of making MSA payments or abide by the public health provisions of the MSA. To deal with this concern, all Settling States enacted the Model Escrow Statute, which is designed to ensure that there will be a fund available to satisfy State claims in the event the State obtains a judgment against an NPM.

HOW HAVE THE PURPOSES OF THE MODEL ESCROW STATUTE BEEN SUBVERTED?

A provision of the Model Escrow Statute permits an NPM to obtain a release of funds from escrow "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 under the MSA...." Experience in several states has shown that this provision enables NPMs that concentrate their sales in a single state or a few states to obtain early releases of the great majority of their escrow deposits. This outcome was never contemplated and threatens to undermine the effectiveness of the Model Escrow Statutes. Escrow funds so minimized are not adequate to provide security to the States nor do they prevent unfair profit taking.

HOW DOES THE CURRENT ALLOCABLE SHARE RELEASE PROVISION SUBVERT THE MODEL STATUTE?

By way of example, consider an NPM that makes all its sales -- 100 million cigarettes -- in a state whose allocable share of MSA payments is two percent. Under the current statute, although the NPM sold 100 million cigarettes in the State, the amount it would have to leave in escrow would be based on only 2 million cigarettes. This permits an NPM that has geographically concentrated sales to obtain a refund of the vast majority of its escrow deposits. This allows the NPM to significantly lower the cost of its cigarettes, because the NPM is not escrowing its full share of the future healthcare burden that its product imposes on the State. In lowering the cost, the NPM presents a product that is very attractive to youth, who tend to be more price-sensitive than adults. People that start smoking as minors are much more likely to become daily smokers, and eventually become a healthcare burden on the State.

HOW DOES THE PROPOSED AMENDMENT REMEDY THE PROBLEM?

[BILL #] eliminates the unintended consequence of the original language that has compromised the law's effectiveness. [BILL #] provides that the MSA payments relevant to release would not be limited to a State's allocable share of the NPM's (hypothetical) total MSA payments. In other words, where the NPM sells 100 million cigarettes in a State, the NPM would be entitled to a release only to the extent that its escrow payment exceeded what would have been its MSA payment on these 100 million cigarettes.

WEREN'T STATES TOLD THEY WERE NOT SUPPOSED TO AMEND THE MODEL STATUTE?

NO. The amendment is consistent with the purposes of the Model Escrow Statute: it sharply reduces the ability of an NPM to minimize its payments by concentrating its sales in one or two states and it sharply reduces the unintended disparity created by the current Model Escrow Statute. Moreover, the Original Participating Manufacturers ("OPMs") and the largest Subsequent Participating Manufacturers ("SPMs") have signed letters of assurance that the amendment will not affect the ability of the Model Escrow Statutes to protect the States from any potential downward adjustments in MSA payments.

IS THE AMENDMENT CONSTITUTIONAL?

There is no significant risk that the proposed amendment is unconstitutional. The Model Escrow Statute, has been challenged in several lawsuits, and has consistently been upheld as a valid enactment. For example, in Star Scientific Inc. v. Beales, 278 F.3d 339 (4th Cir.), cert. denied, 123 S.Ct. 93 (2002), the Fourth Circuit Court of Appeals held that Virginia's statute was constitutional under the Equal Protection, Due Process, and Commerce Clauses. Moreover, in the unlikely event the amendment was struck down, a "back-up provision" eliminates the paragraph dealing with the allocable share release. Should the Model Escrow Statute thereafter be held to be unconstitutional because of the ABSENCE of the allocable share release paragraph, then the original Model Escrow Statute allocable share release language would be restored. As a result, in the remote event that BOTH alternative changes (i.e., eliminating the loophole, and eliminating the release paragraph altogether) are held unconstitutional, the Statute would be restored to its original position. (I.e.: If you amend your assault statute, and the amendment is held unconstitutional, assault doesn't become legal. Rather the law is restored to its original position.)

WILL PASSAGE OF THE AMENDMENT PUT AT RISK MY STATE'S MSA PAYMENTS?

NO. Passing the amendment will NOT jeopardize a State's MSA payments. The only parties that could make such a challenge are parties to the MSA. As noted, the parties that make more than 99 percent of the payments have signed letters of assurance that the amendment will not affect the validity of the Model Escrow Statutes. Companies that want to maintain an unfair competitive advantage may try to scare States with misinformation so that they can continue to profit by exploiting the loophole in the current statute. States that enact the amendment will ensure that NPMs who sell in their States make escrow deposits as originally intended.

WILL THE PROPOSAL HAVE A FISCAL IMPACT?

The proposed amendment would likely be "revenue neutral." Escrow deposits do not constitute state revenues; they remain the property of the NPM. However, the legislation would likely result in a reduction in the administrative costs of enforcing the Model Escrow Statute because there would be fewer requests for releases from escrow for the State to process. Moreover, should the State obtain a judgment against an NPM to recover the health care costs imposed on the State by the NPM's products, the proposed legislation would enhance the State's ability to recover that judgment.

**TEXT OF ALLOCABLE SHARE AMENDMENT
TO MODEL STATUTE**

*In 895110 (2)
(b) 2. b.*

1. Subparagraph B of paragraph 2 of subdivision b of section XXX is amended to read as follows:

(B) 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 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)~~ 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 had it been a ~~participating manufacturer~~ Participating Manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or

§ 2. Severability Clause.

If this act, or any portion of the amendment to subparagraph b of paragraph 2 of subdivision b of section XXX made by this act, is held by a court of competent jurisdiction to be unconstitutional, then such subparagraph b shall be deemed to be repealed in its entirety. If paragraph 2 of subdivision b of section XXX shall thereafter be held by a court of competent jurisdiction to be unconstitutional, then this act shall be deemed repealed, and subparagraph b of paragraph 2 of subdivision b of section xxx be restored as if no such amendments had been made. Neither any holding of unconstitutionality nor the repeal of subparagraph b of paragraph 2 of subdivision b of section XXX shall affect, impair or invalidate any other portion of section XXX, or the application of such section to any other person or circumstance, and such remaining portions of section xxx shall at all times continue in full force and effect.

990.001(11)