



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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TO: ALL NON-PARTICIPATING TOBACCO PRODUCT MANUFACTURERS

**FROM: MICHAEL PLUMLEY, ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY**

DATE: JUNE 25, 2004

**RE: PASSAGE AND IMPLEMENTATION OF HB 97 REGARDING
NON-PARTICIPATING TOBACCO PRODUCT MANUFACTURERS**

Please be advised that the Kentucky General Assembly passed HB 97 April 13, 2004, and the bill was signed by the Governor on April 22, 2004. This provision amends KRS 131.602 by changing the calculation used to determine whether an NPM has deposited an excess amount into escrow in a given year. Under this statute, the escrow deposits are the property of the NPM, which earns interest on the accounts as it accrues, and the deposits are returned after 25 years if they have not been released prior to that time.

We have received questions from the industry regarding when this provision will be applied to sales of NPMs and how the release provision will be implemented in April 2005. In order to effectively and fairly implement this provision, our office has determined that the new calculation for releases should be applied to sales beginning August 1, 2004, the first full month after the statutory change is technically effective. Therefore, our office will consider properly supported requests for a release from escrow based upon the old provision for sales between January 1, 2004 and July 31, 2004. The burden is on the NPM to provide calculations and proof of sales.

HB 97 also includes a provision allowing the Office of the Attorney General to promulgate regulations requiring quarterly payments into escrow. We are in the process of drafting such regulations to be proposed and filed. Further information on quarterly installment deposits will be provided when it becomes available. It is unlikely that quarterly deposits would be required prior to January 1, 2005. We enclose a copy of the HB 97 amendments discussed above with this notice.

FREE CONFERENCE COMMITTEE REPORT

The Free Conference Committee on **HB** **SB** 97 has met as provided in the Rules of the House and Senate and hereby reports the following to be adopted:

GA **SCS** **HCS**

For the above-referenced bill, with these amendments (if applicable):

Committee (list by chamber and number): _____ ;

Floor (list by chamber and number): _____ ; and

The following Free Conference Committee action:

On page 11, after line 9, by inserting:

"Section 2. KRS 131.602 is amended to read as follows:

- (1) Any tobacco product manufacturer selling cigarettes to consumers within this state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, after June 30, 2000, shall do one (1) of the following:
 - (a) Become a participating manufacturer, as that term is defined in section II(jj) of the master settlement agreement, and generally perform its financial obligations under the master settlement agreement; or
 - (b) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts, as such amounts are adjusted for inflation:
 1. For 2000: \$0.0104712 per unit sold after June 30, 2000;
 2. For each of 2001 and 2002: \$0.0136125 per unit sold;
 3. For each of 2003 through 2006: \$0.0167539 per unit sold; and

4. For 2007 and each year thereafter: \$0.0188482 per unit sold.
- (2) A tobacco product manufacturer that places funds into escrow pursuant to subsection (1)(b) of this section shall receive the interest or other appreciation on such funds as earned. Such 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 Kentucky or any releasing party located or residing in Kentucky. 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 the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the master settlement agreement payments, as determined pursuant to section IX(i) of that agreement including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold~~[Kentucky's allocable share of the total payments that such manufacturer would have been required to make in that year under the master settlement agreement, as determined pursuant to section IX(i)(2) of the master settlement agreement, and before any of the adjustments or offsets described in section IX(i)(3) of that agreement other than the inflation adjustment,]~~ had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or
 - (c) To the extent not released from escrow under paragraph (a) or (b) of this subsection, funds shall be released from escrow and revert back to such tobacco product manufacturer twenty-five (25) years after the date on which they were placed into escrow.
- (3) Each tobacco product manufacturer that elects to place funds into escrow pursuant to subsection (1)(b) of this section shall annually certify to the Attorney General that it is in

compliance with subsections (1)(b) and (2) of this section. The Attorney General may bring a civil action on behalf of Kentucky 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 fifteen (15) days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a violation of subsection (1)(b) or (2) of this section, may impose a civil penalty, to be paid to the general fund of Kentucky, in an amount not to exceed five percent (5%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent (100%) of the original amount improperly withheld from escrow;
- (b) In the case of a knowing violation, be required within fifteen (15) days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a knowing violation of subsection (1)(b) or (2) of this section, may impose a civil penalty, to be paid to the general fund of Kentucky, in an amount not to exceed fifteen percent (15%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent (300%) of the original amount improperly withheld from escrow; and
- (c) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within Kentucky, whether directly or through a distributor, retailer, or similar intermediary, for a period not to exceed two (2) years.

Each failure to make an annual deposit required under this section shall constitute a separate violation.

Section 3. KRS 131.620 is amended to read as follows:

(1) The Attorney General may, at any time, require from the nonparticipating manufacturer proof from the financial institution in which the manufacturer has established a qualified escrow fund, for the purpose of compliance with KRS 131.600 and 131.602, of the amount of money

in the fund, exclusive of interest, the amount and date of each deposit to the fund, and the amount and date of each withdrawal from the fund.

(2) To promote compliance with the provisions of Section 2 of this Act, the Attorney General may promulgate regulations requiring a nonparticipating manufacturer subject to the requirements of Section 2 of this Act to make the escrow deposits required in quarterly installments during the year in which the sales covered by such deposits are made. The Attorney General may require production of information sufficient to enable the Attorney General to determine the adequacy of the amount of the installment deposit."; and

On page 11, line 10, after "Section", by deleting "2", and by inserting "4", and after "in", by inserting "Section 1 of"; and

Amend the title to read as follows: "AN ACT relating to tobacco issues."

Senate Members

Senator Richie Sanders, Chair

Senator David Boswell

Senator Brett Guthrie

House Members

Representative Roger Thomas, Chair

Representative Tom McKee

Representative Steve Nunn

Representative Charles Siler

Representative Rob Wilkey

The above-named members, in separate votes by house, all concur in the provisions of this report.

March 29, 2004
DATE

For Clerk's Use: Adopted: _____
Repassage Vote: _____