

FIRST REGULAR SESSION

# HOUSE BILL NO. 1152

## 95TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE DIEHL.

2501L.01I

D. ADAM CRUMBLISS, Chief Clerk

### AN ACT

To amend chapter 196, RSMo, by adding thereto six new sections relating to the tobacco master settlement agreement, with penalty provisions and an emergency clause.

*Be it enacted by the General Assembly of the state of Missouri, as follows:*

Section A. Chapter 196, RSMo, is amended by adding thereto six new sections, to be known as sections 196.1020, 196.1023, 196.1026, 196.1029, 196.1032, and 196.1035, to read as follows:

**196.1020. As used in sections 196.1020 to 196.1035, the following terms mean:**

(1) **"Brand family"**, all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including but not limited to "menthol", "lights", "kings", and "100s", and includes any brand name alone or in conjunction with any other word trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes;

(2) **"Cigarette"**, the same meaning as such term is defined in section 196.1000;

(3) **"Director"**, the director of the Missouri department of revenue;

(4) **"Licensed wholesaler"**, a person who is authorized to affix tax stamps to packages or other containers of cigarettes under chapter 149, RSMo, or any person who is required to pay the tax imposed under section 149.160, RSMo, on other tobacco products;

(5) **"Master settlement agreement"**, the same meaning as such term is defined in section 196.1000;

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

16           (6) "Nonparticipating manufacturer", any tobacco product manufacturer that is  
17 not a participating manufacturer;

18           (7) "Participating manufacturer", the same meaning as such term is defined in  
19 section II(jj) of the master settlement agreement and all amendments thereto;

20           (8) "Qualified escrow fund", the same meaning as such term is defined in section  
21 196.1000;

22           (9) "Tobacco product manufacturer", the same meaning as such term is defined  
23 in section 196.1000;

24           (10) "Units sold", the same meaning as such term is defined in section 196.1000.

          196.1023. 1. (1) Every tobacco product manufacturer whose cigarettes are sold in  
2 this state, whether directly or through a distributor, retailer, or similar intermediary or  
3 intermediaries, shall execute and deliver on a form prescribed by the director a  
4 certification to the director no later than the thirtieth day of April each year certifying  
5 under penalty of perjury that as of the date of such certification such tobacco product  
6 manufacturer is a participating manufacturer or is in full compliance with section  
7 196.1003, including all quarterly installment payments required under subsection 5 of  
8 section 196.1029.

9           (2) A participating manufacturer shall include in its certification a list of its brand  
10 families. The participating manufacturer shall update such list thirty calendar days prior  
11 to any addition to or modification of its brand families by executing and delivering a  
12 supplemental certification to the director.

13           (3) A nonparticipating manufacturer shall include in its certification:

14           (a) A list of all of its brand families and the number of units sold for each brand  
15 family that were sold in the state during the preceding calendar year;

16           (b) A list of all of its brand families that have been sold in the state at any time  
17 during the current calendar year;

18           (c) Indicating by an asterisk any brand family sold in the state during the preceding  
19 calendar year that is no longer being sold in the state as of the date of such certification;  
20 and

21           (d) Identifying by name and address any other manufacturer of such brand  
22 families in the preceding or current calendar year.

23

24 The nonparticipating manufacturer shall update such list thirty calendar days prior to any  
25 addition to or modification of its brand families by executing and delivering a  
26 supplemental certification to the director.

27           (4) For a nonparticipating manufacturer, such certification shall further certify:

28           (a) That such nonparticipating manufacturer is registered to do business in the  
29 state or has appointed a resident agent for service of process and provided notice thereof  
30 as required in section 196.1023;

31           (b) That such nonparticipating manufacturer has established and continues to  
32 maintain a qualified escrow fund and has executed a qualified escrow agreement that has  
33 been reviewed and approved by the director and that governs the qualified escrow fund;

34           (c) That such nonparticipating manufacturer is in full compliance with section  
35 196.1003 and sections 196.1020 to 196.1035 and any rules promulgated thereunder;

36           (d) a. The name, address, and telephone number of the financial institution where  
37 the nonparticipating manufacturer has established such qualified escrow fund required  
38 under section 196.1003 and all rules promulgated thereunder;

39           b. The account number of such qualified escrow fund and any subaccount number  
40 for the state;

41           c. The amount such nonparticipating manufacturer placed in such fund for  
42 cigarettes sold in the state during the preceding calendar year, the date and amount of each  
43 such deposit, and such evidence or verification as may be deemed necessary by the director  
44 to confirm the foregoing; and

45           d. The amount and date of any withdrawal or transfer of funds the  
46 nonparticipating manufacturer made at any time from such fund or from any other  
47 qualified escrow fund into which it ever made escrow payments under section 196.1003 and  
48 all rules promulgated thereunder.

49           (5) A tobacco product manufacturer shall not include a brand family in its  
50 certification unless:

51           (a) In the case of a participating manufacturer, such participating manufacturer  
52 affirms that the brand family is deemed to be its cigarettes for purposes of calculating its  
53 payments under the master settlement agreement for the relevant year, in the volume and  
54 shares determined under the master settlement agreement; and

55           (b) In the case of a nonparticipating manufacturer, such nonparticipating  
56 manufacturer affirms that the brand family is deemed to be its cigarettes for purposes of  
57 section 196.1003.

58

59 Nothing in this section shall be construed as limiting or otherwise affecting the state's right  
60 to maintain that a brand family constitutes cigarettes of a different tobacco product  
61 manufacturer for purposes of calculating payments under the master settlement agreement  
62 or for purposes of section 196.1003.

63           **(6) Tobacco product manufacturers shall maintain all invoices and documentation**  
64 **of sales and other such information relied upon for such certification for a period of five**  
65 **years, unless otherwise required by law to maintain them for a greater period of time.**

66           **2. By July 1, 2009, the director shall develop and make available for public**  
67 **inspection or publish on its web site a directory listing of all tobacco product**  
68 **manufacturers that have provided current and accurate certifications conforming to the**  
69 **requirements of subsection 1 of this section and all brand families that are listed in such**  
70 **certifications, except:**

71           **(1) The director shall not include or retain in such directory the name or brand**  
72 **families of any nonparticipating manufacturer that fails to provide the required**  
73 **certification or whose certification the director determines is not in compliance with**  
74 **subdivisions (3) and (4) of subsection 1 of this section, unless the director has determined**  
75 **that such violation has been cured to the satisfaction of the director;**

76           **(2) Neither a tobacco product manufacturer nor brand family shall be included or**  
77 **retained in the directory if the director concludes in the case of a nonparticipating**  
78 **manufacturer that:**

79           **(a) Any escrow payment required under section 196.1003 for any period for any**  
80 **brand family whether or not listed by such nonparticipating manufacturer has not been**  
81 **fully paid into a qualified escrow fund governed by a qualified escrow agreement that has**  
82 **been approved by the director; or**

83           **(b) Any outstanding final judgment including interest thereon for violations of**  
84 **section 196.1003 has not been fully satisfied for such brand family and such manufacturer.**

85           **3. The director shall update the directory as necessary in order to correct mistakes**  
86 **and to add or remove a tobacco product manufacturer or brand family to keep the**  
87 **directory in conformity with the requirements of sections 196.1020 to 196.1035. At least**  
88 **thirty days prior to the removal of any tobacco product manufacturer or brand family**  
89 **from the directory, the director shall post notice of such removal in the directory. The**  
90 **director shall also transmit notice of such removal by electronic mail or other practicable**  
91 **means to each licensed wholesaler.**

92           **4. Every licensed wholesaler shall provide and update as necessary an electronic**  
93 **mail address to the director for the purpose of receiving any notifications that may be**  
94 **required by sections 196.1020 to 196.1035.**

95           **5. It shall be unlawful for any person to:**

96           **(1) Affix a stamp to a package or other container of cigarettes of a tobacco product**  
97 **manufacturer or brand family not included in the directory; or**

98           (2) Sell, offer, or possess for sale in this state cigarettes of a tobacco product  
99 manufacturer or brand family not included in the directory.

**196.1026. 1.** Any nonresident or foreign nonparticipating manufacturer that has  
2 not registered to do business in this state as a foreign corporation or business entity shall  
3 as a condition precedent to having its brand families listed or retained in the directory  
4 appoint and continually engage without interruption the services of an agent in this state  
5 to act as agent for the service of process on whom all process, and any action or proceeding  
6 against it concerning or arising out of the enforcement of sections 196.1003 and 196.1020  
7 to 196.1035 may be served in any manner authorized by law. Such service shall constitute  
8 legal and valid service of process on the nonparticipating manufacturer. The  
9 nonparticipating manufacturer shall provide the name, address, phone number, and proof  
10 of the appointment and availability of such agent to the satisfaction of the director.

11           **2.** The nonparticipating manufacturer shall provide notice to the director thirty  
12 calendar days prior to termination of the authority of an agent and shall further provide  
13 proof to the satisfaction of the director of the appointment of a new agent no less than five  
14 calendar days prior to the termination of an existing agent appointment. In the event an  
15 agent terminates an agency appointment, the nonparticipating manufacturer shall notify  
16 the director of the termination within five calendar days and shall include proof to the  
17 satisfaction of the director of the appointment of a new agent.

18           **3.** Any nonparticipating manufacturer whose cigarettes are sold in this state and  
19 who has not appointed and engaged an agent as herein required shall be deemed to have  
20 appointed the secretary of state as such agent and may be proceeded against in courts of  
21 this state by service of process upon the secretary of state. However, the appointment of  
22 the secretary of state as such agent shall not satisfy the condition precedent for having the  
23 brand families of the nonparticipating manufacturer included or retained in the directory.

**196.1029. 1.** Each licensed wholesaler shall submit monthly such information as  
2 the director requires to facilitate compliance with sections 196.1020 to 196.1035, including  
3 but not limited to a list by brand family of the total number of cigarettes, or in the case of  
4 roll-your-own, the equivalent stick count for which the licensed wholesaler affixed stamps  
5 during the previous calendar quarter or otherwise paid the tax due for such cigarettes.  
6 The licensed wholesaler shall maintain and make available to the director all invoices and  
7 documentation of sales of all nonparticipating manufacturer cigarettes and any other  
8 information relied upon in reporting to the director for a period of five years.

9           **2.** The director is authorized to disclose to the attorney general any information  
10 received under sections 196.1020 to 196.1035 and requested by the attorney general for  
11 purposes of determining compliance with and enforcing the provisions of sections 196.1020

12 to 196.1035. The director and attorney general shall share with each other the information  
13 received under section 196.1003, sections 196.1020 to 196.1035, and may share such  
14 information with other federal, state, or local agencies for purposes of enforcement of  
15 sections 196.1003 and sections 196.1020 to 196.1035, or corresponding laws of other states.

16 3. The director may require at any time from the nonparticipating manufacturer  
17 proof from the financial institution in which such manufacturer has established a qualified  
18 escrow fund for the purpose of compliance with section 196.1003 of the amount of money  
19 in such fund exclusive of interest, and the amount and date of each deposit to such fund,  
20 and the amount and date of each withdrawal from such fund.

21 4. In addition to any other information required to be submitted under sections  
22 196.1020 to 196.1035, the director may require a licensed wholesaler or tobacco product  
23 manufacturer to submit any additional information, including but not limited to samples  
24 of the packaging or labeling of each brand family, as is necessary to enable the director to  
25 determine whether a tobacco product manufacturer is in compliance with sections 196.1020  
26 to 196.1035.

27 5. To promote compliance with sections 196.1020 to 196.1035, the director may  
28 promulgate rules requiring a tobacco product manufacturer to make the required escrow  
29 deposits in quarterly installments during the year in which the sales covered by such  
30 deposits are made. The director may require production of information to enable the  
31 director to determine the adequacy of the amount of the installment deposit.

196.1032. 1. In addition to or in lieu of any other civil or criminal remedy provided  
2 by law, upon a determination that a licensed wholesaler or any person has violated  
3 subsection 3 of section 196.1023 or any regulation adopted under sections 196.1020 to  
4 196.1035, the director may revoke or suspend the license of any licensed wholesaler in the  
5 manner provided in subsection 3 of section 149.035, RSMo. Each stamp affixed and each  
6 sale or offer to sell cigarettes in violation of subsection 3 of section 196.1023 shall constitute  
7 a separate violation. For each such violation, the director may also impose a civil penalty  
8 in an amount not to exceed the greater of five hundred percent of the retail value of the  
9 cigarettes or five thousand dollars upon a determination of a violation of subsection 3 of  
10 section 196.1023 or any regulations adopted thereunder.

11 2. Any cigarettes that have been sold, offered for sale, or possessed for sale in this  
12 state in violation of subsection 3 of section 196.1023 shall be deemed contraband and such  
13 cigarettes shall be subject to seizure and forfeiture as provided in chapter 149, RSMo, and  
14 all such cigarettes so seized and forfeited shall be destroyed and not resold.

15 3. The attorney general on behalf of the director may seek an injunction to restrain  
16 a threatened or actual violation of subsection 3 of section 196.1023, or subsection 1 or 4 of

17 section 196.1029 by a licensed wholesaler and to compel the licensed wholesaler to comply  
18 with such provisions. In any action brought under this section, the state shall be entitled  
19 to recover the costs of investigation, costs of the action, and reasonable attorney fees.

20 4. It shall be unlawful for a person to sell or distribute cigarettes, or acquire, hold,  
21 own, possess, transport, import, or cause to be imported cigarettes that the person knows  
22 or should know are intended for distribution or sale in the state in violation of subsection  
23 3 of section 196.1023. A violation of this section is a class A misdemeanor.

24 5. A person who violates subsection 3 of section 196.1023 engages in an unfair  
25 practice in violation of section 407.020, RSMo.

196.1035. 1. A determination of the director not to list or to remove from the  
2 directory a brand family or tobacco product manufacturer shall be subject to review in the  
3 circuit court of Cole County.

4 2. No person shall be issued a license or granted a renewal of a license under  
5 chapter 149, RSMo, unless such person has certified in writing under the penalty of  
6 perjury that such person will comply fully with sections 196.1020 to 196.1035.

7 3. For the calendar year 2009, if the effective date of sections 196.1020 to 196.1035  
8 is later than March 16, 2009:

9 (1) The first report of licensed wholesalers required in subsection 1 of section  
10 196.1029 shall be due thirty calendar days after such effective date; and

11 (2) The certification by a tobacco product manufacturer described in subsection  
12 1 of section 196.1023 shall be due forty-five calendar days after such effective date.

13 4. The director may promulgate rules necessary to effect the purpose of sections  
14 196.1020 to 196.1035.

15 5. In any action brought by the state to enforce sections 196.1020 to 196.1035, the  
16 state shall be entitled to recover the costs of investigation, expert witness fees, costs of the  
17 action and reasonable attorney fees.

18 6. If a court of competent jurisdiction determines that a person has violated sections  
19 196.1020 to 196.1035, the court shall order any profits, gains, gross receipts, or other  
20 benefits from the violation to be disgorged and paid to the state treasurer for deposit in the  
21 "Tobacco Control Special Fund", which is hereby created. Notwithstanding the provisions  
22 of section 33.080, RSMo, to the contrary, any moneys remaining in the fund at the end of  
23 the biennium shall not revert to the credit of the general revenue fund. Unless otherwise  
24 expressly provided, the remedies or penalties provided by sections 196.1020 to 196.1035 are  
25 cumulative to each other and to the remedies or penalties available under all other laws of  
26 this state.

27           **7. If any section or portion of a section in sections 196.1020 to 196.1035 causes**  
28 **section 196.1003 to no longer constitute a qualifying or model statute, as those terms are**  
29 **defined in the master settlement agreement, that portion of sections 196.1020 to 196.1035**  
30 **shall be invalid. If any section or portion of a section in sections 196.1020 to 196.1035 is**  
31 **for any reason held to be invalid, unlawful, or unconstitutional, such decision shall not**  
32 **affect the validity of the remaining portions of sections 196.1020 to 196.1035.**

          Section B. Because immediate action is necessary to protect the economic welfare of the  
2 citizens of this state, section A of this act is deemed necessary for the immediate preservation  
3 of the public health, welfare, peace, and safety, and is hereby declared to be an emergency act  
4 within the meaning of the constitution, and section A of this act shall be in full force and effect  
5 upon its passage and approval.

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