

D R A F T

SUMMARY

Provides Attorney General with increased enforcement authority over contraband cigarette sales in conjunction with nonparticipating manufacturer adjustment settlement related to tobacco Master Settlement Agreement. Imposes joint and several liability on importer and nonparticipating manufacturer for violation of escrow provisions. Requires nonparticipating manufacturer to post bond to secure escrow obligations. Enhances certification requirements. Allows for sharing of information among Attorney General, Department of Revenue and other federal, state or local agencies for purpose of enforcing Master Settlement Agreement provisions. Prohibits sales of cigarettes and smokeless tobacco products via mail, telephone or electronic network. Authorizes execution of investigative demand by Attorney General. Allows for civil penalties.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to the tobacco Master Settlement Agreement; creating new pro-
3 visions; amending ORS 180.205, 180.405, 180.410, 180.415, 180.435, 323.800
4 and 323.806; and declaring an emergency.

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

6 **SECTION 1.** ORS 323.800 is amended to read:

7 323.800. As used in ORS 323.800 to 323.806:

8 (1) "Adjusted for inflation" means increased in accordance with the for-
9 mula for inflation adjustment set forth in Exhibit C to the Master Settlement
10 Agreement.

11 (2)(a) "Affiliate" means a person who directly or indirectly owns or con-
12 trols, is owned or controlled by, or is under common ownership or control
13 with, another person.

1 (b) For purposes of defining “affiliate”:

2 (A) The terms “owns,” “is owned” and “ownership” mean ownership of
3 an equity interest, or the equivalent thereof, of 10 percent or more; and

4 (B) The term “person” means an individual, partnership, committee, as-
5 sociation, corporation or any other organization or group of persons.

6 (3) “Allocable share” means Allocable Share as that term is defined in the
7 Master Settlement Agreement.

8 (4)(a) “Cigarette” means any product that contains nicotine, is intended
9 to be burned or heated under ordinary conditions of use, and consists of or
10 contains:

11 (A) Any roll of tobacco wrapped in paper or in any substance not con-
12 taining tobacco;

13 (B) Tobacco, in any form, that is functional in the product and that be-
14 cause of its appearance, the type of tobacco used in the filler, or its pack-
15 aging and labeling, is likely to be offered to, or purchased by, consumers as
16 a cigarette; or

17 (C) Any roll of tobacco wrapped in any substance containing tobacco that,
18 because of its appearance, the type of tobacco used in the filler, or its
19 packaging and labeling, is likely to be offered to, or purchased by, consumers
20 as a cigarette described in subparagraph (A) of this paragraph.

21 (b) The term “cigarette” includes “roll-your-own tobacco” (i.e., tobacco
22 that, because of its appearance, type, packaging or labeling, is suitable for
23 use and likely to be offered to, or purchased by, consumers as tobacco for
24 making cigarettes). For purposes of this paragraph, 0.09 ounces of roll-your-
25 own tobacco shall constitute one individual cigarette.

26 **(5) “Importer” means:**

27 **(a) Any person in the United States to whom cigarettes are shipped**
28 **or consigned, if federal excise tax has not been paid on the cigarettes,**
29 **and if the cigarettes are manufactured in a foreign country;**

30 **(b) Any person who removes cigarettes for sale or consumption in**
31 **the United States from a customs bonded manufacturing warehouse;**

1 **or**

2 **(c) Any person who smuggles or otherwise unlawfully brings ciga-**
3 **rettes into the United States.**

4 [(5)] **(6)** “Master Settlement Agreement” means the settlement agreement
5 (and related documents) entered into on November 23, 1998, by the State of
6 Oregon and leading United States tobacco product manufacturers.

7 [(6)] **(7)** “Qualified escrow fund” means an escrow arrangement with a
8 federally or state chartered financial institution having no affiliation with
9 any tobacco product manufacturer and having assets of at least \$1 billion
10 where such arrangement requires that such financial institution hold the
11 escrowed funds’ principal for the benefit of releasing parties and prohibits
12 the tobacco product manufacturer who is placing the funds into escrow from
13 using, accessing or directing the use of the escrowed funds’ principal except
14 as consistent with ORS 323.806 [(2)(b)] **(1)(b)(B)**.

15 [(7)] **(8)** “Released claims” means Released Claims as that term is defined
16 in the Master Settlement Agreement.

17 [(8)] **(9)** “Releasing parties” means Releasing Parties as that term is de-
18 fined in the Master Settlement Agreement.

19 [(9)(a)] **(10)(a)** “Tobacco product manufacturer” means an entity that, af-
20 ter October 23, 1999, directly (and not exclusively through any affiliate):

21 (A) Manufactures cigarettes anywhere that such manufacturer intends to
22 be sold in the United States, including cigarettes intended to be sold in the
23 United States through an importer (except where such importer is an Ori-
24 ginal Participating Manufacturer (as that term is defined in the Master
25 Settlement Agreement) that will be responsible for the payments under the
26 Master Settlement Agreement with respect to such cigarettes as a result of
27 the provisions of subsection II(mm) of the Master Settlement Agreement and
28 that pays the taxes specified in subsection II(z) of the Master Settlement
29 Agreement, and provided that the manufacturer of such cigarettes does not
30 market or advertise such cigarettes in the United States);

31 (B) Is the first purchaser anywhere for resale in the United States of

1 cigarettes manufactured anywhere that the manufacturer does not intend to
2 be sold in the United States; or

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

5 (b) The term “tobacco product manufacturer” does not include an affiliate
6 of a tobacco product manufacturer unless such affiliate is itself a tobacco
7 product manufacturer under paragraph (a)(A), (B) or (C) of this subsection.

8 ~~[(10)]~~ **(11)(a)** “Units sold” means the number of individual cigarettes sold
9 in the State of Oregon by the applicable tobacco product manufacturer
10 (whether directly or through a distributor, retailer or similar intermediary
11 or intermediaries) during the year in question, *as measured by excise taxes*
12 *collected by the State of Oregon on roll-your-own tobacco containers or on*
13 *packs bearing* **that are required to bear** the excise tax stamp of this state
14 **or that are sold as “roll-your-own tobacco” on which excise tax is**
15 **due.** The Department of Revenue *[shall]* **and the Attorney General may**
16 promulgate such rules as are necessary to ascertain the amount of state ex-
17 cise tax paid on the cigarettes of such tobacco product manufacturer for each
18 year.

19 **(b) “Units sold” does not include cigarettes the purchase or use of**
20 **which the state is prohibited from taxing under the Constitution or**
21 **statutes of the United States.**

22 **SECTION 2.** ORS 323.806 is amended to read:

23 323.806. **(1)** Any tobacco product manufacturer selling cigarettes to con-
24 sumers within the State of Oregon (whether directly or through a distributor,
25 retailer or similar intermediary or intermediaries) after October 23, 1999,
26 shall do one of the following:

27 ~~[(1)]~~ **(a)** Become a Participating Manufacturer (as that term is defined in
28 section II(jj) of the Master Settlement Agreement) and generally perform its
29 financial obligations under the Master Settlement Agreement; or

30 ~~[(2)(a)]~~ **(b)(A)** Place into a qualified escrow fund by April 15 of the year
31 following the year in question the following amounts (as such amounts are

1 adjusted for inflation):

2 [(A)] (i) For 1999, \$0.0094241 per unit sold after October 23, 1999.

3 [(B)] (ii) For 2000, \$0.0104712 per unit sold.

4 [(C)] (iii) For each of the years 2001 and 2002, \$0.0136125 per unit sold.

5 [(D)] (iv) For each of the years 2003 through 2006, \$0.0167539 per unit
6 sold.

7 [(E)] (v) For 2007 and each year thereafter, \$0.0188482 per unit sold.

8 [(b)] (B) A tobacco product manufacturer that places funds into escrow
9 pursuant to [*paragraph (a) of this subsection*] **subparagraph (A) of this**
10 **paragraph** shall receive the interest or other appreciation on such funds as
11 earned. Such funds themselves shall be released from escrow only under the
12 following circumstances:

13 [(A)] (i) To pay a judgment or settlement on any released claim brought
14 against such tobacco product manufacturer by the State of Oregon or any
15 releasing party located or residing in this state. Funds shall be released from
16 escrow under this [*subparagraph*] **sub-subparagraph** in the order in which
17 they were placed into escrow and only to the extent and at the time neces-
18 sary to make payments required under such judgment or settlement;

19 [(B)] (ii) To the extent that a tobacco product manufacturer establishes
20 that the amount it was required to place into escrow on account of units sold
21 in Oregon in a particular year was greater than the Master Settlement
22 Agreement payments, as determined pursuant to section IX(i) of that agree-
23 ment after final determination of all adjustments, that the manufacturer
24 would have been required to make on account of such units sold had it been
25 a Participating Manufacturer (as that term is defined in the Master Settle-
26 ment Agreement), the excess shall be released from escrow and revert back
27 to such tobacco product manufacturer; or

28 [(C)] (iii) To the extent not released from escrow under [*subparagraph (A)*
29 *or (B) of this paragraph*] **sub-subparagraph (i) or (ii) of this subpara-**
30 **graph**, funds shall be released from escrow and revert back to such tobacco
31 product manufacturer 25 years after the date on which they were placed into

1 escrow.

2 [(c)] (C) Each tobacco product manufacturer that elects to place funds
3 into escrow pursuant to this [subsection] **paragraph** shall annually certify
4 to the Attorney General that it is in compliance with this [subsection] **par-**
5 **agraph**. The Attorney General may bring a civil action on behalf of the
6 State of Oregon against any tobacco product manufacturer that fails to place
7 into escrow the funds required under this [subsection] **paragraph**. Any to-
8 bacco product manufacturer that fails in any year to place into escrow the
9 funds required under this [subsection] **paragraph** shall:

10 [(A)] (i) Be required within 15 days to place such funds into escrow as
11 shall bring such manufacturer into compliance with this [subsection] **para-**
12 **graph**. The court, upon a finding of a violation of this [subsection] **para-**
13 **graph**, may impose a civil penalty to be paid to the General Fund of this
14 state in an amount not to exceed five percent of the amount improperly
15 withheld from escrow per day of the violation and in a total amount not to
16 exceed 100 percent of the original amount improperly withheld from escrow;

17 [(B)] (ii) In the case of a knowing violation, be required within 15 days
18 to place such funds into escrow as shall bring such manufacturer into com-
19 pliance with this [subsection] **paragraph**. The court, upon a finding of a
20 knowing violation of this [subsection] **paragraph**, may impose a civil penalty
21 to be paid to the General Fund of this state in an amount not to exceed 15
22 percent of the amount improperly withheld from escrow per day of the vio-
23 lation and in a total amount not to exceed 300 percent of the original amount
24 improperly withheld from escrow; and

25 [(C)] (iii) In the case of a second knowing violation, be prohibited from
26 selling cigarettes to consumers within the State of Oregon (whether directly
27 or through a distributor, retailer or similar intermediary or intermediaries)
28 for a period not to exceed two years. Each failure to make an annual deposit
29 required under this section shall constitute a separate violation.

30 (2) In the case of units sold that are cigarettes manufactured out-
31 side the United States and imported into the United States by an

1 **importer:**

2 **(a) Importers shall be jointly and severally liable with the tobacco**
3 **product manufacturer of the cigarettes for the escrow deposits re-**
4 **quired under subsection (1)(b)(A) of this section;**

5 **(b) Importers may be sued under subsection (1)(b)(C) of this section**
6 **to the same extent as the tobacco product manufacturer, and shall be**
7 **subject to all of the same civil penalties, remedies or other relief that**
8 **may be awarded against the tobacco product manufacturer of the cig-**
9 **arettes as provided in subsection (1)(b)(C) of this section;**

10 **(c) If the importer fails or refuses within 15 days of the Attorney**
11 **General's written demand to deposit the funds into escrow for which**
12 **it is jointly and severally liable under paragraph (a) of this subsection,**
13 **all cigarettes imported into the United States by the importer shall**
14 **constitute contraband cigarettes as defined in ORS 323.010 and shall**
15 **be subject to seizure and forfeiture as provided under ORS 323.248; and**

16 **(d) A nonparticipating manufacturer located outside the United**
17 **States that conducts business in this state shall provide to the Attor-**
18 **ney General on a form prescribed by the Attorney General a declara-**
19 **tion from each importer that imports the cigarettes of the**
20 **nonparticipating manufacturer intended for sale in this state stating**
21 **that the importer accepts liability pursuant to subsection (1)(b)(A) of**
22 **this section and consents to the jurisdiction of the courts of this state**
23 **for the purposes of enforcing this section.**

24 **SECTION 3.** ORS 323.806, as amended by section 22, chapter 801, Oregon
25 Laws 2003, is amended to read:

26 323.806. (1) Any tobacco product manufacturer selling cigarettes to con-
27 sumers within the State of Oregon (whether directly or through a distributor,
28 retailer or similar intermediary or intermediaries) after October 23, 1999,
29 shall do one of the following:

30 [(1)] (a) Become a Participating Manufacturer (as that term is defined in
31 section II(jj) of the Master Settlement Agreement) and generally perform its

1 financial obligations under the Master Settlement Agreement; or

2 [(2)(a)] (b)(A) Place into a qualified escrow fund by April 15 of the year
3 following the year in question the following amounts (as such amounts are
4 adjusted for inflation):

5 [(A)] (i) For 1999, \$0.0094241 per unit sold after October 23, 1999.

6 [(B)] (ii) For 2000, \$0.0104712 per unit sold.

7 [(C)] (iii) For each of the years 2001 and 2002, \$0.0136125 per unit sold.

8 [(D)] (iv) For each of the years 2003 through 2006, \$0.0167539 per unit
9 sold.

10 [(E)] (v) For 2007 and each year thereafter, \$0.0188482 per unit sold.

11 [(b)] (B) A tobacco product manufacturer that places funds into escrow
12 pursuant to [paragraph (a) of this subsection] **subparagraph (A) of this**
13 **paragraph** shall receive the interest or other appreciation on such funds as
14 earned. Such funds themselves shall be released from escrow only under the
15 following circumstances:

16 [(A)] (i) To pay a judgment or settlement on any released claim brought
17 against such tobacco product manufacturer by the State of Oregon or any
18 releasing party located or residing in this state. Funds shall be released from
19 escrow under this [subparagraph] **sub-subparagraph** in the order in which
20 they were placed into escrow and only to the extent and at the time neces-
21 sary to make payments required under such judgment or settlement;

22 [(B)] (ii) To the extent that a tobacco product manufacturer establishes
23 that the amount it was required to place into escrow in a particular year
24 was greater than this state's allocable share of the total payments that such
25 manufacturer would have been required to make in that year under the
26 Master Settlement Agreement (as determined pursuant to section IX(i)(2) of
27 the Master Settlement Agreement, and before any of the adjustments or off-
28 sets described in section IX(i)(3) of that agreement other than the inflation
29 adjustment) had it been a Participating Manufacturer (as that term is de-
30 fined in the Master Settlement Agreement), the excess shall be released from
31 escrow and revert back to such tobacco product manufacturer; or

1 [(C)] (iii) To the extent not released from escrow under [subparagraph (A)
2 or (B) of this paragraph] **sub-subparagraph (i) or (ii) of this subpara-**
3 **graph**, funds shall be released from escrow and revert back to such tobacco
4 product manufacturer 25 years after the date on which they were placed into
5 escrow.

6 [(c)] (C) Each tobacco product manufacturer that elects to place funds
7 into escrow pursuant to this [subsection] **paragraph** shall annually certify
8 to the Attorney General that it is in compliance with this [subsection] **par-**
9 **agraph**. The Attorney General may bring a civil action on behalf of the
10 State of Oregon against any tobacco product manufacturer that fails to place
11 into escrow the funds required under this [subsection] **paragraph**. Any to-
12 bacco product manufacturer that fails in any year to place into escrow the
13 funds required under this [subsection] **paragraph** shall:

14 [(A)] (i) Be required within 15 days to place such funds into escrow as
15 shall bring such manufacturer into compliance with this [subsection] **para-**
16 **graph**. The court, upon a finding of a violation of this [subsection] **para-**
17 **graph**, may impose a civil penalty to be paid to the General Fund of this
18 state in an amount not to exceed five percent of the amount improperly
19 withheld from escrow per day of the violation and in a total amount not to
20 exceed 100 percent of the original amount improperly withheld from escrow;

21 [(B)] (ii) In the case of a knowing violation, be required within 15 days
22 to place such funds into escrow as shall bring such manufacturer into com-
23 pliance with this [subsection] **paragraph**. The court, upon a finding of a
24 knowing violation of this [subsection] **paragraph**, may impose a civil penalty
25 to be paid to the General Fund of this state in an amount not to exceed 15
26 percent of the amount improperly withheld from escrow per day of the vio-
27 lation and in a total amount not to exceed 300 percent of the original amount
28 improperly withheld from escrow; and

29 [(C)] (iii) In the case of a second knowing violation, be prohibited from
30 selling cigarettes to consumers within the State of Oregon (whether directly
31 or through a distributor, retailer or similar intermediary or intermediaries)

1 for a period not to exceed two years. Each failure to make an annual deposit
2 required under this section shall constitute a separate violation.

3 **(2) In the case of units sold that are cigarettes manufactured out-**
4 **side the United States and imported into the United States by an**
5 **importer:**

6 **(a) Importers shall be jointly and severally liable with the tobacco**
7 **product manufacturer of the cigarettes for the escrow deposits re-**
8 **quired under subsection (1)(b)(A) of this section;**

9 **(b) Importers may be sued under subsection (1)(b)(C) of this section**
10 **to the same extent as the tobacco product manufacturer, and shall be**
11 **subject to all of the same civil penalties, remedies, or other relief that**
12 **may be awarded against the tobacco product manufacturer of the cig-**
13 **arettes as provided in subsection (1)(b)(C) of this section;**

14 **(c) If the importer fails or refuses within 15 days of the Attorney**
15 **General's written demand to deposit the funds into escrow for which**
16 **it is jointly and severally liable under paragraph (a) of this subsection,**
17 **all cigarettes imported into the United States by the importer shall**
18 **constitute contraband cigarettes as defined in ORS 323.010 and shall**
19 **be subject to seizure and forfeiture as provided under ORS 323.248; and**

20 **(d) A nonparticipating manufacturer located outside the United**
21 **States that conducts business in this state shall provide to the Attor-**
22 **ney General on a form prescribed by the Attorney General a declara-**
23 **tion from each importer that imports the cigarettes of the**
24 **nonparticipating manufacturer intended for sale in this state stating**
25 **that the importer accepts liability pursuant to subsection (1)(b)(A) of**
26 **this section and consents to the jurisdiction of the courts of this state**
27 **for the purposes of enforcing this section.**

28 **SECTION 4.** ORS 180.405 is amended to read:

29 180.405. As used in ORS 180.400 to 180.455 and 323.106:

30 (1) "Brand family" means all styles of cigarettes sold under the same
31 trademark and differentiated from one another by means of additional modi-

1 fiers or descriptors, including, but not limited to, cigarettes labeled
2 “menthol,” “lights,” “kings,” “100s” and any cigarettes sold under a brand
3 name, alone or in conjunction with any other word, trademark, logo, symbol,
4 motto, selling message, recognizable pattern of colors or other indicia of
5 product identification, that are identical to, similar to or identifiable with
6 a previously known brand of cigarettes.

7 (2) “Cigarette” has the meaning given that term in ORS 323.800.

8 (3) “Distributor” means a person who is licensed under ORS 323.105 and
9 any other person who is a distributor for the purposes of ORS 323.005 to
10 323.482.

11 **(4) “Importer” has the meaning given that term in ORS 323.800.**

12 [(4)] (5) “Master Settlement Agreement” has the meaning given that term
13 in ORS 323.800.

14 [(5)] (6) “Nonparticipating manufacturer” means any tobacco product
15 manufacturer that is not a participating manufacturer.

16 [(6)] (7) “Participating manufacturer” has the meaning given that term in
17 section II(jj) of the Master Settlement Agreement.

18 [(7)] (8) “Qualified escrow fund” has the meaning given that term in ORS
19 323.800.

20 **(9) “Retailer” means a person that sells cigarettes or smokeless to-**
21 **bacco products to individuals for personal consumption.**

22 **(10) “Smokeless tobacco products” has the meaning given that term**
23 **in ORS 323.810.**

24 [(8)] (11) “Tobacco product manufacturer” has the meaning given that
25 term in ORS 323.800.

26 [(9)] (12) “Units sold” has the meaning given that term in ORS 323.800.

27 **SECTION 5.** ORS 180.410 is amended to read:

28 180.410. (1) Every tobacco product manufacturer whose cigarettes are sold
29 in this state whether directly or through a distributor, retailer or similar
30 intermediary shall execute and deliver a certification to the Attorney Gen-
31 eral certifying that as of the date of the certification, the tobacco product

1 manufacturer is either:

2 (a) A participating manufacturer; or

3 (b) In full compliance with ORS 323.806 and with rules adopted under ORS
4 180.445 and 180.450.

5 (2) The certification required by subsection (1) of this section shall be on
6 a form prescribed by the Attorney General and shall be submitted no later
7 than April 30 each year. The form shall permit the tobacco product man-
8 ufacturer to indicate the electronic mail address to which the Attorney
9 General may send notice of changes in the directory developed under ORS
10 180.425 if the tobacco product manufacturer elects to receive electronic mail
11 notice.

12 (3) A participating manufacturer shall include in the certification re-
13 quired by subsection (1) of this section a list of its brand families. The par-
14 ticipating manufacturer shall update the list at least 30 days prior to any
15 addition or modification to its brand families by executing and delivering a
16 supplemental certification to the Attorney General.

17 (4) A participating manufacturer may not include a brand family in the
18 list required by subsection (3) of this section unless the participating man-
19 ufacturer affirms that the cigarettes in the brand family are to be considered
20 the participating manufacturer's cigarettes for purposes of calculating the
21 participating manufacturer's payments under the Master Settlement Agree-
22 ment for the relevant year, in the volume and shares determined under the
23 Master Settlement Agreement. This subsection does not limit or otherwise
24 affect the right of the state to maintain that cigarettes in a brand family are
25 those of a different tobacco product manufacturer for purposes of calculating
26 payments under the Master Settlement Agreement or for purposes of ORS
27 323.800 to 323.806.

28 (5) A nonparticipating manufacturer shall include in the certification re-
29 quired by subsection (1) of this section a complete list of:

30 (a) All of its brand families and the number of units of each brand family
31 that were sold in the state during the preceding calendar year;

1 (b) All of its brand families that have been sold in the state at any time
2 during the current calendar year;

3 (c) Any brand family of the manufacturer sold in the state during the
4 preceding calendar year that is no longer being sold in the state as of the
5 date of the certification, which may be indicated on the list described in
6 paragraph (a) of this subsection by an asterisk; [*and*]

7 (d) The name and address of every other tobacco product manufacturer
8 that manufactured a brand family described in paragraph (a) or (b) of this
9 subsection in the preceding or current calendar year[.];

10 (e) **The name and address of all distributors that the manufacturer**
11 **intends to use to sell its brand families in this state; and**

12 (f) **In the case of brand families imported into the United States by**
13 **one or more importers, the name and address of all importers of the**
14 **brand families.**

15 (6) A nonparticipating manufacturer shall update the list required by
16 subsection (5) of this section at least 30 days prior to any addition or mod-
17 ification to its brand families by executing and delivering a supplemental
18 certification to the Attorney General.

19 (7) A nonparticipating manufacturer may not include a brand family in
20 the list required by subsection (5) of this section unless the nonparticipating
21 manufacturer affirms that the cigarettes in the brand family are to be con-
22 sidered the nonparticipating manufacturer's cigarettes for purposes of ORS
23 323.800 to 323.806. This subsection does not limit or otherwise affect the right
24 of the state to maintain that cigarettes in a brand family are those of a dif-
25 ferent tobacco product manufacturer for purposes of calculating payments
26 under the Master Settlement Agreement or for purposes of ORS 323.800 to
27 323.806.

28 **SECTION 6.** ORS 180.415 is amended to read:

29 180.415. In the certification required by ORS 180.410 (1), a nonparticipat-
30 ing manufacturer shall further certify:

31 (1) That the nonparticipating manufacturer [*is*] **and, if applicable, the**

1 **nonparticipating manufacturer's importer are** registered to do business
2 in the State of Oregon or [*has*] **have** appointed a resident agent for service
3 of process and provided notice of the appointment as required by ORS
4 180.430.

5 (2) That the nonparticipating manufacturer:

6 (a) Has established and continues to maintain a qualified escrow fund;
7 and

8 (b) Has executed a qualified escrow agreement that has been reviewed and
9 approved by the Attorney General and that governs the qualified escrow
10 fund. The Attorney General shall adopt rules defining the form and content
11 of a model escrow agreement. A nonparticipating manufacturer that executes
12 the model escrow agreement is deemed to have satisfied the requirement that
13 it use a form of escrow agreement that has been reviewed and approved by
14 the Attorney General.

15 (3)(a) The name, address and telephone number of the financial institution
16 where the nonparticipating manufacturer has established the qualified
17 escrow fund required by ORS 323.806;

18 (b) The account number of the qualified escrow fund and any subaccount
19 number for the State of Oregon;

20 (c) The amount the nonparticipating manufacturer placed in the qualified
21 escrow fund for cigarettes sold in Oregon during the preceding calendar year,
22 the amount and date of each deposit and evidence or verification as may be
23 deemed necessary by the Attorney General to confirm the amounts and dates;
24 and

25 (d) The amount and date of any withdrawal of funds the nonparticipating
26 manufacturer made at any time from the qualified escrow fund or from any
27 other qualified escrow fund into which the nonparticipating manufacturer
28 ever made escrow payments pursuant to ORS 323.806.

29 **(4) That the nonparticipating manufacturer has posted a bond in**
30 **accordance with section 9 of this 2017 Act.**

31 **(5) That all shipments or sales made within or into this state by the**

1 **nonparticipating manufacturer or its importer are made to a distrib-**
2 **utor of cigarettes licensed under ORS 323.105 or a distributor of to-**
3 **bacco products licensed under ORS 323.530.**

4 **SECTION 7.** ORS 180.435 is amended to read:

5 180.435. (1) Not later than 20 days after the end of each calendar quarter,
6 and more frequently if so directed by the Attorney General, a distributor
7 shall report such information as the Attorney General requires to facilitate
8 compliance by tobacco product manufacturers with this section and ORS
9 180.410, 180.415, 180.420, 180.430 and 180.440, and with rules adopted under
10 ORS 180.445 and 180.450. The information shall include, but need not be
11 limited to, a list by brand family of the total number of cigarettes or, in the
12 case of roll-your-own tobacco, the equivalent stick count for which the dis-
13 tributor affixed stamps or otherwise paid the tax due during the previous
14 calendar quarter.

15 (2) A distributor shall maintain for a period of five years all invoices and
16 documentation of sales of cigarettes manufactured by nonparticipating man-
17 ufacturers and any other information relied upon in reporting to the Attor-
18 ney General under subsection (1) of this section. The distributor shall make
19 the invoices and other documentation available to the Attorney General
20 upon request.

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

27 (b) If a person fails to produce any books, papers, records or other infor-
28 mation required to be produced, fails to appear or testify about a matter for
29 which testimony may be compelled or otherwise fails to comply with a
30 subpoena issued under this subsection, the Attorney General may apply to
31 the circuit court of the county in which the person to whom the subpoena

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

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

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

14 (5) The Attorney General and the Department of Revenue may share with
15 each other information received under [*this section and ORS 180.410, 180.415*
16 *and 323.106*] **ORS 180.400 to 180.455, ORS chapter 323 and corresponding**
17 **rules**, and may share such information with federal, state or local agencies
18 for purposes of enforcement of [*this section and ORS 180.410, 180.415, 180.420,*
19 *180.430, 180.440 and 323.806, rules adopted under ORS 180.445 and 180.450 and*
20 *corresponding laws of other states*] **ORS 180.400 to 180.455, ORS chapter 323**
21 **and corresponding rules, or the corresponding laws of other states and**
22 **with the data clearinghouse or similar entity established pursuant to**
23 **a settlement agreement between the State of Oregon and the partic-**
24 **ipating manufacturers, and with any parties necessary to effectuate**
25 **the terms of the settlement agreement.**

26 (6) The Attorney General may at any time require a nonparticipating
27 manufacturer to produce proof from the financial institution in which the
28 nonparticipating manufacturer has established a qualified escrow fund for
29 the purpose of compliance with ORS 323.806 of the amount of moneys in the
30 fund, exclusive of interest, the amount and date of each deposit and the
31 amount and date of each withdrawal from the fund.

1 (7) The Attorney General shall, upon request of a nonparticipating man-
2 ufacturer whose compliance with escrow requirements is at issue, provide the
3 manufacturer with copies of all documents upon which any proposed addition
4 to the escrow is based. Documents required to be provided under this sub-
5 section include, but are not necessarily limited to, reports under this section
6 from distributors. The information provided to the manufacturer under this
7 subsection may not include information about brand families or products of
8 any tobacco product manufacturer other than the one to whom the informa-
9 tion is provided. The information may be used only for the purpose of de-
10 termining the appropriate amount of escrow deposits.

11 (8) The Attorney General may require a distributor or a tobacco product
12 manufacturer to submit any additional information, including, but not lim-
13 ited to, samples of the packaging and labeling of each brand family, to enable
14 the Attorney General to determine whether a tobacco product manufacturer
15 is in compliance with this section and ORS 180.410, 180.415, 180.420, 180.430
16 and 180.440 and with rules adopted under ORS 180.445 and 180.450.

17 **SECTION 8. Sections 9 to 11 of this 2017 Act are added to and made**
18 **a part of ORS 180.400 to 180.455.**

19 **SECTION 9. Bond required of nonparticipating manufacturer.** (1)
20 **A nonparticipating manufacturer shall post a bond for the benefit of**
21 **the state, in accordance with this section, which is conditioned on the**
22 **nonparticipating manufacturer fully complying with the escrow obli-**
23 **gations of ORS 323.806.**

24 **(2) The bond must be posted at least 10 days in advance of each**
25 **calendar quarter as a condition to the nonparticipating manufacturer**
26 **and its brand families being included in the state directory for that**
27 **quarter. The amount of the bond must be the greater of:**

28 **(a) The greatest required escrow amount due from the nonpartic-**
29 **ipating manufacturer or its predecessor for any of the 12 preceding**
30 **calendar quarters; or**

31 **(b) \$25,000.**

1 **(3) If a nonparticipating manufacturer that posted a bond has failed**
2 **to make or have made on its behalf deposits equal to the full amount**
3 **owed for a quarter within 15 days following the due date for the**
4 **quarter, the Attorney General may execute upon the bond in the**
5 **amount equal to any remaining amount of the escrow due, including**
6 **any applicable penalties or other charges allowable by law. Amounts**
7 **the Attorney General collects on a bond shall be deposited into the**
8 **General Fund for the benefit of the state and shall reduce the amount**
9 **of escrow due from the nonparticipating manufacturer in the dollar**
10 **amount collected. Escrow obligations above the amount collected on**
11 **the bond remain due from the nonparticipating manufacturer and any**
12 **importer liable as provided in ORS 323.806.**

13 **(4) The bond required under this section must be a good and suffi-**
14 **cient bond executed by a surety company licensed and authorized to**
15 **do business in Oregon and shall be conditioned to pay the escrow re-**
16 **quirements as well as any penalties or other charges under this chap-**
17 **ter.**

18 **(5) The Attorney General may promulgate rules necessary to im-**
19 **plement this section including acceptable forms and types of bonds.**

20 **SECTION 10. Prohibited Conduct.** (1)(a) **A person engaged in the**
21 **business of selling cigarettes or smokeless tobacco products for profit**
22 **may not ship or transport, or cause to be shipped or transported, cig-**
23 **arettes or smokeless tobacco products ordered or purchased by mail**
24 **or telephone or through a computer or other electronic network to any**
25 **person in this state other than a distributor or retailer.**

26 **(b) Paragraph (a) of this subsection does not apply to a freight**
27 **forwarder or motor carrier, as those terms are defined in 49 U.S.C.**
28 **13102, as in effect on the effective date of this 2017 Act, or an air car-**
29 **rier, as defined in 49 U.S.C. 40102, as in effect on the effective date of**
30 **this 2017 Act.**

31 **(2) A retailer may not sell cigarettes or smokeless tobacco products**

1 unless the retailer or an employee of the retailer makes the sale to the
2 purchaser in person as part of a face-to-face exchange.

3 (3) A person may not knowingly provide substantial assistance to
4 a person that is violating subsection (1) or (2) of this section.

5 **SECTION 11. Civil Remedies.** (1) The Attorney General may bring
6 a civil action in the name of the State of Oregon against a person who
7 violates section 10 of this 2017 Act or for the purpose of seeking an
8 injunction to restrain an actual or threatened violation of section 10
9 of this 2017 Act and compel compliance with section 10 of this 2017 Act.

10 (2) If a court determines that a person violated section 10 of this
11 2017 Act, the court shall order the disgorgement of any profits, gain,
12 gross receipts or other benefit from the violation. All moneys
13 disgorged under this subsection must be deposited in the Tobacco
14 Enforcement Fund established under ORS 180.205.

15 (3)(a) In any action brought pursuant to this section, the state may
16 recover the costs of the investigation, the costs of the action, reason-
17 able attorney fees and a civil penalty for each violation, not to exceed
18 \$5,000 per violation. A civil penalty imposed under this section must
19 be imposed in the manner provided by ORS 183.745.

20 (b) For the purposes of this subsection, each shipment or transport
21 of cigarettes or smokeless tobacco products constitutes a separate vi-
22 olation.

23 (4) Unless expressly provided, the remedies or penalties under this
24 section are cumulative to each other and to the remedies available
25 under all other laws of this state.

26 **SECTION 12. Investigative Demand.** (1) If it appears to the Attorney
27 General that a person, including a person described in section 10 (1)(b)
28 of this 2017 Act, has possession, custody or control of any information,
29 document or other material that is relevant to an investigation of a
30 violation of ORS 180.400 to 180.455 or 323.806, or that could lead to the
31 discovery of relevant information in an investigation of a violation of

1 **ORS 180.400 to 180.455 or 323.806, the Attorney General may execute an**
2 **investigative demand and may cause an investigative demand to be**
3 **served upon the person. The investigative demand may require the**
4 **person:**

5 (a) **To appear and testify under oath at the time and place stated**
6 **in the investigative demand;**

7 (b) **To answer written interrogatories; or**

8 (c) **To produce relevant documentary material or physical evidence**
9 **for examination at the time and place stated in the investigative de-**
10 **mand.**

11 (2) **An investigative demand under this section shall be served in**
12 **the manner provided by ORS 646.622 and may be enforced in the**
13 **manner provided by ORS 646.626.**

14 **SECTION 13.** ORS 180.205 is amended to read:

15 180.205. (1) The Tobacco Enforcement Fund is established separate and
16 distinct from the General Fund. The Tobacco Enforcement Fund shall consist
17 of:

18 (a) Moneys deposited into the fund under ORS 180.450 and 180.491 **and**
19 **section 11 of this 2017 Act;** and

20 (b) Moneys transferred to the fund under ORS 293.537.

21 (2) Moneys in the Tobacco Enforcement Fund are continuously appropri-
22 ated to the Department of Justice for the purpose of enforcing the provisions
23 of ORS 180.400 to 180.455, 180.465 to 180.494, 323.106, 323.806 and 323.810 to
24 323.816. Moneys in the fund are not subject to allotment under ORS 291.234
25 to 291.260.

26 **SECTION 14.** The section captions used in this 2017 Act are provided
27 **only for the convenience of the reader and do not become part of the**
28 **statutory law of this state or express any legislative intent in the**
29 **enactment of this 2017 Act.**

30 **SECTION 15.** This 2017 Act being necessary for the immediate
31 **preservation of the public peace, health and safety, an emergency is**

1 **declared to exist, and this 2017 Act takes effect on its passage.**

2
