

## SENATE AMENDMENTS TO B-ENGROSSED HOUSE BILL 2128

By COMMITTEE ON RULES

June 23

1 On page 8 of the printed B-engrossed bill, delete lines 34 through 45 and delete pages 9 through  
2 15 and insert:

3 **“SECTION 8. (1) Except for a Participating Manufacturer, as that term is defined in the**  
4 **Master Settlement Agreement, that is generally performing its financial obligations under**  
5 **the Master Settlement Agreement, a tobacco product manufacturer is liable for an equity**  
6 **assessment for units sold within the State of Oregon after January 1, 2024.**

7 **“(2) The equity assessment is \$0.0188482 per unit sold, as this amount is adjusted for in-**  
8 **flation.**

9 **“(3)(a) Each tobacco product manufacturer that is liable for an equity assessment shall**  
10 **annually certify to the Attorney General that it is in compliance with this section and remit**  
11 **the required equity assessment to this state by April 15 of the year following the sales year**  
12 **at issue. Tobacco product manufacturers have a continuing obligation to submit amended**  
13 **certificates of compliance if their sales or payment information changes.**

14 **“(b) The Attorney General may issue amended notices of equity assessment if additional**  
15 **units sold are discovered through audit or otherwise. The tobacco product manufacturer**  
16 **shall cause the assessed amount to be remitted to this state within 30 days of the date of the**  
17 **amended notice.**

18 **“(c) Any amounts recovered under this section are the property of the state, and this**  
19 **section creates no cause or right of action in any party except the State of Oregon. Amounts**  
20 **recovered under this section shall be deposited in the Oregon Health Authority Fund estab-**  
21 **lished under ORS 413.101 and shall be used for expenses of the Oregon Health Plan.**

22 **“(d) Nothing in this section operates to:**

23 **“(A) Waive the right of the state to bring a claim against a tobacco product manufac-**  
24 **turer, except that any funds paid to the state under this section shall be credited on a**  
25 **dollar-for-dollar basis against any such judgment or settlement; or**

26 **“(B) Relieve a tobacco product manufacturer from any obligation or duty imposed pur-**  
27 **suant to ORS 180.400 to 180.455 or any other provision of Oregon law.**

28 **“(e) A tobacco product manufacturer may seek and receive a credit or refund of equity**  
29 **assessment payments to the extent that the tobacco product manufacturer establishes that**  
30 **the amount of the equity assessment paid on account of units sold in Oregon in a particular**  
31 **year was greater than the Master Settlement Agreement payments, as determined pursuant**  
32 **to section IX(i) of that agreement after final determination of all adjustments, that the**  
33 **manufacturer would have been required to make an account of such units sold, had it been**  
34 **a Participating Manufacturer, as that term is defined in the Master Settlement Agreement.**  
35 **A tobacco product manufacturer may seek a credit or refund within one year after the due**

1 **date of the assessment.**

2 **“(4) The Attorney General may bring a civil action on behalf of the State of Oregon**  
3 **against any tobacco product manufacturer that fails to remit the amount due under sub-**  
4 **section (2) of this section. In addition to recovering the equity assessment, the Attorney**  
5 **General shall be entitled to reasonable attorney fees, costs and expenses incurred in prose-**  
6 **cuting the action and any appeal. Attorney fees, costs and expenses recovered under this**  
7 **subsection shall be deposited in the Tobacco Enforcement Fund established under ORS**  
8 **180.205.**

9 **“(5)(a) The court, upon a finding of a violation of subsection (1) of this section, may im-**  
10 **pose a civil penalty upon the tobacco product manufacturer to be paid to the General Fund**  
11 **of this state in an amount not to exceed five percent of the amount improperly withheld per**  
12 **day of the violation and in a total amount not to exceed 100 percent of the original amount**  
13 **improperly withheld.**

14 **“(b) The court, upon a finding of a knowing violation of subsection (1) of this section,**  
15 **may impose a civil penalty upon the tobacco product manufacturer to be paid to the General**  
16 **Fund of this state in an amount not to exceed 15 percent of the amount improperly withheld**  
17 **per day of the violation and in a total amount not to exceed 300 percent of the original**  
18 **amount improperly withheld.**

19 **“(c) In the case of a second knowing violation of subsection (1) of this section, the to-**  
20 **bacco product manufacturer shall be prohibited from selling cigarettes to consumers within**  
21 **the State of Oregon (whether directly or through a distributor, retailer or similar interme-**  
22 **diary or intermediaries) for a period not to exceed two years. Each failure to make a pay-**  
23 **ment required under this section shall constitute a separate violation.**

24 **“(6) In the case of units sold that are cigarettes manufactured outside the United States**  
25 **and imported into the United States by an importer:**

26 **“(a) Importers shall be jointly and severally liable with the tobacco product manufacturer**  
27 **of the cigarettes for the equity assessments required under subsection (1) of this section;**

28 **“(b) Importers may be sued under subsection (4) of this section to the same extent as**  
29 **the tobacco product manufacturer, and shall be subject to all of the same civil penalties,**  
30 **remedies or other relief that may be awarded against the tobacco product manufacturer of**  
31 **the cigarettes as provided in subsection (4) of this section;**

32 **“(c) If the importer fails or refuses within 15 days of the Attorney General’s written de-**  
33 **mand to remit the equity assessment for which it is jointly and severally liable under para-**  
34 **graph (a) of this subsection, all cigarettes imported into the United States by the importer**  
35 **shall constitute contraband cigarettes as defined in ORS 323.010 and shall be subject to sei-**  
36 **zure and forfeiture as provided under ORS 323.248; and**

37 **“(d) A nonparticipating manufacturer located outside the United States that conducts**  
38 **business in this state shall provide to the Attorney General on a form prescribed by the At-**  
39 **torney General a declaration from each importer that imports the cigarettes of the nonpar-**  
40 **ticipating manufacturer intended for sale in this state stating that the importer accepts**  
41 **liability pursuant to subsection (1) of this section and consents to the jurisdiction of the**  
42 **courts of this state for the purposes of enforcing this section.**

43 **“SECTION 9. ORS 180.415 is amended to read:**

44 **“180.415. In the certification required by ORS 180.410 (1), a nonparticipating manufacturer shall**  
45 **further certify:**

1 “(1) That the nonparticipating manufacturer and, if applicable, the nonparticipating  
2 manufacturer’s importer are registered to do business in the State of Oregon or have appointed a  
3 resident agent for service of process and provided notice of the appointment as required by ORS  
4 180.430.

5 “(2) That the nonparticipating manufacturer:

6 “(a) **Has made all required equity assessment payments; or**

7 “[*(a)*] (b)(A) Has established and continues to maintain a qualified escrow fund; and

8 “[*(b)*] (B) Has executed a qualified escrow agreement that has been reviewed and approved by  
9 the Attorney General and that governs the qualified escrow fund. The Attorney General shall adopt  
10 rules defining the form and content of a model escrow agreement. A nonparticipating manufacturer  
11 that executes the model escrow agreement is deemed to have satisfied the requirement that it use  
12 a form of escrow agreement that has been reviewed and approved by the Attorney General.

13 “(3)(a) The name, address and telephone number of the financial institution where the nonpar-  
14 ticipating manufacturer has established the qualified escrow fund required by ORS 323.806;

15 “(b) The account number of the qualified escrow fund and any subaccount number for the State  
16 of Oregon;

17 “(c) The amount the nonparticipating manufacturer **has** placed in the qualified escrow fund **or**  
18 **has paid as equity assessments** for cigarettes sold in Oregon during the preceding calendar year,  
19 the amount and date of each deposit **or payment** and evidence or verification as may be deemed  
20 necessary by the Attorney General to confirm the amounts and dates; and

21 “(d) The amount and date of any withdrawal of funds the nonparticipating manufacturer made  
22 at any time from [*the qualified escrow fund or from any other*] **any** qualified escrow fund into which  
23 the nonparticipating manufacturer ever made escrow payments pursuant to ORS 323.806 **or section**  
24 **8 of this 2023 Act.**

25 “(4) That the nonparticipating manufacturer has posted a bond in accordance with ORS 180.416.

26 “(5) That all shipments or sales made within or into this state by the nonparticipating man-  
27 ufacturer or its importer are made to a distributor of cigarettes licensed under ORS 323.105 or a  
28 distributor of tobacco products licensed under ORS 323.530.

29 “**SECTION 10.** ORS 180.416 is amended to read:

30 “180.416. (1) A nonparticipating manufacturer shall post a bond for the benefit of the state, in  
31 accordance with this section, which is conditioned on the nonparticipating manufacturer fully com-  
32 plying with the [*escrow*] obligations of ORS 323.806 **or section 8 of this 2023 Act.**

33 “(2) The bond must be posted at least 10 days in advance of each calendar quarter as a condition  
34 to the nonparticipating manufacturer and its brand families being included in the state directory for  
35 that quarter. The amount of the bond must be the greater of:

36 “(a) The greatest required escrow **or equity assessment payment** amount due from the non-  
37 participating manufacturer or its predecessor for any of the 12 preceding calendar quarters; or

38 “(b) \$25,000.

39 “(3) If a nonparticipating manufacturer that posted a bond has failed to make or have made on  
40 its behalf deposits **or payments** equal to the full amount owed for a quarter within 15 days follow-  
41 ing the due date for the quarter, the Attorney General may execute upon the bond in the amount  
42 equal to any remaining amount [*of the escrow*] due, including any applicable penalties or other  
43 charges allowable by law. Amounts the Attorney General collects on a bond shall be deposited into  
44 the General Fund for the benefit of the state and shall reduce the amount [*of escrow*] due from the  
45 nonparticipating manufacturer in the dollar amount collected. [*Escrow*] Obligations above the

1 amount collected on the bond remain due from the nonparticipating manufacturer and any importer  
2 liable as provided in ORS 323.806 **or section 8 of this 2023 Act.**

3 “(4) The bond required under this section must be a good and sufficient bond executed by a  
4 surety company licensed and authorized to do business in Oregon and shall be conditioned to pay  
5 the escrow requirements as well as any penalties or other charges under this chapter.

6 “(5) The Attorney General may promulgate rules necessary to implement this section including  
7 acceptable forms and types of bonds.

8 “**SECTION 11.** ORS 180.425 is amended to read:

9 “180.425. (1) The Attorney General shall develop and make available for public inspection a di-  
10 rectory listing all tobacco product manufacturers that have provided current and accurate certif-  
11 ications conforming to the requirements of ORS 180.410 and 180.415 and all brand families that are  
12 listed in the certifications.

13 “(2) The Attorney General may not include or retain in the directory the name or brand families  
14 of any nonparticipating manufacturer that fails to provide the required certification or whose cer-  
15 tification the Attorney General determines is not in compliance with ORS 180.410 and 180.415, un-  
16 less the Attorney General has determined that the violation has been cured to the satisfaction of  
17 the Attorney General. The Attorney General shall adopt rules defining the criteria by which the  
18 Attorney General will exercise the discretion granted by this subsection.

19 “(3) The Attorney General may not include or retain in the directory a nonparticipating man-  
20 ufacturer or a brand family if the Attorney General concludes that:

21 “(a) Any [*escrow*] payment required from the nonparticipating manufacturer pursuant to ORS  
22 323.806 **or section 8 of this 2023 Act** for any period for any brand family, whether listed or not  
23 listed by the nonparticipating manufacturer, has not been fully paid, **if applicable**, into a qualified  
24 escrow fund governed by a qualified escrow agreement that has been approved by the Attorney  
25 General; or

26 “(b) Any outstanding final judgment, including interest thereon, for a violation of ORS 323.806  
27 **or section 8 of this 2023 Act** has not been fully satisfied for the brand family or the nonpartic-  
28 ipating manufacturer.

29 “(4) The Attorney General shall update the directory in order to correct mistakes and to add  
30 or remove a tobacco product manufacturer or a brand family to keep the directory in conformity  
31 with the requirements of this section. The Attorney General shall update the directory with new  
32 brand families upon receipt of an annual or supplemental certification listing new brand families if  
33 the Attorney General determines that the annual or supplemental certification is in compliance with  
34 the requirements of ORS 180.410 and 180.415. The Attorney General shall make the determination  
35 about compliance within 45 days of receipt of the certification.

36 “(5) The Attorney General shall:

37 “(a) Create and maintain a list of persons, including but not limited to tobacco product man-  
38 ufacturers and distributors, that are interested in receiving electronic mail notifications of changes  
39 in the directory developed under this section;

40 “(b) Develop a registration form to be completed by persons interested in receiving electronic  
41 mail notification of changes in the directory developed under this section that are not otherwise  
42 required by ORS 180.435 (4) or rules adopted under ORS 180.445 or 180.450 to submit their electronic  
43 mail addresses to the Attorney General; and

44 “(c) Immediately upon making any change in the directory developed under this section, send  
45 electronic mail notices of the change to all persons on the list created under this subsection.

1       “**SECTION 12.** ORS 180.435 is amended to read:

2       “180.435. (1) Not later than 20 days after the end of each calendar quarter, and more frequently  
3 if so directed by the Attorney General, a distributor shall report such information as the Attorney  
4 General requires to facilitate compliance by tobacco product manufacturers with this section and  
5 ORS 180.410, 180.415, 180.420, 180.430 and 180.440, and with rules adopted under ORS 180.445 and  
6 180.450. The information shall include, but need not be limited to, a list by brand family of the total  
7 number of cigarettes or, in the case of roll-your-own tobacco, the equivalent stick count for which  
8 the distributor affixed stamps or otherwise paid the tax due during the previous calendar quarter.

9       “(2) A distributor shall maintain for a period of five years all invoices and documentation of  
10 sales of cigarettes manufactured by nonparticipating manufacturers and any other information relied  
11 upon in reporting to the Attorney General under subsection (1) of this section. The distributor shall  
12 make the invoices and other documentation available to the Attorney General upon request.

13       “(3)(a) The Attorney General may compel by subpoena the production of any books, papers, re-  
14 cords or other information required to be maintained under subsection (2) of this section and may  
15 require any person to appear and provide testimony pertinent to the information described in sub-  
16 section (2) of this section. The subpoena shall have the same force and effect and be served in the  
17 same manner as in a civil action in the circuit court.

18       “(b) If a person fails to produce any books, papers, records or other information required to be  
19 produced, fails to appear or testify about a matter for which testimony may be compelled or other-  
20 wise fails to comply with a subpoena issued under this subsection, the Attorney General may apply  
21 to the circuit court of the county in which the person to whom the subpoena was issued resides or  
22 may be found. The application shall be for an order requiring the person to comply with the demand  
23 or request of the Attorney General. The application shall be made by ex parte motion. The order  
24 of the court shall require the person against whom the order is directed to comply with the request  
25 or demand of the Attorney General within 10 days after the service of the order, or such further  
26 time as the court may grant, or to justify the failure to comply with the order within that time.

27       “(c) Failure to comply with an order under this subsection shall constitute contempt of court.  
28 The remedy provided under this paragraph shall be in addition to any other remedy provided by law.

29       “(4) A distributor shall provide the Attorney General with an electronic mail address so that the  
30 Attorney General may notify the distributor of the information required under subsections (1) and  
31 (8) of this section.

32       “(5) The Attorney General and the Department of Revenue may share with each other informa-  
33 tion received under ORS 180.400 to 180.455, ORS chapter 323 and corresponding rules, and may  
34 share such information with federal, state or local agencies for purposes of enforcement of ORS  
35 180.400 to 180.455, ORS chapter 323 and corresponding rules, or the corresponding laws of other  
36 states and with the data clearinghouse or similar entity established pursuant to a settlement  
37 agreement between the State of Oregon and the participating manufacturers, and with any parties  
38 necessary to effectuate the terms of the settlement agreement.

39       “(6) The Attorney General may at any time require a nonparticipating manufacturer to produce  
40 proof from the financial institution in which the nonparticipating manufacturer has established a  
41 qualified escrow fund for the purpose of compliance with ORS 323.806 of the amount of moneys in  
42 the fund, exclusive of interest, the amount and date of each deposit and the amount and date of each  
43 withdrawal from the fund.

44       “(7) The Attorney General shall, upon request of a nonparticipating manufacturer whose com-  
45 pliance with escrow **or equity assessment** requirements is at issue, provide the manufacturer with

1 copies of all documents upon which any proposed addition to the escrow **or equity assessment** is  
2 based. Documents required to be provided under this subsection include, but are not necessarily  
3 limited to, reports under this section from distributors. The information provided to the manufac-  
4 turer under this subsection may not include information about brand families or products of any  
5 tobacco product manufacturer other than the one to whom the information is provided. The infor-  
6 mation may be used only for the purpose of determining the appropriate amount of escrow **or equity**  
7 **assessment** deposits.

8 “(8) The Attorney General may require a distributor or a tobacco product manufacturer to  
9 submit any additional information, including, but not limited to, samples of the packaging and la-  
10 beling of each brand family, to enable the Attorney General to determine whether a tobacco product  
11 manufacturer is in compliance with this section and ORS 180.410, 180.415, 180.420, 180.430 and  
12 180.440 and with rules adopted under ORS 180.445 and 180.450.

13 “**SECTION 13.** ORS 180.445 is amended to read:

14 “180.445. (1) To promote compliance with the provisions of ORS 180.410, 180.415, 180.420,  
15 180.430, 180.435 and 180.440, the Attorney General may adopt rules requiring a nonparticipating  
16 manufacturer to make the escrow deposits **or equity assessment payments** required by ORS  
17 323.806 **or section 8 of this 2023 Act** in quarterly installments during the year in which the sales  
18 covered by the deposits are made. The Attorney General may require a nonparticipating manufac-  
19 turer to produce information sufficient to enable the Attorney General to determine the adequacy  
20 of the amount of the installment deposit **or payment**.

21 “(2) If the Attorney General adopts rules requiring a nonparticipating manufacturer to make  
22 escrow deposits **or payments** in quarterly installments, the rules may also provide that a nonpar-  
23 ticipating manufacturer that has been in continuous compliance for one year with ORS 180.410,  
24 180.415, 180.420, 180.430, 180.435, 180.440 and 323.806 **and section 8 of this 2023 Act** may make  
25 escrow deposits **or payments** required by ORS 323.806 **or section 8 of this 2023 Act** in annual  
26 payments during the second and subsequent years in which deposits are required.

27 “**SECTION 14.** ORS 180.205 is amended to read:

28 “180.205. (1) The Tobacco Enforcement Fund is established separate and distinct from the Gen-  
29 eral Fund. The Tobacco Enforcement Fund shall consist of:

30 “(a) Moneys deposited into the fund under ORS 180.450, 180.451 and 180.491 **and section 8 of**  
31 **this 2023 Act**; and

32 “(b) Moneys transferred to the fund under ORS 293.537.

33 “(2) Moneys in the Tobacco Enforcement Fund are continuously appropriated to the Department  
34 of Justice for the purpose of enforcing the provisions of ORS 180.400 to 180.455, 180.465 to 180.494,  
35 323.106, 323.806 and 323.810 to 323.816 **and section 8 of this 2023 Act**. Moneys in the fund are not  
36 subject to allotment under ORS 291.234 to 291.260.

37 “**SECTION 15.** ORS 293.537 is amended to read:

38 “293.537. (1) The Tobacco Settlement Funds Account is established as an account in the General  
39 Fund. Except as provided in section 2, chapter 11, Oregon Laws 2003, the account shall consist of  
40 all moneys paid to this state under the Master Settlement Agreement of 1998.

41 “(2) Before July 1 of each odd-numbered year, the Department of Justice shall submit for ap-  
42 proval to the Oregon Department of Administrative Services the estimated costs that will be in-  
43 curred by the Department of Justice in the subsequent biennium in enforcing the provisions of ORS  
44 180.400 to 180.455, 323.106 and 323.806 **and section 8 of this 2023 Act**. On July 1 of each odd-  
45 numbered year, a sum equal to the amount approved by the Oregon Department of Administrative

1 Services shall be transferred from the Tobacco Settlement Funds Account to the Tobacco Enforce-  
2 ment Fund established under ORS 180.205. If the Department of Justice determines during a  
3 biennium that it needs funds for purposes described in this subsection in addition to the amount  
4 approved by the Oregon Department of Administrative Services, the Department of Justice may re-  
5 quest transfer of additional moneys from the Tobacco Settlement Funds Account and the additional  
6 amount approved by the Oregon Department of Administrative Services shall be transferred to the  
7 Tobacco Enforcement Fund.

8 “(3) Except as provided in subsection (2) of this section, all moneys in the Tobacco Settlement  
9 Funds Account are continuously appropriated to the Oregon Department of Administrative Services  
10 to be expended as directed by the Legislative Assembly.

11 “(4) All moneys in the Tobacco Settlement Funds Account shall be invested as provided in ORS  
12 293.701 to 293.790.

13 **“SECTION 16. The amendments to ORS 180.415, 180.416, 180.425, 180.435 and 180.445 by**  
14 **sections 9 to 13 of this 2023 Act apply to certifications submitted under ORS 180.410 on or**  
15 **after January 1, 2025.”**

16 \_\_\_\_\_