

House Engrossed

State of Arizona  
House of Representatives  
Forty-sixth Legislature  
Second Regular Session  
2004

CHAPTER 294

# HOUSE BILL 2247

AN ACT

AMENDING SECTION 44-7101, ARIZONA REVISED STATUTES; RELATING TO TOBACCO  
PRODUCT MANUFACTURERS ESCROW ACCOUNTS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 44-7101, Arizona Revised Statutes, is amended to  
3 read:

4 44-7101. Tobacco product manufacturers escrow accounts; model  
5 statute

6 A. This state enacts the model statute described in the master  
7 settlement agreement entered into on November 23, 1998 between this state and  
8 certain United States tobacco product manufacturers as exhibit T as follows:

9 Section 1. Findings and Purpose.

10 (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 many  
15 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 a  
20 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  
25 the 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 substantial  
36 changes in their advertising and marketing practices and corporate culture,  
37 with the intention of reducing underage smoking.

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

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

3 Section 2. Definitions.

4 (a) "Adjusted for inflation" means increased in accordance with the  
5 formula for inflation adjustment set forth in exhibit C to the master  
6 settlement agreement.

7 (b) "Affiliate" means a person who directly or indirectly owns or  
8 controls, is owned or controlled by, or is under common ownership or control  
9 with, another person. Solely for purposes of this definition, the terms  
10 "owns," "is owned" and "ownership" mean ownership of an equity interest, or  
11 the equivalent thereof, of ten percent or more, and the term "person" means  
12 an individual, partnership, committee, association, corporation or any other  
13 organization or group of persons.

14 (c) "Allocable share" means allocable share as that term is defined  
15 in the master settlement agreement.

16 (d) "Cigarette" means any product that contains nicotine, is intended  
17 to be burned or heated under ordinary conditions of use, and consists of or  
18 contains (1) any roll of tobacco wrapped in paper or in any substance not  
19 containing tobacco; or (2) tobacco, in any form, that is functional in the  
20 product, which, because of its appearance, the type of tobacco used in the  
21 filler, or its packaging and labeling, is likely to be offered to, or  
22 purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped  
23 in any substance containing tobacco which, because of its appearance, the  
24 type of tobacco used in the filler, or its packaging and labeling, is likely  
25 to be offered to, or purchased by, consumers as a cigarette described in  
26 clause (1) of this definition. The term "cigarette" includes "roll-your-own"  
27 (i.e., any tobacco which, because of its appearance, type, packaging, or  
28 labeling is suitable for use and likely to be offered to, or purchased by,  
29 consumers as tobacco for making cigarettes). For purposes of this definition  
30 of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one  
31 individual "cigarette."

32 (e) "Master settlement agreement" means the settlement agreement (and  
33 related documents) entered into on November 23, 1998 by the state and leading  
34 United States tobacco product manufacturers.

35 (f) "Qualified escrow fund" means an escrow arrangement with a  
36 federally or state chartered financial institution having no affiliation with  
37 any tobacco product manufacturer and having assets of at least \$1,000,000,000  
38 where such arrangement requires that such financial institution hold the  
39 escrowed funds' principal for the benefit of releasing parties and prohibits  
40 the tobacco product manufacturer placing the funds into escrow from using,  
41 accessing or directing the use of the funds' principal except as consistent  
42 with section 3(B)(2) of this act.

43 (g) "Released claims" means released claims as that term is defined  
44 in the master settlement agreement.

1 (h) "Releasing parties" means releasing parties as that term is  
2 defined in the master settlement agreement.

3 (i) "Tobacco product manufacturer" means an entity that after the date  
4 of enactment of this act directly (and not exclusively through any  
5 affiliate):

6 (1) Manufactures cigarettes anywhere that such manufacturer intends  
7 to be sold in the United States, including cigarettes intended to be sold in  
8 the United States through an importer (except where such importer is an  
9 original participating manufacturer (as that term is defined in the master  
10 settlement agreement) that will be responsible for the payments under the  
11 master settlement agreement with respect to such cigarettes as a result of  
12 the provisions of subsection II(MM) of the master settlement agreement and  
13 that pays the taxes specified in subsection II(Z) of the master settlement  
14 agreement, and provided that the manufacturer of such cigarettes does not  
15 market or advertise such cigarettes in the United States);

16 (2) Is the first purchaser anywhere for resale in the United States  
17 of cigarettes manufactured anywhere that the manufacturer does not intend to  
18 be sold in the United States; or

19 (3) Becomes a successor of an entity described in paragraph (1) or  
20 (2).

21 The term "tobacco product manufacturer" shall not include an affiliate  
22 of a tobacco product manufacturer unless such affiliate itself falls within  
23 any of (1)-(3) above.

24 (j) "Units sold" means the number of individual cigarettes sold in the  
25 state by the applicable tobacco product manufacturer (whether directly or  
26 through a distributor, retailer or similar intermediary or intermediaries)  
27 during the year in question, as measured by excise taxes collected by the  
28 state on packs (or "roll-your-own" tobacco containers) bearing the excise tax  
29 stamp of the state. The department of revenue shall promulgate such  
30 regulations as are necessary to ascertain the amount of state excise tax paid  
31 on the cigarettes of such tobacco product manufacturer for each year.

32 Section 3. Requirements.

33 Any tobacco product manufacturer selling cigarettes to consumers within  
34 the state (whether directly or through a distributor, retailer or similar  
35 intermediary or intermediaries) after the date of enactment of this act shall  
36 do one of the following:

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

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

43 2000: \$.0104712 per unit sold after the date of enactment of this act;

44 For each of 2001 and 2002: \$.0136125 per unit sold;

45 For each of 2003 through 2006: \$.0167539 per unit sold;

1 For each of 2007 and each year thereafter: \$.0188482 per unit sold.

2 (2) A tobacco product manufacturer that places funds into escrow  
3 pursuant to paragraph (1) shall receive the interest or other appreciation  
4 on such funds as earned. Such funds themselves shall be released from escrow  
5 only under the following circumstances:

6 (a) To pay a judgment or settlement on any released claim brought  
7 against such tobacco product manufacturer by the state or any releasing party  
8 located or residing in the state. Funds shall be released from escrow under  
9 this subparagraph (i) in the order in which they were placed into escrow and  
10 (ii) only to the extent and at the time necessary to make payments required  
11 under such judgment or settlement;

12 (b) To the extent that a tobacco product manufacturer establishes that  
13 the amount it was required to place into escrow ON ACCOUNT OF UNITS SOLD IN  
14 THE STATE in a particular year was greater than ~~the state's allocable share~~  
15 ~~of the total payments that such manufacturer would have been required to make~~  
16 ~~in that year under the master settlement agreement (as determined pursuant~~  
17 ~~to section IX(i)(2) of the master settlement agreement, and before any of the~~  
18 ~~adjustments or offsets described in section IX(i)(3) of that agreement other~~  
19 ~~than the inflation adjustment) THE MASTER SETTLEMENT AGREEMENT PAYMENTS, AS~~  
20 ~~DETERMINED PURSUANT TO SECTION IX(i) OF THAT AGREEMENT INCLUDING AFTER FINAL~~  
21 ~~DETERMINATION OF ALL ADJUSTMENTS, THAT SUCH MANUFACTURER WOULD HAVE BEEN~~  
22 ~~REQUIRED TO MAKE ON ACCOUNT OF SUCH UNITS SOLD had it been a participating~~  
23 ~~manufacturer, the excess shall be released from escrow and revert back to~~  
24 ~~such tobacco product manufacturer; or~~

25 (c) To the extent not released from escrow under subparagraphs (a) or  
26 (b), funds shall be released from escrow and revert back to such tobacco  
27 product manufacturer twenty-five years after the date on which they were  
28 placed into escrow.

29 (3) Each tobacco product manufacturer that elects to place funds into  
30 escrow pursuant to this subsection shall annually certify to the attorney  
31 general that it is in compliance with this subsection. The attorney general  
32 may bring a civil action on behalf of the state against any tobacco product  
33 manufacturer that fails to place into escrow the funds required under this  
34 section. Any tobacco product manufacturer that fails in any year to place  
35 into escrow the funds required under this section shall:

36 (a) Be required within 15 days to place such funds into escrow as  
37 shall bring it into compliance with this section. The court, upon a finding  
38 of a violation of this subsection, may impose a civil penalty to be paid to  
39 the general fund of the state in an amount not to exceed 5 percent of the  
40 amount improperly withheld from escrow per day of the violation and in a  
41 total amount not to exceed 100 percent of the original amount improperly  
42 withheld from escrow;

43 (b) In the case of a knowing violation, be required within 15 days to  
44 place such funds into escrow as shall bring it into compliance with this  
45 section. The court, upon a finding of a knowing violation of this

1 subsection, may impose a civil penalty to be paid to the general fund in an  
2 amount not to exceed 15 percent of the amount improperly withheld from escrow  
3 per day of the violation and in a total amount not to exceed 300 percent of  
4 the original amount improperly withheld from escrow; and

5 (c) In the case of a second knowing violation, be prohibited from  
6 selling cigarettes to consumers within the state (whether directly or through  
7 a distributor, retailer or similar intermediary) for a period not to exceed  
8 2 years.

9 Each failure to make an annual deposit required under this section  
10 shall constitute a separate violation and the violator shall pay to the  
11 attorney general the costs and attorney fees incurred during a successful  
12 prosecution under paragraph (3).

13 SECTION 4. EFFECT OF JUDICIAL ACTION.

14 IF SECTION 3, SUBPARAGRAPH (b), PARAGRAPH 2, SUBDIVISION (b) IS HELD  
15 BY A COURT OF COMPETENT JURISDICTION TO BE UNCONSTITUTIONAL, THE FOLLOWING  
16 PROVISIONS APPLY IN ITS PLACE:

17 TO THE EXTENT THAT A TOBACCO PRODUCT MANUFACTURER ESTABLISHES THAT THE  
18 AMOUNT IT WAS REQUIRED TO PLACE INTO ESCROW IN A PARTICULAR YEAR WAS GREATER  
19 THAN THE STATE'S ALLOCABLE SHARE OF THE TOTAL PAYMENTS THAT SUCH MANUFACTURER  
20 WOULD HAVE BEEN REQUIRED TO MAKE IN THAT YEAR UNDER THE MASTER SETTLEMENT  
21 AGREEMENT (AS DETERMINED PURSUANT TO SECTION IX(i)(2) OF THE MASTER  
22 SETTLEMENT AGREEMENT, AND BEFORE ANY OF THE ADJUSTMENTS OR OFFSETS DESCRIBED  
23 IN SECTION IX(i)(3) OF THAT AGREEMENT OTHER THAN THE INFLATION ADJUSTMENT)  
24 HAD IT BEEN A PARTICIPATING MANUFACTURER, THE EXCESS SHALL BE RELEASED FROM  
25 ESCROW AND REVERT BACK TO SUCH TOBACCO PRODUCT MANUFACTURER; OR

26 ANY HOLDING OF UNCONSTITUTIONALITY OR THE REPEAL OF SECTION 3,  
27 SUBPARAGRAPH (b), PARAGRAPH 2, SUBDIVISION (b) OF THIS STATUTE DOES NOT  
28 IMPAIR OR INVALIDATE ANY OTHER PORTION OF THIS STATUTE OR THE APPLICATION OF  
29 THIS STATUTE TO ANY OTHER PERSON OR CIRCUMSTANCE AND THE REMAINING PORTIONS  
30 OF THIS STATUTE CONTINUE IN FULL FORCE AND EFFECT.

APPROVED BY THE GOVERNOR JUNE 1, 2004.

FILED IN THE OFFICE OF THE SECRETARY OF STATE JUNE 1, 2004.

Passed the House March 15, 2004

Passed the Senate May 24, 2004

by the following vote: 42 Ayes,

by the following vote: 27 Ayes,

11 Nays, 7 Not Voting

2 Nays, 1 Not Voting

Jake Flake  
Speaker of the House

Ken Bennett  
President of the Senate

Norman L. Moore  
Chief Clerk of the House

Charmine Bellington  
Secretary of the Senate

EXECUTIVE DEPARTMENT OF ARIZONA  
OFFICE OF GOVERNOR

This Bill was received by the Governor this

25th day of May, 2004

at 11:33 o'clock a. M.

Wennifer Ybarra  
Secretary to the Governor

Approved this 1 day of

June, 2004

at 3:45 o'clock P. M.

Jon R. Ralston  
Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA  
OFFICE OF SECRETARY OF STATE

This Bill was received by the Secretary of State

this 1 day of June, 2004

at 4:38 o'clock P. M.

Janice K. Brewer  
Secretary of State

H.B. 2247