

Clearinghouse Rule 04-028

ORDER OF THE ATTORNEY GENERAL CREATING RULE

The Wisconsin Attorney General hereby creates JUS 16, relating to enforcement of the Tobacco Master Settlement Agreement.

Analysis By the Attorney General's Office

- (1) **Statutes interpreted:** s. 895.12, Stats.
- (2) **Statutory authority:** s. 895.12(9), Stats.
- (3) **Explanation of agency authority:** Tobacco manufacturers who have not joined the MSA (non-participating manufacturers) must make annual payments into an escrow account. The amount of the payment is based on the number of cigarettes sold. The aim of requiring such escrow payments is to ensure a pot of money if the state sues the manufacturer for healthcare costs due to smoking-related illness, and to level the playing field between the manufacturers that settled with the states and those that did not. 2003 Wisconsin Act 73 gave the Department of Justice additional powers to enforce the provisions of the MSA against non-participating manufacturers.
- (4) **Related statute or rule:** Provisions of the MSA relating to non-participating manufacturers were codified in Wisconsin statutes at ss. 895.10 and 895.12, Stats.
- (5) **Plain language analysis:** 2003 Wisconsin Act 73 gives the Department of Justice a number of new powers to enforce the MSA. Specifically, cigarette manufacturers must make detailed certifications concerning the products they make, and the attorney general must maintain a directory of the manufacturers who have current and accurate certifications. Manufacturers that have not signed on to the MSA must put into place certified escrow accounts and escrow a certain amount for each cigarette sold to consumers in the State of Wisconsin. The act also allows the attorney general to require certifications and escrow payments quarterly.

This proposed rule implements the powers granted under 2003 Wisconsin Act 73. The proposed rules allow the Department of Justice to require non-participating manufacturers to certify their compliance and make their escrow payments quarterly. The rules set out the timelines for the submission of payments and certifications. In addition, the rules set out the attorney general's duties in maintaining the directory of compliant manufacturers, and state the conditions under which a manufacturer shall not be included on the directory.

(6) **Summary of, and comparison with, existing or proposed federal regulations:** There are no similar federal regulations.

(7) **Comparison with rules in adjacent states:** Iowa, Illinois and Michigan have similar regulations. The proposed rules in Wisconsin were modeled on Iowa's. The proposed rules stem from uniform legislation that is being passed in most of the states that signed on to the MSA. The legislation, known as "complementary legislation," enhances enforcement of the MSA. Minnesota did not sign the MSA and thus does not have similar regulations.

(8) **Summary of factual data and analytical methodologies:** There were no special data or methodologies used in preparing the proposed rules. The proposed rules were modeled on similar rules used in Iowa.

(9) **Analysis and documents used to determine effect on small business:** The primary tool used in determining the effect on small businesses was the experience of the Department of Justice in enforcing the MSA.

(10) **Anticipated costs incurred by private sector:** It is anticipated that there may be some negligible costs incurred in recordkeeping for those companies that are requested to certify quarterly.

(11) **Effect on small business:** There may be an effect on small businesses. Currently, there is no Wisconsin manufacturer that would be affected by the proposed rules. Under statutory law, non-participating manufacturers (none of which are currently located in Wisconsin) are required to escrow money for possible future litigation concerning the state's health costs related to smoking. The rule gives the Department of Justice the power to require these non-participating manufacturers to provide certifications and escrow payments quarterly. While the Department of Justice believes that quarterly payment will assist non-participating manufacturers to make appropriate marketing decisions so that they can meet these financial obligations, the quarterly reporting will require more paperwork for them.

(12) **Contact person:** All comments and questions should be directed to Charlotte Gibson, Assistant Attorney General, Wisconsin Department of Justice, 17 West Main Street, Madison, Wisconsin 53702; (608) 266-7656; *gibsoncj@doj.state.wi.us*.

(13) **Basis and purpose of the proposed rule:** The proposed rule puts in place certain powers that were granted to the Department of Justice by 2003 Wisconsin Act 73. Although the state securitized its payments under the MSA, the state is still responsible for diligently enforcing the terms of the MSA. If the state fails in that enforcement, it could be liable to the bondholders for any resulting reduced payments. By implementing the new powers granted to the Department of Justice by 2003 Wisconsin Act 73, the Department of Justice will be better able to enforce the MSA and to meet its obligations thereunder.

(14) **Summary of public comments:** No one appeared at the public hearing on the proposed rule, and the Department of Justice received no comments in writing.

(15) **Changes to plain language analysis or fiscal estimate:** The plain language analysis was expanded in response to legislative council staff comments.

(16) **Response to legislative staff comments:** All recommendations were adopted in whole.

Text of Rule

SECTION 1. Chapter Jus 16 is created to read:

Chapter Jus 16
ENFORCEMENT OF TOBACCO MASTER SETTLEMENT AGREEMENT

Jus 16.01 Definitions

Jus 16.03 Quarterly escrow deposits

Jus 16.04 Directory

Jus 16.05 Directory update notices

Jus 16.06 Burden

Jus 16.01 Definitions. In this chapter:

(1) “Directory” means the directory of compliant tobacco product manufacturers and brands, as provided for by s. 895.12(2)(b), Stats.

(2) “Quarter” means January 1 through March 31; April 1 through June 30; July 1 through September 30; and October 1 through December 31.

(3) “Tobacco product manufacturer” has the meaning given in s. 895.10(1)(i), Stats.

Jus 16.03 Quarterly escrow deposits.

(1) The attorney general may require all nonparticipating manufacturers to make the escrow payments required by s. 895.10(2), Stats. in quarterly installments. Factors that the attorney general may use in deciding whether to exempt a nonparticipating manufacturer from quarterly escrow payments include:

(a) Established History of Compliant Escrow Deposit. Nonparticipating manufacturers that have an established history of fully and timely funding a qualified escrow fund in Wisconsin, including for sales in the calendar year immediately prior to the current sales year.

(b) No Outstanding Judgments. Nonparticipating manufacturers that have no outstanding unpaid judgments, including any civil penalty.

(c) Limited Sales Volume. Nonparticipating manufacturers that have fewer than 1,000,000 of their cigarettes sold in Wisconsin during a quarter.

(d) Other Considerations. The attorney general may also consider other facts reasonably suggesting that the nonparticipating manufacturer may not make its full required escrow deposit by April 15 of the year following the year in which the cigarettes sales were made.

(2) Nonparticipating manufacturers that are required to make quarterly escrow deposits shall make their escrow deposits no later than 30 days after the end of the quarter in which the sales are made, and shall provide the attorney general receipt of official notification of the deposit no later than 10 days after the date that the escrow deposit is required.

Note: For example, the deadline for making a quarterly escrow deposit for cigarette sales occurring in February is April 30 of the same year. The deadline for officially notifying the attorney general of a quarterly escrow deposit for sales of cigarettes that occurred in February is May 10 of the same year.

(3) If the attorney general requires a nonparticipating manufacturer to make quarterly payments, the nonparticipating manufacturer shall also certify that such payments are complete and provide information sufficient to enable the attorney general to determine the adequacy of the installment. To be timely filed, the certification must be received by the attorney general's office within 40 days of the end of the quarter in which sales were made. If the required certification is not provided to and timely received by the attorney general, the attorney general may remove the delinquent nonparticipating manufacturer and its brand families from the directory.

(4) If the required quarterly escrow deposit is not timely made in full, or the attorney general does not receive timely official notice of the quarterly escrow deposit, the attorney general shall remove the delinquent nonparticipating manufacturer and its brand families from the directory.

Jus 16.04 Directory.

(1)(a) Except as provided in this section, the attorney general shall maintain and publish a directory that lists all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of s. 895.12(2)(a), Stats., and all brand families that are listed in such certifications.

(b) In determining what constitutes a complying certification, the attorney general may require the tobacco product manufacturer to provide such information and supporting documentation, including samples of the product sought to be certified, as the attorney general deems necessary. The attorney general may require the certification to be signed by an owner, officer, partner or director of the tobacco product manufacturer.

(c) The attorney general shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand families to keep the directory in conformity with the requirements of this chapter and s. 895.12, Stats.

(2) The attorney general shall not include or retain in the directory the name or brand

families of any tobacco product manufacturer if any of the following apply:

(a) The tobacco product manufacturer fails to provide the required certification in the form prescribed by the attorney general.

(b) The tobacco product manufacturer provides a certification that the attorney general determines is not in compliance with s. 895.12(2)(a), Stats., unless such violation has been cured to the satisfaction of the attorney general.

(c) Any escrow payment required pursuant to s. 895.10(2), Stats., for any period or for any brand family, whether or not the brand family is listed by such nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the attorney general.

(d) Any outstanding final judgment, including interest, has not been fully satisfied for such brand family and/or the manufacturer.

(e) The tobacco product manufacturer makes a misrepresentation on the certification.

(3) The directory will be available on the Internet at the attorney general's website. The homepage address for the attorney general's website is: *http://www.doj.state.wi.us/*.

Jus 16.05 Notification of inclusion in and exclusion from directory.

(1) If a tobacco product manufacturer has applied for inclusion in the directory, and the attorney general determines that it is in compliance with s. 895.12, Stats., the attorney general shall notify the tobacco product manufacturer by mail of the compliance and of the fact that the manufacturer will be added to the directory. The notice shall indicate each brand family of the tobacco product manufacturer that the attorney general has determined will be added to the directory.

(2) The attorney general shall notify by certified mail the tobacco product manufacturer's agent for service of process of any decision not to include in or to remove from the directory the tobacco product manufacturer, a brand family of the tobacco product manufacturer, or both. Notices of a removal from the directory shall be sent electronically 10 days prior to the attorney general's removing the tobacco product manufacturer or its brand family or both.

Jus 16.06 Burden. The burden of proof shall be on the tobacco product manufacturer to establish that it or a particular brand family is entitled to be listed in the directory.

SECTION 2. Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

Dated at Madison, Wisconsin, this ____ day of December, 2004.

Peggy A. Lautenschlager
Attorney General