

(Smokeless Tobacco Master Settlement Agreement)

180.465 Legislative findings. The Legislative Assembly finds that violations of ORS 323.810 to 323.816 threaten the integrity of the Smokeless Tobacco Master Settlement Agreement, the fiscal soundness of the state and the public health. The Legislative Assembly finds that enacting procedural enhancements will aid the enforcement of ORS 323.810 to 323.816 and thereby safeguard the integrity of the Smokeless Tobacco Master Settlement Agreement, the fiscal soundness of the state and the public health. [2009 c.717 §6]

180.468 Definitions. As used in ORS 180.465 to 180.494:

- (1) "Distributor" means a person who is licensed under ORS 323.520 and any other person who is a distributor for the purposes of ORS 323.500 to 323.645.
- (2) "Nonparticipating manufacturer" means any tobacco product manufacturer that is not a participating manufacturer.
- (3) "Participating manufacturer" has the meaning given that term in section II(ee) of the Smokeless Tobacco Master Settlement Agreement.
- (4) "Qualified escrow fund" has the meaning given that term in ORS 323.810.
- (5) "Smokeless Tobacco Master Settlement Agreement" has the meaning given that term in ORS 323.810.
- (6) "Smokeless tobacco products" has the meaning given that term in ORS 323.810.
- (7) "Tobacco product manufacturer" has the meaning given that term in ORS 323.810.
- (8) "Units sold" has the meaning given that term in ORS 323.810. [2009 c.717 §7]

180.471 Manufacturer certification. (1) Every tobacco product manufacturer whose smokeless tobacco products are sold in this state, whether directly or through a distributor, retailer or similar intermediary, shall execute and deliver a certification to the Attorney General certifying that, as of the date of the certification, the tobacco product manufacturer is either:

- (a) A participating manufacturer; or
- (b) In full compliance with ORS 323.816 and with rules adopted under ORS 180.489 and 180.491.

(2) The certification required by subsection (1) of this section shall be on a form prescribed by the Attorney General and shall be submitted no later than April 30 each year. The form shall permit the tobacco product manufacturer to indicate the electronic mail address to which the Attorney General may send notice of changes in the directory developed under ORS 180.477 if the tobacco product manufacturer elects to receive electronic mail notice. [2009 c.717 §8]

180.474 Nonparticipating manufacturer certification; rules. In the certification required by ORS 180.471, a nonparticipating manufacturer shall further certify:

- (1) That the nonparticipating manufacturer is registered to do business in the State of Oregon or has appointed a resident agent for service of process and provided notice of the appointment as required by ORS 180.480.
- (2) That the nonparticipating manufacturer:
 - (a) Has established and continues to maintain a qualified escrow fund; and
 - (b) Has executed a qualified escrow agreement that has been reviewed and approved by the Attorney General and that governs the qualified escrow fund. The Attorney General shall adopt rules defining the form and content of a model escrow agreement. A nonparticipating manufacturer that executes the model escrow agreement is deemed to have satisfied the requirement that it use a form of escrow agreement that has been reviewed and approved by the Attorney General.
- (3)(a) The name, address and telephone number of the financial institution where the nonparticipating manufacturer has established the qualified escrow fund required by ORS 323.816;
- (b) The account number of the qualified escrow fund and any subaccount number for the State of Oregon;

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

(d) The amount and date of any withdrawal of funds the nonparticipating manufacturer made at any time from the qualified escrow fund or from any other qualified escrow fund into which the nonparticipating manufacturer ever made escrow payments pursuant to ORS 323.816. [2009 c.717 §9]

180.477 Attorney General's directory; rules. (1) The Attorney General shall develop and make available for public inspection a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of ORS 180.471 and 180.474.

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

(3) The Attorney General may not include or retain in the directory a nonparticipating manufacturer if the Attorney General concludes that:

(a) Any escrow payment required from the nonparticipating manufacturer pursuant to ORS 323.816 for any period 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) Any outstanding final judgment against the nonparticipating manufacturer, including interest thereon, for a violation of ORS 323.816 has not been fully satisfied.

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

(5) The Attorney General shall:

(a) Create and maintain a list of persons, including but not limited to tobacco product manufacturers and distributors, that are interested in receiving electronic mail notifications of changes in the directory developed under this section;

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

(c) Immediately upon making any change in the directory developed under this section, send electronic mail notices of the change to all persons on the list created under this subsection. [2009 c.717 §10]

180.480 Nonresident nonparticipating manufacturer service agent. (1)(a) Any nonresident or foreign nonparticipating manufacturer that has not registered to do business in the State of Oregon as a foreign corporation or business entity shall, as a condition precedent to being listed or retained in the directory developed under ORS 180.477, appoint and continuously engage the services of a resident agent in this state. The agent shall act as agent for service of process on whom all process in any action or proceeding against the nonparticipating manufacturer concerning or arising out of the enforcement of this section or ORS 180.471, 180.474, 180.477, 180.483, 180.486 or 323.816, or rules adopted under ORS 180.489 and 180.491, may be served in any manner authorized by law. Service on the agent

constitutes legal and valid service of process on the nonparticipating manufacturer.

(b) The nonparticipating manufacturer shall provide the name, address, telephone number and proof of the appointment and availability of the agent to the Attorney General.

(2) The nonparticipating manufacturer shall provide notice to the Attorney General at least 30 calendar days prior to termination of the authority of an agent and shall provide proof to the satisfaction of the Attorney General of the appointment of a new agent at least five calendar days prior to the termination of an existing agent appointment. If an agent terminates the agent's appointment, the nonparticipating manufacturer shall notify the Attorney General of the termination within five calendar days and shall include proof to the Attorney General of the appointment of a new agent.

(3) A nonparticipating manufacturer whose smokeless tobacco products are sold in this state who has not appointed or designated an agent as required by this section shall be deemed to have appointed the Secretary of State as the agent and may be proceeded against in courts of this state by service of process upon the Secretary of State. However, the appointment of the Secretary of State as the agent does not satisfy the condition precedent to the nonparticipating manufacturer being listed or retained in the directory. [2009 c.717 §11]

180.483 Distributor obligations; Attorney General and Department of Revenue information sharing; nonparticipating manufacturer escrow requirements. (1) Not later than 20 days after the end of each calendar quarter, and more frequently if so directed by the Attorney General, a distributor of smokeless tobacco products subject to the requirements of ORS 323.500 to 323.645 shall report such information as the Attorney General requires to facilitate compliance by tobacco product manufacturers with this section and ORS 180.471, 180.474, 180.477, 180.480, 180.486 and 323.816 and with rules adopted under ORS 180.489 and 180.491. The information shall include, but need not be limited to, a list of the total number of units sold of smokeless tobacco products for which the distributor paid the tax due during the previous calendar quarter.

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

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

(4) The Attorney General and the Department of Revenue may share with each other information received under this section and ORS 180.471, 180.474 and 323.520 and may share such information with federal, state or local agencies for purposes of enforcement of this section and ORS 180.471, 180.474, 180.477, 180.480, 180.486 and 323.816, rules adopted under ORS 180.489 and 180.491 and corresponding laws of other states.

(5) The Attorney General may at any time require a nonparticipating manufacturer to produce proof from the financial institution in which the nonparticipating manufacturer has established a qualified escrow fund for the purpose of compliance with ORS 323.816 of the amount of moneys in the fund, exclusive of interest, the amount and date of each deposit and the amount and date of each withdrawal from the fund.

(6) The Attorney General shall, upon request of a nonparticipating manufacturer whose compliance with escrow requirements is at issue, provide the manufacturer with copies of all documents upon which any proposed addition to the escrow is based. Documents required to be provided under this subsection include, but are not necessarily limited to, reports under this section from distributors. The information provided to the manufacturer under this subsection may not include information about products of any tobacco product manufacturer other than the one to whom the information is provided. The information may be used only for the purpose of determining the appropriate amount of escrow deposits.

(7) The Attorney General may require a distributor or a tobacco product manufacturer to submit any additional information, including, but not limited to, samples of the packaging and labeling of each

smokeless tobacco product manufactured or distributed, to enable the Attorney General to determine whether a tobacco product manufacturer is in compliance with this section and ORS 180.471, 180.474, 180.477, 180.480, 180.486 and 323.816 and with rules adopted under ORS 180.489 and 180.491. [2009 c.717 §12]

180.486 Prohibited conduct; penalty. (1) A person may not:

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

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

(c) Possess in this state for sale in another jurisdiction smokeless tobacco products of a tobacco product manufacturer that the person acquired at a time when the tobacco product manufacturer was not included in the directory developed under ORS 180.477 and was not in compliance with the Smokeless Tobacco Master Settlement Agreement qualifying statute in the other jurisdiction or with statutes that supplement the qualifying statute in that jurisdiction; or

(d) Distribute, in this state, free samples of smokeless tobacco products:

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

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

(2) A person who sells, offers for sale, distributes, acquires, holds, owns, possesses, transports, imports or causes to be imported smokeless tobacco products that the person knows or should know are intended for sale or distribution in violation of subsection (1) of this section commits a Class A misdemeanor. [2009 c.717 §13]

180.489 Quarterly escrow deposits; rules. (1) To promote compliance with the provisions of ORS 180.471, 180.474, 180.477, 180.480, 180.483 and 180.486, the Attorney General may adopt rules requiring a nonparticipating manufacturer to make the escrow deposits required by ORS 323.816 in quarterly installments during the year in which the sales covered by the deposits are made. The Attorney General may require a nonparticipating manufacturer to produce information sufficient to enable the Attorney General to determine the adequacy of the amount of the installment deposit.

(2) If the Attorney General adopts rules requiring a nonparticipating manufacturer to make escrow deposits in quarterly installments, the rules may also provide that a nonparticipating manufacturer that has been in continuous compliance for one year with ORS 180.471, 180.474, 180.477, 180.480, 180.483, 180.486 and 323.816 may make escrow deposits required by ORS 323.816 in annual payments during the second and subsequent years in which deposits are required. [2009 c.717 §14]

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

(2) The Attorney General may adopt rules necessary to effect the purposes of ORS 180.465 to 180.494 and 323.520 (3).

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

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

(5) Unless otherwise expressly provided, the remedies or penalties provided by this section and ORS 180.486 and 180.494 are cumulative to each other and to the remedies or penalties available under all other laws of this state. [2009 c.717 §15]

180.494 Revocation or suspension of distributor license; refusal to issue license; penalties; remedies. (1) Upon a determination that a distributor has violated ORS 180.486, the Department of Revenue may revoke or suspend the license of the distributor in the manner provided by ORS 323.535. Each offer to sell smokeless tobacco products in violation of ORS 180.486 constitutes a separate violation.

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

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

(b) Upon a determination that a person has violated ORS 180.486 (1)(a), the department may impose a civil penalty in an amount not to exceed \$5,000. Judicial review of an order imposing a civil penalty shall be as provided in ORS 305.445 and 305.501.

(4) The Attorney General may seek an injunction to restrain a threatened or actual violation of ORS 180.483 or 180.486 by a distributor and to compel the distributor to comply with ORS 180.483 and 180.486. In any action brought pursuant to this subsection, the state may recover the costs of investigation, the costs of the action and reasonable attorney fees.

(5) A person who violates ORS 180.486 (1) engages in an unlawful practice in violation of ORS 646.608. [2009 c.717 §16]

SMOKELESS TOBACCO MASTER SETTLEMENT AGREEMENT

323.810 Definitions for ORS 323.810 to 323.816. As used in ORS 323.810 to 323.816:

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

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

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

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

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

(4) "Released claims" has the meaning given that term in section II(gg) of the Smokeless Tobacco Master Settlement Agreement.

(5) "Releasing parties" has the meaning given that term in section II(ii) of the Smokeless Tobacco Master Settlement Agreement.

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

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

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

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

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

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

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

(9) "Units sold" means the number of individual containers of smokeless tobacco products sold in the State of Oregon by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the State of Oregon. The Department of Revenue shall adopt such rules as are necessary to ascertain the amount of state excise tax paid on the smokeless tobacco products of such tobacco product manufacturer for each year. A unit container shall contain 3.2 ounces of moist snuff, as defined in ORS 323.500, or 3.0 ounces of chewing tobacco. [2009 c.717 §18]

323.813 Findings and purpose. (1) The use of smokeless tobacco products presents serious public

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

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

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

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

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

- (a) To pay substantial sums to the State of Oregon (tied in part to their volume of sales);
- (b) To fund a national foundation devoted to the interests of public health; and
- (c) To make substantial changes in their advertising and marketing practices and corporate culture, with the intention of reducing underage smoking.

(6) It would be contrary to the policy of the State of Oregon if those tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that this state will have an eventual source of recovery from them if they are proven to have acted culpably. It is thus in the interest of the State of Oregon to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise. [2009 c.717 §19]

323.816 Required actions by manufacturer. (1) Any tobacco product manufacturer selling smokeless tobacco products to consumers within the State of Oregon (whether directly or through a distributor, retailer or similar intermediary or intermediaries) after September 28, 2009, shall do one of the following:

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

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

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

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

(b) To refund any excess amount owed to a tobacco product manufacturer when the tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in

Oregon in a particular year was greater than the Smokeless Tobacco Master Settlement Agreement payments, as determined pursuant to section IX(c) of that agreement after final determination of all adjustments, that the manufacturer would have been required to make on account of such units sold had it been a Participating Manufacturer, as defined in section II(ee) of the Smokeless Tobacco Master Settlement Agreement; or

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

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

(a) Be required within 15 days to place such funds into escrow as shall bring the manufacturer into compliance with this section. The court, upon a finding of a violation of this section, may impose a civil penalty to be paid to the General Fund of this state in an amount not to exceed five percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 100 percent of the original amount improperly withheld from escrow;

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

(c) In the case of a second knowing violation, be prohibited from selling smokeless tobacco products to consumers within the State of Oregon (whether directly or through a distributor, retailer or similar intermediary or intermediaries) for a period not to exceed two years. Each failure to make an annual deposit required under this section shall constitute a separate violation. [2009 c.717 §20]