

**131.602 Tobacco product manufacturer's options to become participating manufacturer or to contribute to qualified escrow fund on quarterly basis -- Management of escrow fund -- Penalties for failure to place required funds in escrow -- Assignment of escrow funds to Commonwealth -- Credit of assigned funds against judgment -- Opinion of Attorney General required prior to assignment -- Importers jointly and severally liable with non-U.S. manufacturers for escrow amounts -- Posting of financial instrument.**

- (1) Any tobacco product manufacturer selling cigarettes to consumers within this state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, after June 30, 2000, shall do one (1) of the following:
  - (a) Become a participating manufacturer, as that term is defined in section II(jj) of the master settlement agreement, and generally perform its financial obligations under the master settlement agreement; or
  - (b)
    1. Place into a qualified escrow fund the following amounts, as adjusted for inflation:
      - a. For 2000: \$0.0104712 per unit sold after June 30, 2000;
      - b. For each of 2001 and 2002: \$0.0136125 per unit sold;
      - c. For each of 2003 through 2006: \$0.0167539 per unit sold; and
      - d. For 2007 and each year thereafter: \$0.0188482 per unit sold; and
    2. Post a financial instrument with the Attorney General as provided in subsection (10) of this section.
- (2) The nonparticipating manufacturer shall place the amount required under this section into the qualified escrow fund on a quarterly basis.
- (3) A nonparticipating manufacturer that places funds into escrow pursuant to this section shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:
  - (a) To pay a judgment or settlement on any released claim brought against the nonparticipating manufacturer by Kentucky or any releasing party located or residing in Kentucky. Funds shall be released from escrow under this paragraph in the order in which they were placed into escrow and only to the extent and at the time necessary to make payments required under the judgment or settlement;
  - (b) To the extent that a nonparticipating manufacturer establishes that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the master settlement agreement payments, as determined pursuant to section IX(i) of that agreement, including after final determination of all adjustments, that the nonparticipating manufacturer would have been required to make on account of the units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to the nonparticipating manufacturer; or
  - (c) To the extent not released from escrow under paragraph (a) or (b) of this

subsection, funds shall be released from escrow and revert back to the nonparticipating manufacturer twenty-five (25) years after the date on which they were placed into escrow.

- (4) Each nonparticipating manufacturer shall annually certify to the Attorney General that it is in compliance with KRS 131.600 to 131.630, 138.130 to 138.205, 248.752, and 248.754 and any administrative regulations promulgated thereunder.
- (5) In addition to subsection (10)(g) of this section, the Attorney General may bring a civil action on behalf of Kentucky against any nonparticipating manufacturer that fails in any quarter to place into escrow the funds required under this section. Any nonparticipating manufacturer that fails in any quarter to place into escrow the funds required under this section shall:
  - (a) Be required within fifteen (15) days to place sufficient funds into escrow to bring it into compliance with this section. The court, upon a finding of a violation of this section, may impose a civil penalty, to be paid to the general fund of Kentucky, in an amount not to exceed five percent (5%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent (100%) of the original amount improperly withheld from escrow;
  - (b) In the case of a knowing violation, be required within fifteen (15) days to place sufficient funds into escrow to bring it into compliance with this section. The court, upon a finding of a knowing violation of this section, may impose a civil penalty, to be paid to the general fund of Kentucky, in an amount not to exceed fifteen percent (15%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent (300%) of the original amount improperly withheld from escrow; and
  - (c) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within Kentucky, whether directly or through a distributor, retailer, or similar intermediary, for a period not to exceed two (2) years or, if later, until fully compliant with KRS 131.600 to 131.630, 138.130 to 138.205, 248.752, and 248.754 and any administrative regulations promulgated thereunder.

Each failure to place sufficient funds into escrow as required under this section on a quarterly basis as required by subsection (2) of this section shall constitute a separate violation.

- (6) Notwithstanding the provisions of subsection (3) of this section, a nonparticipating manufacturer that elects to place funds into escrow pursuant to this section may make an irrevocable assignment of its interest in the funds to the benefit of the Commonwealth of Kentucky. Such assignment shall be permanent and apply to all funds in the subject qualified escrow fund or that may subsequently come into the fund, including those deposited into the qualified escrow fund prior to the assignment being executed, those deposited into the qualified escrow fund after the assignment is executed, and interest or other appreciation on the funds. The nonparticipating manufacturer, the Attorney General, and the financial institution where the qualified escrow fund is maintained may make amendments to the

qualified escrow fund agreement as may be necessary to effectuate an assignment of rights executed pursuant to this subsection or a withdrawal of funds from the qualified escrow fund pursuant to subsection (7) of this section. An assignment of rights executed pursuant to this subsection shall be in writing, signed by a duly authorized representative of the nonparticipating manufacturer making the assignment, and shall become effective upon delivery of the assignment to the Attorney General and the financial institution where the qualified escrow fund is maintained.

- (7) Notwithstanding the provisions of subsection (3) of this section, any escrow funds assigned to the Commonwealth pursuant to subsection (6) of this section shall be withdrawn by the Commonwealth upon request by the Treasurer of the Commonwealth and approval of the Attorney General. Any funds withdrawn pursuant to this subsection shall be deposited in the general fund and shall be calculated on a dollar-for-dollar basis as a credit against any judgment or settlement described in subsection (3)(a) of this section which may be obtained against the nonparticipating manufacturer who has assigned the funds in the subject qualified escrow fund. Nothing in this subsection or in subsection (6) of this section shall be construed to relieve a nonparticipating manufacturer from any past, current, or future obligations the manufacturer may have pursuant to this chapter.
- (8) Notwithstanding subsections (6) and (7) of this section, no assignment of escrows created pursuant to this section shall be made by a nonparticipating manufacturer, or shall be accepted by the Treasurer of the Commonwealth, unless and until the Attorney General has provided an opinion to the Treasurer, with a copy of the opinion provided to the Governor and the Legislative Research Commission, that amendments to KRS 131.600 and subsections (6) and (7) of this section shall not substantially jeopardize the Commonwealth's payments under the master settlement agreement.
- (9) For any nonparticipating manufacturer that is located outside the United States, each importer of the nonparticipating manufacturer's cigarettes shall be jointly and severally liable with the nonparticipating manufacturer for the deposit of all escrow amounts due under subsection (1) of this section, and the payment of all civil penalties imposed under subsection (5) of this section for the units sold in this state.
- (10)
  - (a) A nonparticipating manufacturer shall post a financial instrument with the Attorney General as a condition of the nonparticipating manufacturer and its brand families being included in the state directory for that quarter.
  - (b) The amount of the financial instrument shall be the greater of fifty thousand dollars (\$50,000) or the greatest required escrow amount due from the nonparticipating manufacturer or its predecessor for the immediately preceding twelve (12) calendar quarters.
  - (c) The financial instrument shall be posted at least ten (10) days in advance of each calendar quarter.
  - (d) The nonparticipating manufacturer shall be the obligor.
  - (e) The State Treasurer shall be the obligee.

- (f) The financial instrument shall be conditioned on the performance by the nonparticipating manufacturer of all of its escrow deposit and other financial obligations under Kentucky law.
- (g) In addition to subsection (5) of this section, if:
  - 1. The nonparticipating manufacturer fails to make its escrow deposits equal to the full amount owed for the quarter within thirty (30) days following the end of the quarter, the Attorney General may execute the financial instrument in the amount equal to any remaining amount of escrow due. The amount collected shall be deposited in the general fund and shall reduce the amount of escrow due from the nonparticipating manufacturer by the dollar amount collected. Escrow obligations that remain after the collection on the financial instrument shall remain due from the nonparticipating manufacturer and each of its importers; and
  - 2. The Attorney General obtains a judgment against the nonparticipating manufacturer for its failure to make the required escrow deposit, the Attorney General may also execute on the financial instrument to recover the amount of the costs of investigation, expert witness fees, costs of action, civil penalties, and attorneys' fees obtained in that judgment. Funds collected from the financial instrument shall be counted first toward the amount of escrow due but not deposited into escrow by the nonparticipating manufacturer.

**Effective:** July 1, 2015

**History:** Amended 2015 Ky. Acts ch. 55, sec. 2, effective July 1, 2015. -- Amended 2006 Ky. Acts ch. 252, Pt. XIX, sec. 1, effective April 25, 2006. -- Amended 2004 Ky. Acts ch. 135, sec. 2, effective July 13, 2004. -- Created 2000 Ky. Acts ch. 342, sec. 2, effective June 30, 2000.

**Legislative Research Commission Note (7/1/2015).** During codification, the Reviser of Statutes has changed the numbering of paragraph (b) of subsection (1) of this statute from the way it appeared in 2015 Ky. Acts ch. 55, sec. 2. None of the text of the subsection was changed.