

House Bill 2538

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of House Interim Committee on Revenue)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Allows Attorney General to compel by subpoena information required to be maintained by smokeless tobacco distributors. Eliminates requirement that smokeless tobacco manufacturers pay into escrow annual amount in proportion to volume of sales. Requires manufacturers not participating in tobacco Master Settlement Agreement to make annual escrow payments to fund foundation supporting education about smokeless tobacco use. Allows Department of Revenue to disclose information related to smokeless tobacco to Attorney General for purposes of monitoring and enforcing compliance with provisions of Smokeless Tobacco Master Settlement Agreement.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to smokeless tobacco products; creating new provisions; amending ORS 180.477, 180.483,
3 180.486, 180.491, 180.494, 323.810, 323.813 and 323.816; and prescribing an effective date.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 180.483 is amended to read:

6 180.483. (1) Not later than 20 days after the end of each calendar quarter, and more frequently
7 if so directed by the Attorney General, a distributor of smokeless tobacco products subject to the
8 requirements of ORS 323.500 to 323.645 shall report such information as the Attorney General re-
9 quires to facilitate compliance by tobacco product manufacturers with this section and ORS 180.471,
10 180.474, 180.477, 180.480, 180.486 and 323.816 and with rules adopted under ORS 180.489 and 180.491.
11 The information shall include, but need not be limited to, a list of the total number of units sold of
12 smokeless tobacco products for which the distributor paid the tax due during the previous calendar
13 quarter.

14 (2) A distributor shall maintain for a period of five years all invoices and documentation of sales
15 of smokeless tobacco products manufactured by nonparticipating manufacturers and any other in-
16 formation relied upon in reporting to the Attorney General under subsection (1) of this section. The
17 distributor shall make the invoices and other documentation available to the Attorney General upon
18 request.

19 **(3)(a) The Attorney General may compel by subpoena the production of any books, pa-**
20 **pers, records or other information required to be maintained under subsection (2) of this**
21 **section and may require any person to appear and provide testimony pertinent to the infor-**
22 **mation described in subsection (2) of this section. The subpoena shall have the same force**
23 **and effect and be served in the same manner as a subpoena in a civil action in the circuit**
24 **court.**

25 **(b) If a person fails to produce any books, papers, records or other information required**
26 **to be produced, fails to appear or testify about a matter for which testimony may be com-**
27 **pelled or otherwise fails to comply with a subpoena issued under this subsection, the Attor-**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 ney General may apply to the circuit court of the county in which the person to whom the
 2 subpoena was issued resides or may be found. The application shall be for an order requiring
 3 the person to comply with the demand or request of the Attorney General. The application
 4 shall be made by *ex parte* motion. The order of the court shall require the person against
 5 whom the order is directed to comply with the request or demand of the Attorney General
 6 within 10 days after the service of the order, or such further time as the court may grant,
 7 or justify the failure to comply with the order within that time.

8 (c) Failure to comply with an order under this subsection constitutes contempt of court.
 9 The remedy provided under this paragraph is in addition to any other remedy provided by
 10 law.

11 [(3)] (4) A distributor shall provide the Attorney General with an electronic mail address so that
 12 the Attorney General may notify the distributor of the information required under subsections (1)
 13 and [(7)] (8) of this section.

14 [(4)] (5) The Attorney General and the Department of Revenue may share with each other in-
 15 formation received under this section and ORS 180.471, 180.474 and 323.520 and may share such in-
 16 formation with federal, state or local agencies for purposes of enforcement of this section and ORS
 17 180.471, 180.474, 180.477, 180.480, 180.486 and 323.816, rules adopted under ORS 180.489 and 180.491
 18 and corresponding laws of other states.

19 [(5)] (6) The Attorney General may at any time require a nonparticipating manufacturer to
 20 produce proof from the financial institution in which the nonparticipating manufacturer has estab-
 21 lished a qualified escrow fund for the purpose of compliance with ORS 323.816 of the amount of
 22 moneys in the fund, exclusive of interest, the amount and date of each deposit and the amount and
 23 date of each withdrawal from the fund.

24 [(6)] (7) The Attorney General shall, upon request of a nonparticipating manufacturer whose
 25 compliance with escrow requirements is at issue, provide the manufacturer with copies of all docu-
 26 ments upon which any proposed addition to the escrow is based. Documents required to be provided
 27 under this subsection include, but are not necessarily limited to, reports under this section from
 28 distributors. The information provided to the manufacturer under this subsection may not include
 29 information about products of any tobacco product manufacturer other than the one to whom the
 30 information is provided. The information may be used only for the purpose of determining the ap-
 31 propriate amount of escrow deposits.

32 [(7)] (8) The Attorney General may require a distributor or a tobacco product manufacturer to
 33 submit any additional information, including, but not limited to, samples of the packaging and la-
 34 beling of each smokeless tobacco product manufactured or distributed, to enable the Attorney Gen-
 35 eral to determine whether a tobacco product manufacturer is in compliance with this section and
 36 ORS 180.471, 180.474, 180.477, 180.480, 180.486 and 323.816 and with rules adopted under ORS 180.489
 37 and 180.491.

38 **SECTION 2.** ORS 180.486 is amended to read:

39 180.486. (1) A person may not:

40 [(a) *Sell, offer for sale or possess for sale in this state smokeless tobacco products of a tobacco*
 41 *product manufacturer that is not included in the directory developed under ORS 180.477;*]

42 [(b) (a) Sell, offer for sale or possess for sale in this state smokeless tobacco products of a to-
 43 bacco product manufacturer that the person acquired at a time when the tobacco product manufac-
 44 turer was not included in the directory developed under ORS 180.477;

45 [(c) (b) Possess in this state for sale in another jurisdiction smokeless tobacco products of a

1 tobacco product manufacturer that the person acquired at a time when the tobacco product man-
 2 ufacturer was not included in the directory developed under ORS 180.477 [*and was not in compliance*
 3 *with the Smokeless Tobacco Master Settlement Agreement qualifying statute in the other jurisdiction*
 4 *or with statutes that supplement the qualifying statute in that jurisdiction*]; or

5 [(d)] (c) Distribute[,] in this state[,] free samples of smokeless tobacco products:

6 (A) To persons under 21 years of age; or

7 (B) In any area, unless access by persons under 21 years of age to that area is prohibited.

8 (2) A person who sells, offers for sale, distributes, acquires, holds, owns, possesses, transports,
 9 imports or causes to be imported smokeless tobacco products that the person knows or should know
 10 are intended for sale or distribution in violation of subsection (1) of this section commits a Class
 11 A misdemeanor.

12 **SECTION 3.** ORS 180.491 is amended to read:

13 180.491. (1) A determination by the Attorney General to omit or remove a tobacco product
 14 manufacturer from the directory developed under ORS 180.477 is subject to review in the manner
 15 prescribed by ORS 183.484 for judicial review of orders in other than contested cases.

16 (2) The Attorney General may adopt rules necessary to effect the purposes of ORS 180.465 to
 17 180.494, [*and*] 323.520 (3) **and 323.810 to 323.816.**

18 (3) In any action brought by the state to enforce ORS 180.471, 180.474, 180.477, 180.480, 180.483,
 19 180.486 or 323.816, or any rule adopted under this section or ORS 180.489, the state may recover the
 20 costs of investigation, expert witness fees, costs of the action and reasonable attorney fees. Moneys
 21 recovered under this subsection shall be deposited into the Tobacco Enforcement Fund established
 22 under ORS 180.205.

23 (4) If a court determines that a person has violated any provision of ORS 180.471, 180.474,
 24 180.477, 180.480, 180.483, 180.486 or 323.816, or any rule adopted under this section or ORS 180.489,
 25 the court shall order any profits, gain, gross receipts or other benefit from the violation to be
 26 disgorged and paid to the Tobacco Enforcement Fund established under ORS 180.205.

27 (5) Unless otherwise expressly provided, the remedies or penalties provided by this section and
 28 ORS 180.486 and 180.494 are cumulative to each other and to the remedies or penalties available
 29 under all other laws of this state.

30 **SECTION 4.** ORS 180.494 is amended to read:

31 180.494. (1) Upon a determination that a distributor has violated ORS 180.486, the Department
 32 of Revenue may revoke or suspend the license of the distributor in the manner provided by ORS
 33 323.535. Each offer to sell smokeless tobacco products in violation of ORS 180.486 constitutes a
 34 separate violation.

35 (2) Upon a determination that a person applying for a license under ORS 323.520 has violated
 36 ORS 180.486 at any time within the five years preceding the application, the department may refuse
 37 to issue the license. The department shall provide opportunity for hearing and judicial review in the
 38 manner provided in ORS 323.535.

39 (3)[(a)] Upon a determination that a person has violated ORS 180.486 [(1)(b) or (c)] **(1)(a) or**
 40 **(b)**, the department may impose a civil penalty in an amount not to exceed the greater of \$5,000 or
 41 500 percent of the retail value of the smokeless tobacco products sold, offered for sale or possessed
 42 for sale. Judicial review of an order imposing a civil penalty shall be as provided in ORS 305.445
 43 and 305.501.

44 [(b) Upon a determination that a person has violated ORS 180.486 (1)(a), the department may im-
 45 pose a civil penalty in an amount not to exceed \$5,000. Judicial review of an order imposing a civil

1 *penalty shall be as provided in ORS 305.445 and 305.501.]*

2 (4) The Attorney General may seek an injunction to restrain a threatened or actual violation
 3 of ORS 180.483 or 180.486 by a [*distributor*] **person** and to compel the [*distributor*] **person** to comply
 4 with ORS 180.483 and 180.486. In any action brought pursuant to this subsection, the state may re-
 5 cover the costs of investigation, the costs of the action [*and*], reasonable attorney fees **and a civil**
 6 **penalty in an amount not to exceed \$5,000. The civil penalty must be imposed in the manner**
 7 **provided by ORS 183.745.**

8 (5) A person who violates ORS 180.486 (1) engages in an unlawful practice in violation of ORS
 9 646.608.

10 **SECTION 5.** ORS 323.813 is amended to read:

11 323.813. (1) The use of smokeless tobacco products presents serious public health concerns to
 12 the State of Oregon and to the residents of the State of Oregon. The United States Surgeon General
 13 has determined that use of smokeless tobacco causes cancer, noncancerous oral conditions and other
 14 serious diseases, and that there are hundreds of thousands of tobacco-related deaths in the United
 15 States each year. These diseases most often do not appear until many years after the person in
 16 question begins using tobacco products.

17 (2) Use of smokeless tobacco products also presents serious financial concerns for this state.
 18 Under certain health care programs, the State of Oregon may have a legal obligation to provide
 19 medical assistance to eligible persons for health conditions associated with the use of smokeless
 20 tobacco, and those persons may have a legal entitlement to receive such medical assistance.

21 (3) Under those health care programs, the State of Oregon pays millions of dollars each year to
 22 provide medical assistance for persons for health conditions associated with the use of smokeless
 23 tobacco products.

24 (4) It is the policy of the State of Oregon that financial burdens imposed on this state by the
 25 use of smokeless tobacco be borne by tobacco product manufacturers rather than by this state to
 26 the extent that such manufacturers either determine to enter into a settlement with the State of
 27 Oregon or are found culpable by the courts.

28 (5) On November 23, 1998, leading United States tobacco product manufacturers entered into a
 29 settlement agreement, titled the "Smokeless Tobacco Master Settlement Agreement," with the State
 30 of Oregon. The Smokeless Tobacco Master Settlement Agreement obligates those manufacturers, in
 31 return for a release of past, present and certain future claims against them as described in the
 32 Smokeless Tobacco Master Settlement Agreement:

33 [*(a) To pay substantial sums to the State of Oregon (tied in part to their volume of sales);]*

34 [*(b) (a) To fund a national foundation devoted to the interests of public health; and*

35 [*(c) (b) To make substantial changes in their advertising and marketing practices and corporate*
 36 *culture, with the intention of reducing underage [*smoking*] **use of smokeless tobacco products.***

37 (6) It would be contrary to the policy of the State of Oregon if those tobacco product manufac-
 38 turers who determine not to enter into such a settlement could use a resulting cost advantage to
 39 derive large, short-term profits in the years before liability may arise without ensuring that this
 40 state will have an eventual source of recovery from them if they are proven to have acted culpably.
 41 It is thus in the interest of the State of Oregon to require that such manufacturers establish a re-
 42 serve fund to guarantee a source of compensation and to prevent such manufacturers from deriving
 43 large, short-term profits and then becoming judgment-proof before liability may arise.

44 **SECTION 6.** ORS 323.816 is amended to read:

45 323.816. (1) Any tobacco product manufacturer selling smokeless tobacco products to consumers

1 within the State of Oregon (whether directly or through a distributor, retailer or similar interme-
 2 diary or intermediaries) after September 28, 2009, **other than a tobacco product manufacturer**
 3 **that, as of July 1, 2011, and for purposes of ORS 323.800 to 323.806, is a Participating Man-**
 4 **ufacturer in the Master Settlement Agreement**, shall do one of the following:

5 *[(a) Comply with the requirements imposed on Participating Manufacturers that are set forth in*
 6 *sections III, V and VII of the Smokeless Tobacco Master Settlement Agreement; or]*

7 *[(b) Place into a qualified escrow fund, by April 15 of the year following the year in question, the*
 8 *amount of \$0.40 per unit sold for 2010 or such amount adjusted for inflation for each year thereafter.]*

9 **(a) Become a Participating Manufacturer (as that term is defined in section II(ee) of the**
 10 **Smokeless Tobacco Master Settlement Agreement) and generally perform the obligations set**
 11 **forth in the Smokeless Tobacco Master Settlement Agreement; or**

12 **(b) Place into a qualified escrow fund, by April 15 of the year following the year in ques-**
 13 **tion, the annual payment under the Smokeless Tobacco Master Settlement Agreement, as**
 14 **determined pursuant to section VI(b)(6) of that agreement, that the manufacturer would be**
 15 **required to pay if it were a participating manufacturer during the year in question. The re-**
 16 **quired payments shall be calculated as if the manufacturer had become a participating**
 17 **manufacturer in 2011.**

18 (2) A tobacco product manufacturer that places funds into escrow pursuant to this section shall
 19 receive the interest or other appreciation on such funds as earned. The funds themselves shall be
 20 released from escrow only under the following circumstances:

21 (a) To pay a judgment or settlement on any released claim brought against such tobacco product
 22 manufacturer by the State of Oregon or any releasing party located or residing in this state. Funds
 23 shall be released from escrow under this paragraph in the order in which they were placed into
 24 escrow and only to the extent and at the time necessary to make payments required under such
 25 judgment or settlement; **or**

26 *[(b) To refund any excess amount owed to a tobacco product manufacturer when the tobacco*
 27 *product manufacturer establishes that the amount it was required to place into escrow on account of*
 28 *units sold in Oregon in a particular year was greater than the Smokeless Tobacco Master Settlement*
 29 *Agreement payments, as determined pursuant to section IX(c) of that agreement after final determi-*
 30 *nation of all adjustments, that the manufacturer would have been required to make on account of such*
 31 *units sold had it been a Participating Manufacturer, as defined in section II(ee) of the Smokeless To-*
 32 *bacco Master Settlement Agreement; or]*

33 *[(c) (b) To refund funds to a tobacco product manufacturer 25 years after the date on which*
 34 *they were placed in escrow, only if the funds were not released from escrow under paragraph (a)*
 35 *[or (b)] of this subsection.*

36 (3) Each tobacco product manufacturer that elects to place funds into escrow pursuant to this
 37 section shall annually certify to the Attorney General that it is in compliance with this section. The
 38 Attorney General may bring a civil action on behalf of the State of Oregon against any tobacco
 39 product manufacturer that fails to place into escrow the funds required under this section. Any to-
 40 bacco product manufacturer that fails in any year to place into escrow the funds required under this
 41 section shall:

42 (a) Be required within 15 days to place such funds into escrow as shall bring the manufacturer
 43 into compliance with this section. The court, upon a finding of a violation of this section, may im-
 44 pose a civil penalty to be paid to the General Fund of this state in an amount not to exceed five
 45 percent of the amount improperly withheld from escrow per day of the violation and in a total

1 amount not to exceed 100 percent of the original amount improperly withheld from escrow;

2 (b) In the case of a knowing violation, be required within 15 days to place such funds into
 3 escrow as shall bring the manufacturer into compliance with this section. The court, upon a finding
 4 of a knowing violation of this section, may impose a civil penalty to be paid to the General Fund
 5 of this state in an amount not to exceed 15 percent of the amount improperly withheld from escrow
 6 per day of the violation and in a total amount not to exceed 300 percent of the original amount
 7 improperly withheld from escrow; and

8 (c) In the case of a second knowing violation, be prohibited from selling smokeless tobacco
 9 products to consumers within the State of Oregon (whether directly or through a distributor, retailer
 10 or similar intermediary or intermediaries) for a period not to exceed two years. Each failure to make
 11 an annual deposit required under this section shall constitute a separate violation.

12 **SECTION 7. Section 8 of this 2011 Act is added to and made a part of ORS 323.810 to**
 13 **323.816.**

14 **SECTION 8. The Department of Revenue may disclose information submitted to the de-**
 15 **partment related to smokeless tobacco products, tobacco product manufacturers and tobacco**
 16 **retailers to the Attorney General, and such other parties as the Attorney General deter-**
 17 **mines necessary, to monitor and enforce compliance by tobacco product manufacturers with**
 18 **ORS 180.465 to 180.494 and 323.810 to 323.816.**

19 **SECTION 9.** ORS 180.477 is amended to read:

20 180.477. (1) The Attorney General shall develop and make available for public inspection a di-
 21 rectory listing all tobacco product manufacturers that have provided current and accurate certif-
 22 ications conforming to the requirements of ORS 180.471 and 180.474.

23 (2) The Attorney General may not include or retain in the directory the name of any nonpar-
 24 ticipating manufacturer that fails to provide the required certification or whose certification the
 25 Attorney General determines is not in compliance with ORS 180.471 and 180.474, unless the Attorney
 26 General has determined that the violation has been cured to the satisfaction of the Attorney Gen-
 27 eral. The Attorney General shall adopt rules defining the criteria by which the Attorney General
 28 will exercise the discretion granted by this subsection.

29 (3) The Attorney General may not include or retain in the directory a nonparticipating man-
 30 ufacturer if the Attorney General concludes that:

31 (a) Any escrow payment required from the nonparticipating manufacturer pursuant to ORS
 32 323.816 for any period has not been fully paid into a qualified escrow fund governed by a qualified
 33 escrow agreement that has been approved by the Attorney General; or

34 (b) Any outstanding final judgment against the nonparticipating manufacturer, including interest
 35 thereon, for a violation of ORS 323.816 has not been fully satisfied.

36 (4) The Attorney General shall update the directory in order to correct mistakes and to add or
 37 remove a tobacco product manufacturer to keep the directory in conformity with the requirements
 38 of this section. The Attorney General shall update the directory with new tobacco product man-
 39 ufacturers upon receipt of an annual or supplemental certification listing new tobacco product
 40 manufacturers if the Attorney General determines that the annual or supplemental certification is
 41 in compliance with the requirements of ORS 180.471 and 180.474. The Attorney General shall make
 42 the determination about compliance within 45 days of receipt of the certification.

43 (5) The Attorney General shall:

44 (a) Create and maintain a list of persons, including but not limited to tobacco product man-
 45 ufacturers and distributors, that are interested in receiving electronic mail notifications of changes

1 in the directory developed under this section;

2 (b) Develop a registration form to be completed by persons interested in receiving electronic
3 mail notification of changes in the directory developed under this section that are not otherwise
4 required by ORS 180.483 [(3)] (4) or rules adopted under ORS 180.489 and 180.491 to submit their
5 electronic mail addresses to the Attorney General; and

6 (c) Immediately upon making any change in the directory developed under this section, send
7 electronic mail notices of the change to all persons on the list created under this subsection.

8 **SECTION 10.** ORS 323.810 is amended to read:

9 323.810. As used in ORS 323.810 to 323.816:

10 (1) "Adjusted for inflation" means increased in accordance with the formula for inflation ad-
11 justment set forth in Exhibit F to the Smokeless Tobacco Master Settlement Agreement.

12 (2) "Affiliate" means a person who directly or indirectly owns or controls, is owned or con-
13 trolled by or is under common ownership or control with another person. For purposes of defining
14 "affiliate":

15 (a) "Owns," "is owned" and "ownership" mean ownership of an equity interest, or the equivalent
16 thereof, of 10 percent or more; and

17 (b) "Person" means an individual, partnership, committee, association, corporation or any other
18 organization or group of persons.

19 (3) "Qualified escrow fund" means an escrow arrangement with a federally or state chartered
20 financial institution having no affiliation with any tobacco product manufacturer and having assets
21 of at least \$1 billion, where such arrangement requires that such financial institution hold the
22 escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product
23 manufacturer who is placing the funds into escrow from using, accessing or directing the use of the
24 escrowed funds' principal except as consistent with ORS 323.816 [(2)(b)].

25 (4) "Released claims" has the meaning given that term in section II(gg) of the Smokeless To-
26 bacco Master Settlement Agreement.

27 (5) "Releasing parties" has the meaning given that term in section II(ii) of the Smokeless To-
28 bacco Master Settlement Agreement.

29 (6) "Smokeless Tobacco Master Settlement Agreement" means the settlement agreement (and
30 related documents) entered into on November 23, 1998, by the State of Oregon and leading United
31 States tobacco product manufacturers.

32 (7) "Smokeless tobacco products" means moist snuff, as defined in ORS 323.500, or chewing to-
33 bacco, as defined in section 5702 of the Internal Revenue Code.

34 (8)(a) "Tobacco product manufacturer" means an entity that, after September 28, 2009, directly
35 (and not exclusively through any affiliate):

36 (A) Manufactures smokeless tobacco products anywhere that such manufacturer intends to be
37 sold in the United States, including smokeless tobacco products intended to be sold in the United
38 States through an importer (except where such importer is an Original Participating Manufacturer,
39 as defined in section II(cc) of the Smokeless Tobacco Master Settlement Agreement), that will be
40 responsible for the payments under the Smokeless Tobacco Master Settlement Agreement with re-
41 spect to such smokeless tobacco products as a result of the provisions of section VI(b) of the
42 Smokeless Tobacco Master Settlement Agreement and that pays the taxes specified in section II(w)
43 of the Smokeless Tobacco Master Settlement Agreement, and provided that the manufacturer of such
44 smokeless tobacco products does not market or advertise such smokeless tobacco products in the
45 United States);

1 (B) Is the first purchaser anywhere for resale in the United States of smokeless tobacco products
2 manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

3 (C) Becomes a successor of an entity described in subparagraph (A) or (B) of this paragraph.

4 (b) "Tobacco product manufacturer" does not include an affiliate of a tobacco product man-
5 ufacturer unless such affiliate is itself a tobacco product manufacturer under paragraph (a) of this
6 subsection.

7 (9) "Units sold" means the number of individual containers of smokeless tobacco products sold
8 in the State of Oregon by the applicable tobacco product manufacturer (whether directly or through
9 a distributor, retailer or similar intermediary or intermediaries) during the year in question, as
10 measured by excise taxes collected by the State of Oregon. The Department of Revenue shall adopt
11 such rules as are necessary to ascertain the amount of state excise tax paid on the smokeless to-
12 bacco products of such tobacco product manufacturer for each year. A unit container shall contain
13 3.2 ounces of moist snuff, as defined in ORS 323.500, or 3.0 ounces of chewing tobacco.

14 **SECTION 11. This 2011 Act takes effect on the 91st day after the date on which the 2011**
15 **session of the Seventy-sixth Legislative Assembly adjourns sine die.**

16
