

**House Substitute for Substitute for SENATE BILL No.
273**

By Committee on Judiciary

3-26

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

1 substantial changes in their advertising and marketing practices and
2 corporate culture, with the intention of reducing underage smoking.

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

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

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

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

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

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

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

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

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

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

39 ~~(E)(v)~~ for each of 2007 ~~and each year thereafter~~ *through 2021:*
40 \$.0188482 per unit sold; *and*

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

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

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

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

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

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

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

1 *manufacturer may elect to receive the excess amount as a refund or a*
2 *credit against future remittances due under this section.*

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

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

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

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

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

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

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

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

1 (b) (1) Not later than July 1, 2009, the attorney general shall develop
2 a directory, to be posted on the attorney general's website. Except as
3 otherwise provided, the directory shall list all tobacco product
4 manufacturers and brand families of such tobacco product manufacturers
5 that have provided current and accurate certifications conforming to the
6 requirements of subsection (c).

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

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

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

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

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

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

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

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

42 (6) Unless otherwise provided by agreement between a stamping
43 agent and a tobacco product manufacturer, the stamping agent shall be

1 entitled to a refund from a tobacco product manufacturer for any money
2 paid by the stamping agent to the tobacco product manufacturer for any
3 cigarettes of the tobacco product manufacturer in the possession of the
4 stamping agent on the effective date of removal from the directory of that
5 tobacco product manufacturer or brand family.

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

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

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

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

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

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

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

- 1 (A) A participating manufacturer; or
2 (B) in full compliance with K.S.A. 50-6a03, and amendments thereto,
3 including payment of all quarterly installment payments as may be
4 required by subsection (d).
- 5 (2) A participating manufacturer shall include in its certification a list
6 of its brand families. The participating manufacturer shall update such list
7 30 calendar days prior to any addition to, or modification of its brand
8 families by executing and delivering a supplemental certification to the
9 attorney general.
- 10 (3) A non-participating manufacturer shall include in its certification:
11 (A) The number of units sold for each brand family sold in the state
12 during the preceding calendar year;
13 (B) a list of all of its brand families sold in the state at any time
14 during the current calendar year, including any brand family sold in the
15 state during the preceding calendar year that is no longer being sold in the
16 state as of the date of such certification;
17 (C) the identity, by name and address, of any other tobacco product
18 manufacturer who manufactured such brand families in the preceding or
19 current calendar year;
20 (D) a declaration that such non-participating manufacturer is
21 registered to do business in the state, or has appointed a resident agent for
22 service of process, and provided notice thereof as required by K.S.A. 2020
23 Supp. 50-6a08, and amendments thereto;
24 (E) a declaration that such non-participating manufacturer:
25 (i) Has established and continues to maintain a qualified escrow fund;
26 ~~and~~
27 (ii) has executed an escrow agreement that governs the qualified
28 escrow fund and that such escrow agreement has been reviewed and
29 approved by the attorney general; *or*
30 (iii) *has not made any cigarette sales in Kansas requiring escrow*
31 *deposits under K.S.A. 50-6a03(b), and amendments thereto;*
32 (F) a declaration that such non-participating manufacturer consents to
33 the jurisdiction of the district court of the third judicial district, Shawnee
34 county, Kansas, for purposes of enforcing this act, or rules or regulations
35 promulgated pursuant thereto, as required by K.S.A. 2020 Supp. 50-
36 6a08(c), and amendments thereto;
37 (G) a declaration that such non-participating manufacturer is in full
38 compliance with K.S.A. 50-6a03(b), and amendments thereto, and any
39 rules or regulations promulgated pursuant to this act;
40 (H) (i) the name, address and telephone number of the financial
41 institution where the non-participating manufacturer has established such
42 qualified escrow fund required pursuant to K.S.A. 50-6a03(b), and
43 amendments thereto;

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

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

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

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

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

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

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

24 Such declarations by importers of a non-participating manufacturer
25 shall appoint for the declarant a resident agent for service of process in
26 Kansas in accordance with K.S.A. 2020 Supp. 50-6a08, and amendments
27 thereto, and consent to jurisdiction in accordance with K.S.A. 2020 Supp.
28 50-6a08, and amendments thereto;

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

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

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

1 (A) In the case of a participating manufacturer, ~~said~~ *such* participating
2 manufacturer affirms that the brand family shall be deemed to be its
3 cigarettes for purposes of calculating its payments under the master
4 settlement agreement for the relevant year in the volume and shares
5 determined pursuant to the master settlement agreement; or

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

10 Nothing in this paragraph shall be construed as limiting or otherwise
11 affecting the state's right to maintain that a brand family constitutes
12 cigarettes of a different tobacco product manufacturer for purposes of
13 calculating payments under the master settlement agreement or K.S.A. 50-
14 6a03(b), and amendments thereto.

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

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

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

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

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

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

40 Sec. 4. K.S.A. 2020 Supp. 50-6a09 is hereby amended to read as
41 follows: 50-6a09. (a) Notwithstanding any other provision of law, if a
42 newly qualified non-participating manufacturer is to be listed in the
43 directory, or if the attorney general reasonably determines that any non-

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

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

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

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

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

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

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

1 (3) any state or jurisdiction that is party to the master settlement
2 agreement has pending litigation, or an unsatisfied judgment against the
3 non-participating manufacturer, or any affiliate thereof, for unpaid escrow
4 obligations, *remittances* or associated penalties, costs or attorney fees.

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

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

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

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

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

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

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

1 culpably. It is thus in the interest of the state to require that such
2 manufacturers establish a reserve fund to guarantee a source of
3 compensation and to prevent such manufacturers from deriving large,
4 short-term profits and then becoming judgment-proof before liability may
5 arise.

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

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

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

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

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

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

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

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

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

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

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

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

43 (C) to the extent not released from escrow under subsection (b)(2)(A)

1 or (b)(2)(B), funds shall be released from escrow and revert back to such
2 tobacco product manufacturer 25 years after the date on which they were
3 placed into escrow.

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

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

18 (B) in the case of a knowing violation, be required within 15 days to
19 place such funds into escrow as shall bring it into compliance with this
20 section. The court, upon a finding of a knowing violation of this
21 subsection, may impose a civil penalty to be paid to the state general fund
22 in an amount not to exceed 15% of the amount improperly withheld from
23 escrow per day of the violation and in a total amount not to exceed 300%
24 of the original 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 required under this section shall
30 constitute a separate violation. A tobacco product manufacturer who is
31 found in violation of this section shall pay, in addition to other amounts
32 assessed under this section and pursuant to law, the costs and attorney fees
33 incurred by the state during a successful presentation under this paragraph
34 (3).

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

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

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

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

1 (b) (1) Not later than July 1, 2009, the attorney general shall develop
2 a directory, to be posted on the attorney general's website. Except as
3 otherwise provided, the directory shall list all tobacco product
4 manufacturers and brand families of such tobacco product manufacturers
5 that have provided current and accurate certifications conforming to the
6 requirements of subsection (c).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39 (A) A participating manufacturer; or

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

43 (2) A participating manufacturer shall include in its certification a list

1 of its brand families. The participating manufacturer shall update such list
2 30 calendar days prior to any addition to, or modification of its brand
3 families by executing and delivering a supplemental certification to the
4 attorney general.

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

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

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

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

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

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

20 (i) Has established and continues to maintain a qualified escrow fund;
21 and

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

25 (F) a declaration that such non-participating manufacturer consents to
26 the jurisdiction of the district court of the third judicial district, Shawnee
27 county, Kansas, for purposes of enforcing this act, or rules or regulations
28 promulgated pursuant thereto, as required by K.S.A. 2020 Supp. 50-
29 6a08(c), and amendments thereto;

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

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

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

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

1 (iv) the amount and date of any withdrawal or transfer of funds the
2 non-participating manufacturer made at any time from such qualified
3 escrow fund or from any other qualified escrow fund into which it ever
4 made escrow payments pursuant to section 6(b), and amendments thereto;

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

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

12 (ii) all penalties assessed under section 6(b), and amendments thereto;
13 and

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

16 Such declarations by importers of a non-participating manufacturer
17 shall appoint for the declarant a resident agent for service of process in
18 Kansas in accordance with K.S.A. 2020 Supp. 50-6a08, and amendments
19 thereto, and consent to jurisdiction in accordance with K.S.A. 2020 Supp.
20 50-6a08, and amendments thereto;

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

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

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

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

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

1 Nothing in this paragraph shall be construed as limiting or otherwise
2 affecting the state's right to maintain that a brand family constitutes
3 cigarettes of a different tobacco product manufacturer for purposes of
4 calculating payments under the master settlement agreement or section
5 6(b), and amendments thereto.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Sec. 11. On January 1, 2022, and the date of publication in the Kansas
22 register of the notice prescribed in section 9, K.S.A. 50-6a01, as amended
23 by section 1 of this act, and 50-6a03, as amended by section 2 of this act,
24 and K.S.A. 2020 Supp. 50-6a04, as amended by section 3 of this act, and
25 50-6a09, as amended by section 4 of this act, are hereby repealed.

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