

HOUSE BILL No. 2451

By Committee on Taxation

3-24

1 AN ACT concerning tobacco products; relating to the sale thereof;
2 remitting certain payments from tobacco product manufacturers to the
3 credit of the Kansas endowment for youth fund rather than deposit into
4 escrow upon certification by the attorney general; amending K.S.A. 50-
5 6a01 and 50-6a03 and K.S.A. 2020 Supp. 50-6a04 and 50-6a09 and
6 repealing the existing sections.
7

8 *Be it enacted by the Legislature of the State of Kansas:*

9 Section 1. K.S.A. 50-6a01 is hereby amended to read as follows: 50-
10 6a01. (a) Cigarette smoking presents serious public health concerns to the
11 state and to the citizens of the state. The surgeon general has determined
12 that smoking causes lung cancer, heart disease and other serious diseases,
13 and that there are hundreds of thousands of tobacco-related deaths in the
14 United States each year. These diseases most often do not appear until
15 many years after the person in question begins smoking.

16 (b) Cigarette smoking also presents serious financial concerns for the
17 state. Under certain health-care programs, the state may have a legal
18 obligation to provide medical assistance to eligible persons for health
19 conditions associated with cigarette smoking, and those persons may have
20 a legal entitlement to receive such medical assistance.

21 (c) Under these programs, the state pays millions of dollars each year
22 to provide medical assistance for these persons for health conditions
23 associated with cigarette smoking.

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

29 (e) On November 23, 1998, leading United States tobacco product
30 manufacturers entered into a settlement agreement, entitled the "master
31 settlement agreement," with the state. The master settlement agreement
32 obligates these manufacturers, in return for a release of past, present and
33 certain future claims against them as described therein, to pay substantial
34 sums to the state-~~(, tied in part to their volume of sales)~~, to fund a national
35 foundation devoted to the interests of public health; and to make
36 substantial changes in their advertising and marketing practices and

1 corporate culture, with the intention of reducing underage smoking.

2 (f) It would be contrary to the policy of the state if tobacco product
3 manufacturers who determine not to enter into such a settlement could use
4 a resulting cost advantage to derive large, short-term profits in the years
5 before liability may arise without ensuring that the state will have an
6 eventual source of recovery from them if they are proven to have acted
7 culpably. It is thus in the interest of the state to require that such
8 manufacturers establish a reserve fund to guarantee a source of
9 compensation and to prevent such manufacturers from deriving large,
10 short-term profits and then becoming judgment-proof before liability may
11 arise.

12 (g) *It is also consistent with the policy of the state to require tobacco*
13 *product manufacturers that have not entered into such a settlement to pay*
14 *directly to the state an amount that: (1) Prevents such manufacturers from*
15 *deriving large, short-term profits and then becoming judgment-proof; (2)*
16 *requires such manufacturers to internalize the healthcare costs imposed on*
17 *the state by cigarette smoking; (3) increases the price of such*
18 *manufacturers' cigarettes, thereby reducing smoking rates, particularly*
19 *among youth, consistent with the state's policy of discouraging underage*
20 *smoking; and (4) serves as partial compensation for the financial burdens*
21 *imposed on the state by cigarette smoking.*

22 Sec. 2. K.S.A. 50-6a03 is hereby amended to read as follows: 50-
23 6a03. Any tobacco product manufacturer selling cigarettes to consumers
24 within the state—(, whether directly or through a distributor, retailer or
25 similar intermediary or intermediaries), after ~~the effective date of this act~~
26 *May 20, 1999*, shall do one of the following:

27 (a) Become a participating manufacturer—(, as that term is defined in
28 section II(jj) of the master settlement agreement), and generally perform
29 its financial obligations under the master settlement agreement; or

30 (b) (1) ~~place into a qualified escrow fund~~ by April 15 of the year
31 following the year in question, *pay* the following amounts—(, as such
32 amounts are adjusted for inflation):

33 (A) *For the following years, place into a qualified escrow fund:*

34 (i) 1999: \$.0094241 per unit sold ~~after the effective date of this act;~~

35 ~~(B) (ii) 2000: \$.0104712 per unit sold;~~

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

37 ~~(D) (iv) for each of 2003 through 2006: \$.0167539 per unit sold;~~

38 ~~(E) (v) for each of 2007 and each year thereafter through 2021:~~

39 \$.0188482 per unit sold; *and*

40 (B) *for 2022 and each year thereafter; remit to the director \$.0188482*
41 *per unit sold. The department of revenue and the attorney general shall*
42 *promulgate rules and regulations as necessary to implement this*
43 *subsection. The director shall remit all such amounts to the state treasurer*

1 *in accordance with the provisions of K.S.A. 75-4215, and amendments*
 2 *thereto. Upon receipt of each such remittance, and upon certification by*
 3 *the attorney general that the tobacco product manufacturer subject to the*
 4 *provisions of this subsection (b)(1)(B) did not seek a credit or refund*
 5 *within one year of the date of remittance to the director, the state treasurer*
 6 *shall deposit the entire amount in the state treasury to the credit of the*
 7 *Kansas endowment for youth fund.*

8 (2) (A) A tobacco product manufacturer that places funds into escrow
 9 pursuant to ~~paragraph (1) of~~ subsection (b)(1)(A) shall receive the interest
 10 or other appreciation on such funds as earned. Such funds themselves shall
 11 be released from escrow only under the following circumstances:

12 ~~(A)~~ (i) To pay a judgment or settlement on any released claim brought
 13 against such tobacco product manufacturer by the state or any releasing
 14 party located or residing in the state. Funds shall be released from escrow
 15 under this ~~subparagraph (i)~~ subsection: (a) In the order in which they were
 16 placed into escrow; and ~~(ii)~~ (b) only to the extent and at the time necessary
 17 to make payments required under such judgment or settlement;

18 ~~(B)~~ (ii) to the extent that a tobacco product manufacturer establishes
 19 that the amount it was required to place into escrow, based on units sold in
 20 the state of Kansas in a particular year, was greater than the master
 21 settlement agreement payments, as determined pursuant to section IX(i) of
 22 that agreement including; after final determination of all adjustments, that
 23 such manufacturer would have been required to make based on such units
 24 sold had it been a participating manufacturer, the excess shall be released
 25 from escrow and revert back to such tobacco product manufacturer; or

26 ~~(C)~~ (iii) to the extent not released from escrow under ~~subparagraphs~~
 27 ~~(A) or (B) of paragraph (2) of~~ subsection (b)(2)(A)(i) or (ii), funds shall be
 28 released from escrow and revert back to such tobacco product
 29 manufacturer 25 years after the date on which they were placed into
 30 escrow.

31 (B) *Each tobacco product manufacturer that remits funds pursuant to*
 32 *subsection (b)(1)(B), within one year after the date of remittance, may*
 33 *contest the amount of such remittance. With respect to any timely-*
 34 *contested remittance, the tobacco product manufacturer may seek a credit*
 35 *or refund to the extent that such tobacco product manufacturer establishes*
 36 *that the amount such manufacturer was required to remit, based on units*
 37 *sold in the state of Kansas in a particular year; was greater than the*
 38 *master settlement agreement payments, as determined pursuant to section*
 39 *IX(i) of that agreement, including after final determination of all*
 40 *adjustments, that such tobacco product manufacturer would have been*
 41 *required to make based on such units sold had such tobacco product*
 42 *manufacturer been a participating manufacturer. The tobacco product*
 43 *manufacturer may elect to receive the excess amount as a refund or a*

1 *credit against future remittances due under this section.*

2 (3) Each tobacco product manufacturer that elects to place funds into
3 escrow pursuant to ~~this subsection (b)(1)(A) or remit funds pursuant to~~
4 *subsection (b)(1)(B)* shall annually certify to the attorney general that it is
5 in compliance with ~~this subsection~~ *such subsections*. The attorney general
6 may bring a civil action on behalf of the state against any tobacco product
7 manufacturer that fails to place into escrow *or remit* the funds required
8 under this section. Any tobacco product manufacturer that fails in any year
9 to place into escrow *or remit* the funds required under this section shall:

10 (A) Be required within 15 days to ~~place such funds into escrow as~~
11 ~~shall bring it~~ *such tobacco product manufacturer* into compliance with this
12 section. The court, upon a finding of a violation of ~~this either~~ subsection
13 *(b)(1)(A) or (b)(1)(B)*, may impose a civil penalty to be credited to the state
14 general fund in an amount not to exceed 5% of the amount improperly
15 withheld ~~from escrow~~ per day of the violation and in a total amount not to
16 exceed 100% of the original amount improperly withheld ~~from escrow~~;

17 (B) in the case of a knowing violation, be required within 15 days to
18 ~~place such funds into escrow as shall bring it~~ *such tobacco product*
19 *manufacturer* into compliance with this section. The court, upon a finding
20 of a knowing violation of ~~this either~~ subsection *(b)(1)(A) or (b)(1)(B)*, may
21 impose a civil penalty to be paid to the state general fund in an amount not
22 to exceed 15% of the amount improperly withheld ~~from escrow~~ per day of
23 the violation and in a total amount not to exceed 300% of the original
24 amount improperly withheld ~~from escrow~~; and

25 (C) in the case of a second knowing violation, be prohibited from
26 selling cigarettes to consumers within the state ~~(, whether directly or~~
27 ~~through a distributor, retailer or similar intermediary)~~, for a period not to
28 exceed two years.

29 Each failure to make an annual deposit *or remittance* required under
30 this section shall constitute a separate violation. A tobacco product
31 manufacturer who is found in violation of this section shall pay, in addition
32 to other amounts assessed under this section and pursuant to law, the costs
33 and attorney's fees incurred by the state during a successful presentation
34 under ~~this paragraph~~ *subsection (b)(3)*.

35 Sec. 3. K.S.A. 2020 Supp. 50-6a04 is hereby amended to read as
36 follows: 50-6a04. (a) No person may:

37 (1) Affix, or cause to be affixed, tax indicia to a package of cigarettes,
38 or otherwise pay the tax due upon such cigarettes, of a tobacco product
39 manufacturer brand family not included in the directory; or

40 (2) sell, offer, possess for sale or import into this state, cigarettes of a
41 tobacco product manufacturer brand family not included in the directory.

42 (b) (1) Not later than July 1, 2009, the attorney general shall develop
43 a directory, to be posted on the attorney general's website. Except as

1 otherwise provided, the directory shall list all tobacco product
2 manufacturers and brand families of such tobacco product manufacturers
3 that have provided current and accurate certifications conforming to the
4 requirements of subsection (c).

5 (2) The attorney general shall not include or retain in the directory
6 any non-participating manufacturer, or non-participating manufacturer's
7 brand family, that has failed to provide the required certification, or whose
8 certification the attorney general determines is not in compliance with
9 subsection (c), unless such failure or noncompliance has been cured to the
10 satisfaction of the attorney general.

11 (3) In the case of a non-participating manufacturer, neither the
12 tobacco product manufacturer nor a brand family shall be included or
13 retained in the directory if the attorney general concludes:

14 (A) That an escrow payment required pursuant to K.S.A. 50-6a03(b),
15 and amendments thereto, for any period for any brand family, whether or
16 not listed by such non-participating manufacturer, has not been fully paid
17 into a qualified escrow fund governed by an escrow agreement that has
18 been approved by the attorney general;

19 (B) *that a remittance required pursuant to K.S.A. 50-6a03(b), and*
20 *amendments thereto, for any period for any brand family, whether or not*
21 *listed by such non-participating manufacturer, has not been fully paid to*
22 *the director as required;*

23 (C) that an outstanding final judgment, including interest thereon, for
24 a violation of K.S.A. 50-6a03, and amendments thereto, has not been fully
25 satisfied for such tobacco product manufacturer; or

26 ~~(D)~~ (D) that, within three calendar years prior to the date of
27 submission or approval of the most recent certification, such tobacco
28 product manufacturer has defaulted on escrow payments *or remittances* in
29 any other state or jurisdiction that is a party to the master settlement
30 agreement and the default has not been cured within 90 calendar days of
31 such default.

32 (4) The attorney general shall update the directory as necessary in
33 order to correct mistakes and to add or remove a tobacco product
34 manufacturer or brand family so as to keep the directory in conformity
35 with the requirements of this act.

36 (5) The attorney general shall promptly post in the directory and
37 transmit by electronic mail to each stamping agent that has provided an
38 electronic mail address, notice of removal from the directory of a tobacco
39 product manufacturer or brand family.

40 (6) Unless otherwise provided by agreement between a stamping
41 agent and a tobacco product manufacturer, the stamping agent shall be
42 entitled to a refund from a tobacco product manufacturer for any money
43 paid by the stamping agent to the tobacco product manufacturer for any

1 cigarettes of the tobacco product manufacturer in the possession of the
2 stamping agent on the effective date of removal from the directory of that
3 tobacco product manufacturer or brand family.

4 (7) Unless otherwise provided by agreement between a retail dealer
5 or a vending machine operator and a tobacco product manufacturer, a retail
6 dealer or a vending machine operator shall be entitled to a refund from a
7 tobacco product manufacturer for any money paid by the retail dealer or
8 vending machine operator to a stamping agent for any cigarettes of the
9 tobacco product manufacturer still in the possession of the retail dealer or
10 vending machine operator on the effective date of removal from the
11 directory of that tobacco product manufacturer or brand family.

12 (8) The attorney general may remove from the state directory a
13 tobacco product manufacturer or brand family if the attorney general
14 concludes that:

15 (A) (i) The tobacco product manufacturer or any of the tobacco
16 product manufacturer's affiliates, sales entity affiliates, officers or directors
17 had pleaded guilty or nolo contendere to or been found guilty of a felony
18 crime relating to the sale or taxation of cigarettes or tobacco products; or

19 (ii) the tobacco product manufacturer and the tobacco product
20 manufacturer's brand families have been removed from the directory of
21 another state based on acts or omissions that would, if done in this state,
22 serve as a basis for removal from the directory maintained by the attorney
23 general under this section, unless the manufacturer demonstrates that its
24 removal from the other state's directory was effected without due process.

25 (B) (i) A tobacco product manufacturer that is removed from the state
26 directory under this subsection ~~(b)~~ shall be eligible for relisting in the
27 directory described in this subsection ~~(b)~~ on the earlier of the date on
28 which the tobacco product manufacturer cures the violation or the date on
29 which the tobacco product manufacturer is reinstated to the directory in the
30 other state; or

31 (ii) in the case of a non-participating manufacturer deemed an
32 elevated risk pursuant to K.S.A. 50-6a09, and amendments thereto, the
33 attorney general may require such non-participating manufacturer to post a
34 bond in accordance with that section.

35 (c) (1) On or before April 30 of each year, every tobacco product
36 manufacturer whose cigarettes are sold in this state, whether directly or
37 through a stamping agent or similar intermediary or intermediaries, shall
38 execute and deliver in the manner prescribed by the attorney general a
39 certification to the attorney general certifying under penalty of perjury
40 that, as of the date of such certification, such tobacco product
41 manufacturer either is:

42 (A) A participating manufacturer; or

43 (B) in full compliance with K.S.A. 50-6a03, and amendments thereto,

1 including payment of all quarterly installment payments as may be
2 required by subsection (d).

3 (2) A participating manufacturer shall include in its certification a list
4 of its brand families. The participating manufacturer shall update such list
5 30 calendar days prior to any addition to, or modification of its brand
6 families by executing and delivering a supplemental certification to the
7 attorney general.

8 (3) A non-participating manufacturer shall include in its certification:

9 (A) The number of units sold for each brand family sold in the state
10 during the preceding calendar year;

11 (B) a list of all of its brand families sold in the state at any time
12 during the current calendar year, including any brand family sold in the
13 state during the preceding calendar year that is no longer being sold in the
14 state as of the date of such certification;

15 (C) the identity, by name and address, of any other tobacco product
16 manufacturer who manufactured such brand families in the preceding or
17 current calendar year;

18 (D) a declaration that such non-participating manufacturer is
19 registered to do business in the state, or has appointed a resident agent for
20 service of process, and provided notice thereof as required by K.S.A. 2020
21 Supp. 50-6a08, and amendments thereto;

22 (E) a declaration that such non-participating manufacturer:

23 (i) Has established and continues to maintain a qualified escrow fund;
24 ~~and~~

25 (ii) has executed an escrow agreement that governs the qualified
26 escrow fund and that such escrow agreement has been reviewed and
27 approved by the attorney general; *or*

28 (iii) *has not made any cigarette sales in Kansas requiring escrow*
29 *deposits under K.S.A. 50-6a03(b), and amendments thereto;*

30 (F) a declaration that such non-participating manufacturer consents to
31 the jurisdiction of the district court of the third judicial district, Shawnee
32 county, Kansas, for purposes of enforcing this act, or rules or regulations
33 promulgated pursuant thereto, as required by K.S.A. 2020 Supp. 50-
34 6a08(c), and amendments thereto;

35 (G) a declaration that such non-participating manufacturer is in full
36 compliance with K.S.A. 50-6a03(b), and amendments thereto, and any
37 rules or regulations promulgated pursuant to this act;

38 (H) (i) the name, address and telephone number of the financial
39 institution where the non-participating manufacturer has established such
40 qualified escrow fund required pursuant to K.S.A. 50-6a03(b), and
41 amendments thereto;

42 (ii) the account number of such qualified escrow fund and any sub-
43 account number for the state of Kansas;

1 (iii) the amount such non-participating manufacturer placed in such
2 qualified escrow fund *or remitted to the director* for cigarettes sold in this
3 state during the preceding calendar year, the date and amount of each such
4 deposit *or remittance* and such evidence or verification as may be deemed
5 necessary by the attorney general to confirm the foregoing; and

6 (iv) the amount and date of any withdrawal or transfer of funds the
7 non-participating manufacturer made at any time from such qualified
8 escrow fund or from any other qualified escrow fund into which it ever
9 made escrow payments pursuant to K.S.A. 50-6a03(b), and amendments
10 thereto;

11 (I) in the case of a non-participating manufacturer located outside of
12 the United States, a declaration from each of its importers to the United
13 States of any of its brand families to be sold in Kansas that such importer
14 accepts joint and several liability with the non-participating manufacturer
15 for:

16 (i) All escrow deposits *and remittances* due under K.S.A. 50-6a03(b),
17 and amendments thereto;

18 (ii) all penalties assessed under K.S.A. 50-6a03(b), and amendments
19 thereto; and

20 (iii) payment of all costs and attorney fees pursuant to any successful
21 action under this act against such manufacturer.

22 Such declarations by importers of a non-participating manufacturer
23 shall appoint for the declarant a resident agent for service of process in
24 Kansas in accordance with K.S.A. 2020 Supp. 50-6a08, and amendments
25 thereto, and consent to jurisdiction in accordance with K.S.A. 2020 Supp.
26 50-6a08, and amendments thereto;

27 (J) the identity of all stamping agents, wholesalers and distributors,
28 by name and address, to whom the non-participating manufacturer or its
29 importer sold cigarettes to or that the manufacturer or importer believes or
30 has reason to believe purchased or received any of the manufacturer's
31 cigarettes from another source during the preceding calendar year, and
32 those for which the manufacturer or its importer plan to sell to or believe
33 or has reason to believe will purchase or receive any of the manufacturer's
34 cigarettes from another source during the certifying calendar year; and

35 (K) a declaration that all sales or shipments made by the non-
36 participating manufacturer or its affiliates, including, but not limited to, its
37 importers and stamping agents provided for certification under this
38 section, within or into this state are made to a stamping agent, wholesaler,
39 distributor or retailer that is licensed in this state.

40 (4) A tobacco product manufacturer may not include a brand family
41 in its certification unless:

42 (A) In the case of a participating manufacturer, ~~said~~ *such* participating
43 manufacturer affirms that the brand family shall be deemed to be its

1 cigarettes for purposes of calculating its payments under the master
2 settlement agreement for the relevant year in the volume and shares
3 determined pursuant to the master settlement agreement; or

4 (B) in the case of a non-participating manufacturer, ~~said~~ *such* non-
5 participating manufacturer affirms that the brand family shall be deemed to
6 be its cigarettes for purposes of K.S.A. 50-6a03(b), and amendments
7 thereto.

8 Nothing in this paragraph shall be construed as limiting or otherwise
9 affecting the state's right to maintain that a brand family constitutes
10 cigarettes of a different tobacco product manufacturer for purposes of
11 calculating payments under the master settlement agreement or K.S.A. 50-
12 6a03(b), and amendments thereto.

13 (5) Invoices and documentation of sales and other such information
14 relied upon for such certification shall be maintained by tobacco product
15 manufacturers for a period of at least five years.

16 (6) As a condition to being listed and having its brand families listed
17 in the directory, a tobacco product manufacturer shall also:

18 (A) Certify annually that such manufacturer or its importer holds a
19 valid permit under 26 U.S.C. § 5713 and provide a copy of such permit to
20 the attorney general;

21 (B) certify annually that it is in compliance with all reporting and
22 registration requirements of 15 U.S.C. § 375 et seq. and provide monthly
23 to the director and the attorney general, regardless of sales or shipments, a
24 copy of all reports required pursuant to 15 U.S.C. §§ 376 and 376a, to be
25 filed electronically in a manner prescribed by the director and attorney
26 general; and

27 (C) pay annually a \$500 directory fee to the attorney general which
28 shall be deposited in the tobacco master settlement agreement compliance
29 fund.

30 (d) The attorney general may require a tobacco product manufacturer
31 subject to the requirements of subsection (c) to make the escrow deposits
32 *or remittances* required by K.S.A. 50-6a03(b), and amendments thereto, in
33 quarterly installments during the calendar year in which the sales covered
34 by such deposits *or remittances* are made. The attorney general may
35 require production of information sufficient to enable the attorney general
36 to determine the adequacy of the amount of the installment deposit *or*
37 *remittance*.

38 Sec. 4. K.S.A. 2020 Supp. 50-6a09 is hereby amended to read as
39 follows: 50-6a09. (a) Notwithstanding any other provision of law, if a
40 newly qualified non-participating manufacturer is to be listed in the
41 directory, or if the attorney general reasonably determines that any non-
42 participating manufacturer who has filed a certification pursuant to
43 ~~subsection (e) of~~ K.S.A. 50-6a04(c), and amendments thereto, poses an

1 elevated risk for noncompliance with this act neither such non-
2 participating manufacturer nor any of its brand families shall be included
3 or retained in the directory unless and until such non-participating
4 manufacturer, or its United States importer that undertakes joint and
5 several liability for the manufacturer's performance in accordance with
6 ~~subsection (c)(3)(I) of K.S.A. 50-6a04(c)(3)(I)~~, and amendments thereto,
7 has posted a bond in accordance with this section.

8 (b) The bond required by this section shall be posted by corporate
9 surety located within the United States in an amount equal to the greater of
10 \$50,000 or the amount of escrow *or remittance* the non-participating
11 manufacturer in either its current or predecessor form was required to
12 deposit *or remit* for sales of cigarettes in this state during the previous
13 calendar year. The bond shall be written in favor of the state of Kansas and
14 shall be conditioned on the performance by the non-participating
15 manufacturer, or its United States importer that undertakes joint and
16 several liability for the manufacturer's performance in accordance with
17 ~~subsection (c)(3)(I) of K.S.A. 50-6a04(c)(3)(I)~~, and amendments thereto,
18 of all of its duties and obligations under this act during the year in which
19 the certification is filed and the next succeeding calendar year.

20 (c) A non-participating manufacturer may be deemed to pose an
21 elevated risk for noncompliance with this act if:

22 (1) The non-participating manufacturer, or any affiliate thereof, has
23 underpaid an escrow obligation *or remittance* with respect to any other
24 state or jurisdiction that is a party to the master settlement agreement at
25 any time within the three calendar years prior to the date of submission or
26 approval of the most recent certification, unless:

27 (A) The non-participating manufacturer did not make the
28 underpayment knowingly or recklessly and the non-participating
29 manufacturer promptly cured the underpayment within 180 calendar days
30 of notice of the underpayment; or

31 (B) the underpayment or lack of payment is the subject of a good
32 faith dispute as documented to the satisfaction of the attorney general and
33 the underpayment is cured within 90 calendar days of entry of a final order
34 establishing the amount of the required escrow *or remittance* payment;

35 (2) any state or jurisdiction that is party to the master settlement
36 agreement has removed the non-participating manufacturer, or its brands
37 or brand families, or an affiliate, or such affiliate's brands or brand
38 families, from the state's directory for noncompliance with the
39 corresponding laws of such other state or jurisdiction at any time within
40 three calendar years prior to the date of submission or approval of the most
41 recent certification; or

42 (3) any state or jurisdiction that is party to the master settlement
43 agreement has pending litigation, or an unsatisfied judgment against the

1 non-participating manufacturer, or any affiliate thereof, for unpaid escrow
2 obligations, *remittances* or associated penalties, costs or attorney fees.

3 (d) As used in this section, "newly qualified non-participating
4 manufacturer" means a non-participating manufacturer that has not
5 previously been listed in the directory. Such non-participating
6 manufacturer may be required to post a bond in accordance with this
7 section for the first five years of its listing, or longer, if they have been
8 deemed to pose an elevated risk for noncompliance.

9 New Sec. 5. (a) Cigarette smoking presents serious public health
10 concerns to the state and to the citizens of the state. The surgeon general
11 has determined that smoking causes lung cancer, heart disease and other
12 serious diseases and that there are hundreds of thousands of tobacco-
13 related deaths in the United States each year. These diseases most often do
14 not appear until many years after the person in question begins smoking.

15 (b) Cigarette smoking also presents serious financial concerns for the
16 state. Under certain healthcare programs, the state may have a legal
17 obligation to provide medical assistance to eligible persons for health
18 conditions associated with cigarette smoking, and those persons may have
19 a legal entitlement to receive such medical assistance.

20 (c) Under these programs, the state pays millions of dollars each year
21 to provide medical assistance for these persons for health conditions
22 associated with cigarette smoking.

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

28 (e) On November 23, 1998, leading United States tobacco product
29 manufacturers entered into a settlement agreement, entitled the "master
30 settlement agreement," with the state. The master settlement agreement
31 obligates these manufacturers, in return for a release of past, present and
32 certain future claims against them as described therein: To pay substantial
33 sums to the state, tied in part to their volume of sales, to fund a national
34 foundation devoted to the interests of public health; and to make
35 substantial changes in their advertising and marketing practices and
36 corporate culture, with the intention of reducing underage smoking.

37 (f) It would be contrary to the policy of the state if tobacco product
38 manufacturers who determine not to enter into such a settlement could use
39 a resulting cost advantage to derive large, short-term profits in the years
40 before liability may arise without ensuring that the state will have an
41 eventual source of recovery from them if they are proven to have acted
42 culpably. It is thus in the interest of the state to require that such
43 manufacturers establish a reserve fund to guarantee a source of

1 compensation and to prevent such manufacturers from deriving large,
2 short-term profits and then becoming judgment-proof before liability may
3 arise.

4 (g) The provisions of this section shall take effect January 1, 2022,
5 and upon the date of publication in the Kansas register of the notice
6 prescribed in section 9, and amendments thereto.

7 New Sec. 6. Any tobacco product manufacturer selling cigarettes to
8 consumers within the state, whether directly or through a distributor,
9 retailer or similar intermediary or intermediaries, after the effective date of
10 this act shall do one of the following:

11 (a) Become a participating manufacturer, as that term is defined in
12 section II(jj) of the master settlement agreement, and generally perform its
13 financial obligations under the master settlement agreement; or

14 (b) (1) place into a qualified escrow fund by April 15 of the year
15 following the year in question the following amounts, as such amounts are
16 adjusted for inflation:

17 (A) 1999: \$.0094241 per unit sold after the effective date of this act;

18 (B) 2000: \$.0104712 per unit sold;

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

20 (D) for each of 2003 through 2006: \$.0167539 per unit sold;

21 (E) for each of 2007 and each year thereafter: \$.0188482 per unit
22 sold.

23 (2) A tobacco product manufacturer that places funds into escrow
24 pursuant to subsection (b)(1) shall receive the interest or other appreciation
25 on such funds as earned. Such funds themselves shall be released from
26 escrow only under the following circumstances:

27 (A) To pay a judgment or settlement on any released claim brought
28 against such tobacco product manufacturer by the state or any releasing
29 party located or residing in the state. Funds shall be released from escrow
30 under this subparagraph: (i) In the order in which they were placed into
31 escrow; and (ii) only to the extent and at the time necessary to make
32 payments required under such judgment or settlement;

33 (B) to the extent that a tobacco product manufacturer establishes that
34 the amount it was required to place into escrow, based on units sold in the
35 state of Kansas in a particular year, was greater than the master settlement
36 agreement payments, as determined pursuant to section IX(i) of that
37 agreement including, after final determination of all adjustments, that such
38 manufacturer would have been required to make based on such units sold
39 had it been a participating manufacturer, the excess shall be released from
40 escrow and revert back to such tobacco product manufacturer; or

41 (C) to the extent not released from escrow under subsection (b)(2)(A)
42 or (b)(2)(B), funds shall be released from escrow and revert back to such
43 tobacco product manufacturer 25 years after the date on which they were

1 placed into escrow.

2 (3) Each tobacco product manufacturer that elects to place funds into
3 escrow pursuant to this subsection shall annually certify to the attorney
4 general that it is in compliance with this subsection. The attorney general
5 may bring a civil action on behalf of the state against any tobacco product
6 manufacturer that fails to place into escrow the funds required under this
7 section. Any tobacco product manufacturer that fails in any year to place
8 into escrow the funds required under this section shall:

9 (A) Be required within 15 days to place such funds into escrow as
10 shall bring it into compliance with this section. The court, upon a finding
11 of a violation of this subsection, may impose a civil penalty to be credited
12 to the state general fund in an amount not to exceed 5% of the amount
13 improperly withheld from escrow per day of the violation and in a total
14 amount not to exceed 100% of the original amount improperly withheld
15 from escrow;

16 (B) in the case of a knowing violation, be required within 15 days to
17 place such funds into escrow as shall bring it into compliance with this
18 section. The court, upon a finding of a knowing violation of this
19 subsection, may impose a civil penalty to be paid to the state general fund
20 in an amount not to exceed 15% of the amount improperly withheld from
21 escrow per day of the violation and in a total amount not to exceed 300%
22 of the original amount improperly withheld from escrow; and

23 (C) in the case of a second knowing violation, be prohibited from
24 selling cigarettes to consumers within the state, whether directly or
25 through a distributor, retailer or similar intermediary, for a period not to
26 exceed two years.

27 Each failure to make an annual deposit required under this section shall
28 constitute a separate violation. A tobacco product manufacturer who is
29 found in violation of this section shall pay, in addition to other amounts
30 assessed under this section and pursuant to law, the costs and attorney fees
31 incurred by the state during a successful presentation under this paragraph
32 (3).

33 (c) The provisions of this section shall take effect January 1, 2022,
34 and upon the date of publication in the Kansas register of the notice
35 prescribed in section 9, and amendments thereto.

36 New Sec. 7. (a) No person may:

37 (1) Affix, or cause to be affixed, tax indicia to a package of cigarettes,
38 or otherwise pay the tax due upon such cigarettes, of a tobacco product
39 manufacturer brand family not included in the directory; or

40 (2) sell, offer, possess for sale or import into this state, cigarettes of a
41 tobacco product manufacturer brand family not included in the directory.

42 (b) (1) Not later than July 1, 2009, the attorney general shall develop
43 a directory, to be posted on the attorney general's website. Except as

1 otherwise provided, the directory shall list all tobacco product
2 manufacturers and brand families of such tobacco product manufacturers
3 that have provided current and accurate certifications conforming to the
4 requirements of subsection (c).

5 (2) The attorney general shall not include or retain in the directory
6 any non-participating manufacturer, or non-participating manufacturer's
7 brand family, that has failed to provide the required certification, or whose
8 certification the attorney general determines is not in compliance with
9 subsection (c), unless such failure or noncompliance has been cured to the
10 satisfaction of the attorney general.

11 (3) In the case of a non-participating manufacturer, neither the
12 tobacco product manufacturer nor a brand family shall be included or
13 retained in the directory if the attorney general concludes:

14 (A) That an escrow payment required pursuant to section 6, and
15 amendments thereto, for any period for any brand family, whether or not
16 listed by such non-participating manufacturer, has not been fully paid into
17 a qualified escrow fund governed by an escrow agreement that has been
18 approved by the attorney general;

19 (B) that an outstanding final judgment, including interest thereon, for
20 a violation of section 6, and amendments thereto, has not been fully
21 satisfied for such tobacco product manufacturer; or

22 (C) that, within three calendar years prior to the date of submission or
23 approval of the most recent certification, such tobacco product
24 manufacturer has defaulted on escrow payments in any other state or
25 jurisdiction that is a party to the master settlement agreement and the
26 default has not been cured within 90 calendar days of such default.

27 (4) The attorney general shall update the directory as necessary in
28 order to correct mistakes and to add or remove a tobacco product
29 manufacturer or brand family so as to keep the directory in conformity
30 with the requirements of this act.

31 (5) The attorney general shall promptly post in the directory and
32 transmit by electronic mail to each stamping agent that has provided an
33 electronic mail address, notice of removal from the directory of a tobacco
34 product manufacturer or brand family.

35 (6) Unless otherwise provided by agreement between a stamping
36 agent and a tobacco product manufacturer, the stamping agent shall be
37 entitled to a refund from a tobacco product manufacturer for any money
38 paid by the stamping agent to the tobacco product manufacturer for any
39 cigarettes of the tobacco product manufacturer in the possession of the
40 stamping agent on the effective date of removal from the directory of that
41 tobacco product manufacturer or brand family.

42 (7) Unless otherwise provided by agreement between a retail dealer
43 or a vending machine operator and a tobacco product manufacturer, a retail

1 dealer or a vending machine operator shall be entitled to a refund from a
2 tobacco product manufacturer for any money paid by the retail dealer or
3 vending machine operator to a stamping agent for any cigarettes of the
4 tobacco product manufacturer still in the possession of the retail dealer or
5 vending machine operator on the effective date of removal from the
6 directory of that tobacco product manufacturer or brand family.

7 (8) The attorney general may remove from the state directory a
8 tobacco product manufacturer or brand family if the attorney general
9 concludes that:

10 (A) (i) The tobacco product manufacturer or any of the tobacco
11 product manufacturer's affiliates, sales entity affiliates, officers or directors
12 had pleaded guilty or nolo contendere to or been found guilty of a felony
13 crime relating to the sale or taxation of cigarettes or tobacco products; or

14 (ii) the tobacco product manufacturer and the tobacco product
15 manufacturer's brand families have been removed from the directory of
16 another state based on acts or omissions that would, if done in this state,
17 serve as a basis for removal from the directory maintained by the attorney
18 general under this section, unless the manufacturer demonstrates that its
19 removal from the other state's directory was effected without due process.

20 (B) (i) A tobacco product manufacturer that is removed from the state
21 directory under this subsection shall be eligible for relisting in the
22 directory described in this subsection on the earlier of the date on which
23 the tobacco product manufacturer cures the violation or the date on which
24 the tobacco product manufacturer is reinstated to the directory in the other
25 state; or

26 (ii) in the case of a non-participating manufacturer deemed an
27 elevated risk pursuant to section 8, and amendments thereto, the attorney
28 general may require such non-participating manufacturer to post a bond in
29 accordance with that section.

30 (c) (1) On or before April 30 of each year, every tobacco product
31 manufacturer whose cigarettes are sold in this state, whether directly or
32 through a stamping agent or similar intermediary or intermediaries, shall
33 execute and deliver in the manner prescribed by the attorney general a
34 certification to the attorney general certifying under penalty of perjury
35 that, as of the date of such certification, such tobacco product
36 manufacturer either is:

37 (A) A participating manufacturer; or

38 (B) in full compliance with section 6, and amendments thereto,
39 including payment of all quarterly installment payments as may be
40 required by subsection (d).

41 (2) A participating manufacturer shall include in its certification a list
42 of its brand families. The participating manufacturer shall update such list
43 30 calendar days prior to any addition to, or modification of its brand

1 families by executing and delivering a supplemental certification to the
2 attorney general.

3 (3) A non-participating manufacturer shall include in its certification:

4 (A) The number of units sold for each brand family sold in the state
5 during the preceding calendar year;

6 (B) a list of all of its brand families sold in the state at any time
7 during the current calendar year, including any brand family sold in the
8 state during the preceding calendar year that is no longer being sold in the
9 state as of the date of such certification;

10 (C) the identity, by name and address, of any other tobacco product
11 manufacturer who manufactured such brand families in the preceding or
12 current calendar year;

13 (D) a declaration that such non-participating manufacturer is
14 registered to do business in the state, or has appointed a resident agent for
15 service of process, and provided notice thereof as required by K.S.A. 2020
16 Supp. 50-6a08, and amendments thereto;

17 (E) a declaration that such non-participating manufacturer:

18 (i) Has established and continues to maintain a qualified escrow fund;
19 and

20 (ii) has executed an escrow agreement that governs the qualified
21 escrow fund and that such escrow agreement has been reviewed and
22 approved by the attorney general;

23 (F) a declaration that such non-participating manufacturer consents to
24 the jurisdiction of the district court of the third judicial district, Shawnee
25 county, Kansas, for purposes of enforcing this act, or rules or regulations
26 promulgated pursuant thereto, as required by K.S.A. 2020 Supp. 50-
27 6a08(c), and amendments thereto;

28 (G) a declaration that such non-participating manufacturer is in full
29 compliance with section 6(b), and amendments thereto, and any rules or
30 regulations promulgated pursuant to this act;

31 (H) (i) the name, address and telephone number of the financial
32 institution where the non-participating manufacturer has established such
33 qualified escrow fund required pursuant to section 6(b), and amendments
34 thereto;

35 (ii) the account number of such qualified escrow fund and any sub-
36 account number for the state of Kansas;

37 (iii) the amount such non-participating manufacturer placed in such
38 qualified escrow fund for cigarettes sold in this state during the preceding
39 calendar year, the date and amount of each such deposit and such evidence
40 or verification as may be deemed necessary by the attorney general to
41 confirm the foregoing; and

42 (iv) the amount and date of any withdrawal or transfer of funds the
43 non-participating manufacturer made at any time from such qualified

1 escrow fund or from any other qualified escrow fund into which it ever
2 made escrow payments pursuant to section 6(b), and amendments thereto;

3 (I) in the case of a non-participating manufacturer located outside of
4 the United States, a declaration from each of its importers to the United
5 States of any of its brand families to be sold in Kansas that such importer
6 accepts joint and several liability with the non-participating manufacturer
7 for:

8 (i) All escrow deposits due under section 6(b), and amendments
9 thereto;

10 (ii) all penalties assessed under section 6(b), and amendments thereto;
11 and

12 (iii) payment of all costs and attorney fees pursuant to any successful
13 action under this act against such manufacturer.

14 Such declarations by importers of a non-participating manufacturer
15 shall appoint for the declarant a resident agent for service of process in
16 Kansas in accordance with K.S.A. 2020 Supp. 50-6a08, and amendments
17 thereto, and consent to jurisdiction in accordance with K.S.A. 2020 Supp.
18 50-6a08, and amendments thereto;

19 (J) the identity of all stamping agents, wholesalers and distributors,
20 by name and address, to whom the non-participating manufacturer or its
21 importer sold cigarettes to or that the manufacturer or importer believes or
22 has reason to believe purchased or received any of the manufacturer's
23 cigarettes from another source during the preceding calendar year, and
24 those for which the manufacturer or its importer plan to sell to or believe
25 or has reason to believe will purchase or receive any of the manufacturer's
26 cigarettes from another source during the certifying calendar year; and

27 (K) a declaration that all sales or shipments made by the non-
28 participating manufacturer or its affiliates, including, but not limited to, its
29 importers and stamping agents provided for certification under this
30 section, within or into this state are made to a stamping agent, wholesaler,
31 distributor or retailer that is licensed in this state.

32 (4) A tobacco product manufacturer may not include a brand family
33 in its certification unless:

34 (A) In the case of a participating manufacturer, such participating
35 manufacturer affirms that the brand family shall be deemed to be its
36 cigarettes for purposes of calculating its payments under the master
37 settlement agreement for the relevant year in the volume and shares
38 determined pursuant to the master settlement agreement; or

39 (B) in the case of a non-participating manufacturer, such non-
40 participating manufacturer affirms that the brand family shall be deemed to
41 be its cigarettes for purposes of section 6(b), and amendments thereto.

42 Nothing in this paragraph shall be construed as limiting or otherwise
43 affecting the state's right to maintain that a brand family constitutes

1 cigarettes of a different tobacco product manufacturer for purposes of
2 calculating payments under the master settlement agreement or section
3 6(b), and amendments thereto.

4 (5) Invoices and documentation of sales and other such information
5 relied upon for such certification shall be maintained by tobacco product
6 manufacturers for a period of at least five years.

7 (6) As a condition to being listed and having its brand families listed
8 in the directory, a tobacco product manufacturer shall also:

9 (A) Certify annually that such manufacturer or its importer holds a
10 valid permit under 26 U.S.C. § 5713 and provide a copy of such permit to
11 the attorney general;

12 (B) certify annually that it is in compliance with all reporting and
13 registration requirements of 15 U.S.C. § 375 et seq. and provide monthly
14 to the director and the attorney general, regardless of sales or shipments, a
15 copy of all reports required pursuant to 15 U.S.C. §§ 376 and 376a, to be
16 filed electronically in a manner prescribed by the director and attorney
17 general; and

18 (C) pay annually a \$500 directory fee to the attorney general which
19 shall be deposited in the tobacco master settlement agreement compliance
20 fund.

21 (d) The attorney general may require a tobacco product manufacturer
22 subject to the requirements of subsection (c) to make the escrow deposits
23 required by section 6(b), and amendments thereto, in quarterly installments
24 during the calendar year in which the sales covered by such deposits are
25 made. The attorney general may require production of information
26 sufficient to enable the attorney general to determine the adequacy of the
27 amount of the installment deposit.

28 (e) The provisions of this section shall take effect January 1, 2022,
29 and upon the date of publication in the Kansas register of the notice
30 prescribed in section 9, and amendments thereto.

31 New Sec. 8. (a) Notwithstanding any other provision of law, if a
32 newly qualified non-participating manufacturer is to be listed in the
33 directory, or if the attorney general reasonably determines that any non-
34 participating manufacturer who has filed a certification pursuant to section
35 7(c), and amendments thereto, poses an elevated risk for noncompliance
36 with this act neither such non-participating manufacturer nor any of its
37 brand families shall be included or retained in the directory unless and
38 until such non-participating manufacturer, or its United States importer
39 that undertakes joint and several liability for the manufacturer's
40 performance in accordance with section 7(c)(3)(I), and amendments
41 thereto, has posted a bond in accordance with this section.

42 (b) The bond required by this section shall be posted by corporate
43 surety located within the United States in an amount equal to the greater of

1 \$50,000 or the amount of escrow the non-participating manufacturer in
2 either its current or predecessor form was required to deposit for sales of
3 cigarettes in this state during the previous calendar year. The bond shall be
4 written in favor of the state of Kansas and shall be conditioned on the
5 performance by the non-participating manufacturer, or its United States
6 importer that undertakes joint and several liability for the manufacturer's
7 performance in accordance with section 7(c)(3)(I), and amendments
8 thereto, of all of its duties and obligations under this act during the year in
9 which the certification is filed and the next succeeding calendar year.

10 (c) A non-participating manufacturer may be deemed to pose an
11 elevated risk for noncompliance with this act if:

12 (1) The non-participating manufacturer, or any affiliate thereof, has
13 underpaid an escrow obligation with respect to any other state or
14 jurisdiction that is a party to the master settlement agreement at any time
15 within the three calendar years prior to the date of submission or approval
16 of the most recent certification, unless:

17 (A) The non-participating manufacturer did not make the
18 underpayment knowingly or recklessly and the non-participating
19 manufacturer promptly cured the underpayment within 180 calendar days
20 of notice of the underpayment; or

21 (B) the underpayment or lack of payment is the subject of a good
22 faith dispute as documented to the satisfaction of the attorney general and
23 the underpayment is cured within 90 calendar days of entry of a final order
24 establishing the amount of the required escrow payment;

25 (2) any state or jurisdiction that is a party to the master settlement
26 agreement has removed the non-participating manufacturer, or its brands
27 or brand families, or an affiliate, or such affiliate's brands or brand
28 families, from the state's directory for noncompliance with the
29 corresponding laws of such other state or jurisdiction at any time within
30 three calendar years prior to the date of submission or approval of the most
31 recent certification; or

32 (3) any state or jurisdiction that is a party to the master settlement
33 agreement has pending litigation, or an unsatisfied judgment against the
34 non-participating manufacturer, or any affiliate thereof, for unpaid escrow
35 obligations, or associated penalties, costs or attorney fees.

36 (d) As used in this section, "newly qualified non-participating
37 manufacturer" means a non-participating manufacturer that has not
38 previously been listed in the directory. Such non-participating
39 manufacturer may be required to post a bond in accordance with this
40 section for the first five years of its listing, or longer, if they have been
41 deemed to pose an elevated risk for noncompliance.

42 (e) The provisions of this section shall take effect January 1, 2022,
43 and upon the date of publication in the Kansas register of the notice

1 prescribed in section 9, and amendments thereto.

2 New Sec. 9. In the event that all or any portion of the amendments to
3 K.S.A. 50-6a03 made by this act are adjudged by any court of competent
4 jurisdiction to be unconstitutional or invalid, the attorney general shall
5 certify to the secretary of state that such adjudication has occurred. Upon
6 receipt of such certification, the secretary of state shall cause a notice of
7 such certification to be published in the Kansas register. On January 1,
8 2022, and the date of publication in the Kansas register of such notice, the
9 amendments to K.S.A. 50-6a01 and 50-6a03, as amended by this act, shall
10 be deemed to be repealed, and sections 5 through 8 of this act shall take
11 effect and be in force. Neither any holding of unconstitutionality nor the
12 repeal of K.S.A. 50-6a01 and 50-6a03, as amended by this act, shall affect,
13 impair or invalidate any other portions of sections 5 through 8 of this act
14 or the application of such sections to any other person or circumstance,
15 and the provisions of sections 5 through 8 of this act shall at all times
16 continue in full force and effect.

17 Sec. 10. K.S.A. 50-6a01 and 50-6a03 and K.S.A. 2020 Supp. 50-6a04
18 and 50-6a09 are hereby repealed.

19 Sec. 11. On January 1, 2022, and the date of publication in the Kansas
20 register of the notice prescribed in section 9, K.S.A. 50-6a01, as amended
21 by section 1 of this act, and 50-6a03, as amended by section 2 of this act,
22 and K.S.A. 2020 Supp. 50-6a04, as amended by section 3 of this act, and
23 50-6a09, as amended by section 4 of this act, are hereby repealed.

24 Sec. 12. This act shall take effect and be in force from and after its
25 publication in the statute book.