

Representative Patrice M. Arent proposes to substitute the following bill:

TOBACCO MANUFACTURERS RESPONSIBILITY ACT

1999 GENERAL SESSION

STATE OF UTAH

Sponsor: Patrice M. Arent

Greg J. Curtis

AN ACT RELATING TO HEALTH; ENACTING THE MODEL TOBACCO SETTLEMENT
STATUTE; AND PROVIDING AN EFFECTIVE DATE.

This act affects sections of Utah Code Annotated 1953 as follows:

ENACTS:

26-44-101, Utah Code Annotated 1953

26-44-201, Utah Code Annotated 1953

26-44-202, Utah Code Annotated 1953

26-44-203, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **26-44-101** is enacted to read:

CHAPTER 44. TOBACCO MANUFACTURERS RESPONSIBILITY ACT

Part 1. Tobacco Manufacturers Responsibility Act

26-44-101. Title.

The chapter is known as the "Tobacco Manufacturers Responsibility Act."

Section 2. Section **26-44-201** is enacted to read:

Part 2. Model Tobacco Settlement Statute

26-44-201. Findings and purpose.

(1) Cigarette smoking presents serious public health concerns to the State and to the citizens of the State. The Surgeon General has determined that smoking causes lung cancer, heart disease and other serious diseases, and that there are hundreds of thousands of tobacco-related

26 deaths in the United States each year. These diseases most often do not appear until many years
27 after the person in question begins smoking.

28 (2) Cigarette smoking also presents serious financial concerns for the State. Under certain
29 health-care programs, the State may have a legal obligation to provide medical assistance to
30 eligible persons for health conditions associated with cigarette smoking, and those persons may
31 have a legal entitlement to receive such medical assistance.

32 (3) Under these programs, the State pays millions of dollars each year to provide medical
33 assistance for these persons for health conditions associated with cigarette smoking.

34 (4) It is the policy of the State that financial burdens imposed on the State by cigarette
35 smoking be borne by tobacco product manufacturers rather than by the State to the extent that such
36 manufacturers either determine to enter into a settlement with the State or are found culpable by
37 the courts.

38 (5) On November 23, 1998, leading United States tobacco product manufacturers entered
39 into a settlement agreement, entitled the "Master Settlement Agreement," with the State. The
40 Master Settlement Agreement obligates these manufacturers, in return for a release of past, present,
41 and certain future claims against them as described therein, to pay substantial sums to the State
42 (tied in part to their volume of sales); to fund a national foundation devoted to the interests of
43 public health; and to make substantial changes in their advertising and marketing practices and
44 corporate culture, with the intention of reducing underage smoking.

45 (6) It would be contrary to the policy of the State if tobacco product manufacturers who
46 determine not to enter into such a settlement could use a resulting cost advantage to derive large,
47 short-term profits in the years before liability may arise without ensuring that the State will have
48 an eventual source of recovery from them if they are proven to have acted culpably. It is thus in
49 the interest of the State to require that such manufacturers establish a reserve fund to guarantee a
50 source of compensation and to prevent such manufacturers from deriving large, short-term profits
51 and then becoming judgment-proof before liability may arise.

52 Section 3. Section **26-44-202** is enacted to read:

53 **26-44-202. Definitions.**

54 As used in this part:

55 (1) "Adjusted for inflation" means increased in accordance with the formula for inflation
56 adjustment set forth in Exhibit C to the Master Settlement Agreement.

57 (2) "Affiliate" means a person who directly or indirectly owns or controls, is owned or
58 controlled by, or is under common ownership or control with, another person. Solely for purposes
59 of this definition, the terms "owns," "is owned" and "ownership" mean ownership of an equity
60 interest, or the equivalent thereof, of 10% or more, and the term "person" means an individual,
61 partnership, committee, association, corporation or any other organization or group of persons.

62 (3) "Allocable share" means Allocable Share as that term is defined in the Master
63 Settlement Agreement.

64 (4) "Cigarette" means any product that contains nicotine, is intended to be burned or heated
65 under ordinary conditions of use, and consists of or contains (a) any roll of tobacco wrapped in
66 paper or in any substance not containing tobacco; or (b) tobacco, in any form, that is functional in
67 the product, which, because of its appearance, the type of tobacco used in the filler, or its
68 packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (c)
69 any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance,
70 the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or
71 purchased by, consumers as a cigarette described in clause (a) of this definition. The term
72 "cigarette" includes "roll-your-own," (i.e., any tobacco which, because of its appearance, type,
73 packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers
74 as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of
75 "roll-your-own" tobacco shall constitute one individual "cigarette."

76 (5) "Master Settlement Agreement" means the settlement agreement (and related
77 documents) entered into on November 23, 1998, by the State and leading United States tobacco
78 product manufacturers.

79 (6) "Qualified escrow fund" means an escrow arrangement with a federally or State
80 chartered financial institution having no affiliation with any tobacco product manufacturer and
81 having assets of at least \$1,000,000,000 where such arrangement requires that such financial
82 institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the
83 tobacco product manufacturer placing the funds into escrow from using, accessing, or directing
84 the use of the funds' principal except as consistent with Subsection 26-44-203(2).

85 (7) "Released claims" means Released Claims as that term is defined in the Master
86 Settlement Agreement.

87 (8) "Releasing parties" means Releasing Parties as that term is defined in the Master

88 Settlement Agreement.

89 (9) (a) "Tobacco product manufacturer" means an entity that after the date of enactment
90 of this Act directly (and not exclusively through any affiliate):

91 (i) manufactures cigarettes anywhere that such manufacturer intends to be sold in the
92 United States, including cigarettes intended to be sold in the United States through an importer
93 (except where such importer is an original participating manufacturer (as that term is defined in
94 the Master Settlement Agreement) that will be responsible for the payments under the Master
95 Settlement Agreement with respect to such cigarettes as a result of the provisions of Subsection
96 II(mm) of the Master Settlement Agreement and that pays the taxes specified in Subsection II(z)
97 of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does
98 not market or advertise such cigarettes in the United States);

99 (ii) is the first purchaser anywhere for resale in the United States of cigarettes
100 manufactured anywhere that the manufacturer does not intend to be sold in the United States; or
101 (iii) becomes a successor of an entity described in Subsection (9)(a)(i) or (ii).

102 (b) "Tobacco product manufacturer" shall not include an affiliate of a tobacco product
103 manufacturer unless such affiliate itself falls within any Subsection (9)(a)(i) through (iii).

104 (10) "Units sold" means the number of individual cigarettes sold in the State by the
105 applicable tobacco product manufacturer (whether directly or through a distributor, retailer or
106 similar intermediary or intermediaries) during the year in question, as measured by excise taxes
107 collected by the State on packs (or "roll-your-own" tobacco containers) bearing the excise tax
108 stamp of the State. The State Tax Commission shall promulgate such regulations as are necessary
109 to ascertain the amount of State excise tax paid on the cigarettes of such tobacco product
110 manufacturer for each year.

111 Section 4. Section **26-44-203** is enacted to read:

112 **26-44-203. Requirements.**

113 (1) Any tobacco product manufacturer selling cigarettes to consumers within the State
114 (whether directly or through a distributor, retailer or similar intermediary or intermediaries) after
115 the date of enactment of this Act shall do one of the following:

116 (a) become a participating manufacturer (as that term is defined in Section II(jj) of the
117 Master Settlement Agreement) and generally perform its financial obligations under the Master
118 Settlement Agreement; or

119 (b) place into a qualified escrow fund by April 15 of the year following the year in
120 question the following amounts (as such amounts are adjusted for inflation):

121 (i) 1999: \$.0094241 per unit sold after the date of enactment of this Act;

122 (ii) 2000: \$.0104712 per unit sold;

123 (iii) for each of 2001 and 2002: \$.0136125 per unit sold;

124 (iv) for each of 2003 through 2006: \$.0167539 per unit sold; and

125 (v) for each of 2007 and each year thereafter: \$.0188482 per unit sold.

126 (2) A tobacco product manufacturer that places funds into escrow pursuant to Subsection

127 (1)(b) shall receive the interest or other appreciation on such funds as earned. Such funds

128 themselves shall be released from escrow only under the following circumstances:

129 (a) to pay a judgment or settlement on any released claim brought against such tobacco

130 product manufacturer by the State or any releasing party located or residing in the State. Funds

131 shall be released from escrow under this Subsection (2)(a):

132 (i) in the order in which they were placed into escrow; and

133 (ii) only to the extent and at the time necessary to make payments required under such

134 judgment or settlement;

135 (b) to the extent that a tobacco product manufacturer establishes that the amount it was

136 required to place into escrow in a particular year was greater than the State's allocable share of the

137 total payments that such manufacturer would have been required to make in that year under the

138 Master Settlement Agreement (as determined pursuant to Section IX(i)(2) of the Master Settlement

139 Agreement, and before any of the adjustments or offsets described in Section IX(i)(3) of that

140 Agreement other than the Inflation Adjustment) had it been a participating manufacturer, the

141 excess shall be released from escrow and revert back to such tobacco product manufacturer; or

142 (c) to the extent not released from escrow under Subsection (2)(a) or (b), funds shall be

143 released from escrow and revert back to such tobacco product manufacturer 25 years after the date

144 on which they were placed into escrow.

145 (3) Each tobacco product manufacturer that elects to place funds into escrow pursuant to

146 Subsection (1)(b) shall annually certify to the executive director that it is in compliance with

147 Subsection (1)(b) and Subsection (2). The executive director may bring a civil action on behalf

148 of the State against any tobacco product manufacturer that fails to place into escrow the funds

149 required under Subsection (1)(b) and Subsection (2). Any tobacco product manufacturer that fails

150 in any year to place into escrow the funds required under this Subsection (1)(b) and Subsection (2)
151 shall:

152 (a) be required within 15 days to place such funds into escrow as shall bring it into
153 compliance with Subsection (1)(b) and Subsection (2). The court, upon a finding of a violation
154 of Subsection (1)(b) or Subsection (2), may impose a civil penalty to be paid to the General Fund
155 in an amount not to exceed 5% of the amount improperly withheld from escrow per day of the
156 violation and in a total amount not to exceed 100% of the original amount improperly withheld
157 from escrow;

158 (b) in the case of a knowing violation, be required within 15 days to place such funds into
159 escrow as shall bring it into compliance with Subsection (1)(b) and Subsection (2). The court,
160 upon a finding of a knowing violation of Subsection (1)(b) or Subsection (2), may impose a civil
161 penalty to be paid to the General Fund of the State in an amount not to exceed 15% of the amount
162 improperly withheld from escrow per day of the violation and in a total amount not to exceed
163 300% of the original amount improperly withheld from escrow; and

164 (c) in the case of a second knowing violation, be prohibited from selling cigarettes to
165 consumers within the State (whether directly or through a distributor) retailer or similar
166 intermediary, for a period not to exceed 2 years.

167 (4) Each failure to make an annual deposit required under Subsection (1)(b) shall
168 constitute a separate violation.

169 (5) A court shall award the State its costs and attorneys fees incurred in bringing any action
170 in which the State establishes that a tobacco product manufacturer has violated this section.

171 **Section 5. Effective date.**

172 This act takes effect on July 1, 1999.

Legislative Review Note**as of 2-1-99 11:16 AM**

This legislation raises the following constitutional or statutory concerns:

This bill contains model language from the tobacco settlement agreement that the state entered into with leading tobacco manufacturers on November 23, 1998, that, if enacted and diligently enforced, protects the state against a potential three percent reduction in settlement monies for each one percent decline in the market share of participating manufacturers. In addition, the model language protects the state in the event the model language is overturned in court by capping at 65% any reduction in tobacco settlement money due to a decline in market share.

Specifically, the model language requires a tobacco manufacturer who did not participate in the tobacco settlement agreement to either accept the terms and conditions of the settlement agreement or pay a certain sum of money for each cigarette sold in the state into an escrow account established by the manufacturer. The purpose of the escrow account is to create a fund from which the state can recover, should the state choose to bring a legal action against the manufacturer, and to ensure that nonparticipating tobacco manufacturers do not enjoy a cost advantage over participating tobacco manufacturers. After money has been in the account for 25 years, it is returned to the tobacco manufacturer. Interest on the account is regularly paid to the tobacco manufacturer.

While there are similarities between the model language and other Utah laws that mandate that funds be set aside for future liabilities, there are differences as well. As such, the legal ramifications are not clear, particularly with respect to the authority of the state to (1) regulate out-of-state tobacco manufacturers whose product was brought into the state through nonaffiliated distributors; and (2) require nonparties to a lawsuit to set aside funds to (a) create an escrow account from which the state can recover in future litigation and (b) place the same financial disadvantage on nonparties as were placed on parties to the lawsuit.

Office of Legislative Research and General Counsel