

**MINUTES  
of the  
SECOND MEETING  
of the  
TOBACCO SETTLEMENT REVENUE OVERSIGHT COMMITTEE**

**July 19, 2010  
Room 317, State Capitol  
Santa Fe**

The Tobacco Settlement Revenue Oversight Committee (TSROC) began the meeting as a subcommittee at 10:20 a.m on Monday, July 19, 2010, in Room 317 of the State Capitol. The chair announced the commencement of webcasting and what that entails. A quorum was achieved at 10:30 a.m.

**Present**

Rep. Gail Chasey, Co-Chair  
Sen. Mary Jane M. Garcia, Co-Chair  
Sen. Dede Feldman  
Rep. Danice Picraux  
Sen. John C. Ryan

**Absent**

Rep. Gloria C. Vaughn

**Advisory Members**

Sen. Rod Adair  
Rep. Ray Begaye  
Sen. Linda M. Lopez  
Sen. Mary Kay Papen

Sen. Sue Wilson Beffort  
Rep. Karen E. Giannini

**Staff**

Sandy Mitchell  
Roxanne Knight  
Michael Hely

**Guests**

The guest list is in the meeting file.

**Handouts**

Copies of handouts and written testimony are in the meeting file.

**Monday, July 19**

**Tobacco Litigation Update; Enforcement Issues; Tobacco Settlement Payments Update**  
—**Albert Lama, Chief Deputy Attorney General, Attorney General's Office (AGO)**  
—**Claudia Ravanelli, Special Projects Coordinator, AGO**

In March 2010, then-Deputy Attorney General David Thomson sent a letter to the Legislative Finance Committee (LFC) and members of the TSROC regarding the projected

amount of revenues for this fiscal year. The AGO is using data from the National Association of Attorneys General. Price Waterhouse-Cooper assisted with figures for the estimate, which is a little over \$45 million. In 2009, there was a \$45 million contribution in tobacco settlement funds (TSF). At the same time, New Mexico had not received information as to whether any of those manufacturers that signed on to the Master Settlement Agreement (MSA) — known as participating manufacturers (PMs), would be withholding any amounts.

From March through May 2010, the TSF calculations for FY2010 were adjusted, and reductions were made to the TSF amount. The actual payment was \$4 million less than estimated.

Thirteen PMs made part of their payments into a "dispute account". Some withheld payments.

Future payments: The TSROC asked for guidance on how to account properly for TSF in the future. The AGO recommended that the same process that is already in effect be used: a gross amount estimate from an audit done in accordance with the MSA, subject to authorized deductions in accordance with the MSA. During the arbitration process, New Mexico will continue to see significant deductions from gross receipts, assuming full withholding. New Mexico's total allocable share is a net \$38 million, which is a conservative estimate.

Arbitration: The AGO is currently engaged in preparatory meetings for a scheduling conference to be held on July 20, 2010 in Chicago. The preparations are for the ongoing litigation, regarding 2003 TSF, that was filed by PMs against MSA states. The arbitrators have been selected. The AGO has been working on the briefs it will file. In September, a substantive hearing with initial statements of claims will take place. In order to streamline the process as much as possible, New Mexico is participating in hiring a lead counsel to represent the state defendants in the PMs lawsuit. The lead counsel will be charged with presenting common issues for all of these states. For issues unique to New Mexico, the AGO has three staff attorneys working with Ms. Ravanelli on the state's individual statement of claims.

Discovery: Tobacco sales documents from 2003 are being prepared for disclosure. There is an issue with the disclosure of New Mexico's tax information in discovery, in that certain data are confidential according to state law. The AGO is currently working on discovery agreements and a possible limited release of that information.

Settlement: There is the potential for settlement at any time. The AGO is prepared to move the case through the arbitration process.

Questions and comments were raised on the following matters:

- In response to a question regarding how many arbitrators are arbitrating in this matter, how they are selected and from what areas of the United States, it was explained that the arbitrators comprise a three-member panel chosen according to the

MSA selection provisions from a pool of retired federal Article 3 judges. Each side chooses an arbitrator, and both agree on a third. The arbitrators come from California, Illinois and Pennsylvania.

- A clarification as to who are the plaintiffs and who are the defendants in the TSF lawsuit: PMs are plaintiffs, and there are 49 state defendants, excluding only Montana.
- A clarification regarding discovery issues: AGO staff explained that regardless of agreement per disclosure, state law creates a confidentiality requirement that imposes penalties regardless of the circumstance of disclosure. The AGO may have to get a New Mexico court order authorizing release for arbitration purposes. Seventy-five percent of discovery comes from information from tobacco distributors, which is filed monthly and redacted in accordance with state law. Approximately 20 percent of this information consists of market reports from nonparticipating tobacco manufacturers (NPMs). Barbara Vigil, New Mexico district court judge, will decide what disclosures, if any, are permitted. If no such tax disclosures are permitted, the burden of proof may be more difficult to meet. The AGO believes that the plaintiffs, not the states, have the burden to prove that states are not compliant with the MSA.
- Possible settlement terms: There could be an MSA amendment providing for changes in how settling states deal with the competitive advantage between PMs and NPMs. There may also be an agreement that states will legislate other changes to tobacco laws and regulations in accordance with any settlement terms.
- Regarding lead counsel: The AGO staff clarified that two lawyers from Washington, D.C., would be chosen and given limits on expenditures. They would be limited to representing issues common to the states that they represent.

### **Litigation Update; Status on PMs, NPMs and Distributors; How Federal and State Legislation Has Affected New Mexico**

—**Claudia Ravanelli, Special Projects Coordinator, Office of the Attorney General**

Ms. Ravanelli testified that in October 2009, the AGO filed a lawsuit against MRC Enterprises in the First Judicial District. MRC Enterprises is a tobacco distributor licensed in New Mexico. The AGO is alleging that MRC Enterprises has dealt extensively in contraband sales, with \$185 million sticks of contraband sold without payment of state taxes.

MRC Enterprises was indicted in Washington State for trafficking in cigarette contraband and money laundering. The Washington State case tracks New Mexico's facts.

On a matter involving "Company SS", the AGO is still completing an investigation and will report later.

In addition, one native wholesale distributor from the foreign trade zone in Nevada was breaking the law. After Nevada provided documentation, the AGO filed a civil case against the malfasant distributor. A recent Oklahoma Supreme Court opinion proved helpful, and New Mexico won. As a result of enforcement of the judgment, this company's distribution in New Mexico has been severely curtailed.

The AGO has 13 judgments currently pending against manufacturers, totaling \$1.8 million in damages. These judgments are for the most part uncollectible. Some states are banding together to pool resources to collect money from manufacturers, such as overseas manufacturers that dumped contraband in New Mexico. On these overseas operations, it is especially difficult to attach assets when collecting on judgments.

There has been an indictment in the matter of Isleta Native Wholesale Supply. A responsible party has pled guilty to money laundering and trafficking and is currently serving a prison sentence.

In another case, the AGO sued six manufacturers and retailers pursuant to federal Food and Drug Administration (FDA) regulations banning flavored cigarettes. Both sides prevailed partly, and both are appealing.

The AGO's web site, [www.nmag.gov](http://www.nmag.gov), provides comprehensive information on the MSA, prohibitions, banned brands, distributor information and pending litigation.

As of June 23, 2010, 11 NPMs are certified in New Mexico, and 202 brands that are 100 percent compliant are currently certified in New Mexico.

The market share in 2009 of PMs in New Mexico represented 1.5 billion sticks, with 25 percent of the share being tax-exempt.

On June 22, 2009, the federal Family Smoking Prevention and Tobacco Control Act went into effect. New Mexico found that it had to take action to certify PMs in compliance with FDA regulations. New Mexico has been able to reduce sales of 20 brand families that have been removed from the AGO's directory. The AGO will have to certify annually that its enforcement is in compliance with FDA regulations.

On July 1, 2009, Senate Bill 219 went into effect, which has helped a great deal by allowing New Mexico to enforce laws against foreign manufacturers. New Mexico is now able to assess an escrow payment on every cigarette stamped in the state. In the first half of 2009, a total of 155 million sticks were reported, with four million eligible for escrow, representing \$109,000 in payments. During the second half of 2009, after SB 219's effective date, 146 million sticks were reported, and the amount of escrow payments rose to \$3.8 million. In the first quarter of 2010, \$1.9 million has been collected.

The local NPMs have seen no decrease in market share.

On January 1, 2010, fire-safe cigarette legislation went into effect. The AGO has met with fire marshals in the state. Now, every tobacco manufacturer has to provide proof of fire-safe certification.

The federal Prevent All Cigarette Trafficking Act of 2009 (PACT) affects all internet

distributors of tobacco. According to the PACT, all distributors are regulated in each state where they are selling tobacco products. The PACT helps to limit the increasing number of rogue distributors that use the false guise of tribal sovereignty to escape regulation.

The AGO is 100 percent compliant on escrow collections.

Regarding the impact of House Bill 3 from the 2010 second special session as it affects SB 219, the AGO has sent a letter to TSROC members. Changes pursuant to HB 3 have been made. In 2009, SB 219 was modified to change the definition of "units sold". In 2010, HB 3 modified that provision by amending Section 7-12-5 NMSA 1978. The AGO sees potential for a significant decrease in the state's ability to collect escrow. NPMs and PMs are concerned about this.

Questions and comments from the committee include the following:

- Regarding the common lead counsel for the majority of participating states in the 2003 TSF arbitration/litigation, the lead counsel is to be concentrated solely on the arbitration case. In response to a question regarding how much New Mexico is paying the lead counsel, it was explained that there is a \$2 million cap for all 49 states together, and the total cost depends upon how much the lead counsel's services are used. The total cost to New Mexico is estimated to be less than \$50,000. The AGO uses in-house resources as much as possible. Ms. Ravanelli is a national expert in this field.

By a motion seconded and adopted, the minutes for the June 2010 TSROC meeting were approved.

### **Tobacco Settlement Revenue Payment Shortfall; Repercussions; Allotment Methods; Proposals for the Future**

—**Dannette Burch, Deputy Secretary for Budget and Policy, Department of Finance and Administration (DFA)**

—**Brent Earnest, Senior Fiscal Analyst, LFC**

For FY2010, the actual MSA payment to New Mexico was \$4 million less than originally estimated. The law requires the DFA to reduce appropriations accordingly. There was a 7.9 percent reduction in appropriations across programs.

Questions and comments from the committee included the following:

- In response to a question about how state agencies allocate legislative funding, it was explained that DFA budgets are made in accordance with the general appropriation act. So long as agencies follow those guidelines, the DFA finds them compliant. When the legislature earmarks funds, an agency must supply reports to relevant committees. If funds are allocated by category, then this is monitored. The DFA only monitors the compliance per level of specificity in the general appropriation act.

- Much of TSF goes to the University of New Mexico (UNM). Under instruction and general (I&G) purpose and area health education centers, there are allocations. It was suggested that \$837,000 be removed from UNM's funding because UNM can get funds elsewhere. Perhaps this money should go to areas most underserved by tobacco cessation programs. The DFA does not make these decisions. Appropriations are made by the legislature. The DFA only reduces allocations proportionately when there is a shortfall. The opinion was expressed that I&G funds should come from the state's general fund.
- TSROC funding for Medicaid is considered nonrecurring, except for \$8 million that has been recurring.
- For LFC and DFA analysis, growth in education, Medicaid, prison populations and health care costs are the most compelling drivers. It was explained that the LFC and DFA will examine cost drivers and that finding means replacing all of the nonrecurring sources that have to be replaced or cut will be a big challenge.
- Before 2003, the DFA collected TSF in April and distributed the funds in the subsequent fiscal year. When TSF were diverted from the permanent fund, the DFA began running a negative balance through April of each year. Approved deductions and unforeseen matters, such as one manufacturer's default, are important risks. The committee pondered how to return to the previous system in which TSF were accounted for only after receipt. It was suggested that general fund appropriations be used to fill in for one year of TSF appropriations. Or, the TSROC could choose to skip one year of TSF appropriations or skip the permanent fund distribution for one year. The likelihood of these alternatives was discussed as well.
- There was discussion on using a one-twelfth draw-down allotment to fund programs and agencies rather than a block disbursement at the beginning of the fiscal year.

### **MSA Funding Issues**

#### **—Traci Cadigan, New Mexico Government Relations Director, American Cancer Society**

- Among youth, smoking is down, but smokeless tobacco use has increased.
- There has been a 26.5 percent reduction in tobacco prevention funding.
- Increases in the cigarette tax are often followed by increases in industry marketing to make up for the fact that young smokers are price-sensitive.

In response to a question as to how increases in smoking incidence among youth are determined, Larry Elmore, program manager for the Tobacco Use Prevention and Control Program (TUPAC), explained that the federal Centers for Disease Control and Prevention (CDC) does a nationwide telephone-based survey of tobacco use rates among youth. One of the questions is whether the respondent has used any tobacco within the last 30 days.

### **Impact of FY2010 and FY2011 Budget Cuts, Department of Health (DOH) Programs**

#### **—Robert Horwitz, Deputy Director, Public Health Division, DOH**

#### **—Mr. Elmore, Program Manger, TUPAC, DOH**

The DFA announced an unexpected cut of 7.9 percent in TSF revenues for FY2010. Sixty-seven TUPAC contracts terminated two weeks early. No cuts are expected to HIV/AIDS

clinical care and breast and cervical cancer clinical care services. The DOH shifted some diabetes program funding to state general fund sources. The DOH is holding 10 percent in abeyance for FY2011, and it used one-time revenues to make up for funds. It will be difficult to identify additional savings during FY2011. The DOH is still 4 percent short of its target in reductions of TSF fund use.

TUPAC reviewed all activities in all contracts, contractor performance histories, contractor applications and capacity. TUPAC eliminated a significant number of contracts and cut funding in many contracts. It looked at statewide funding to ensure geographic coverage throughout the state.

Tobacco marketing is like a "persistent parasitic infection" of which prevention has to remain a step ahead.

Questions and comments from the committee included the following:

- Regarding tobacco use among mentally ill individuals, one of TUPAC's goals is to address tobacco-related disparities, including the disparate use of tobacco among mentally ill individuals. Individuals who start smoking in their teens are also found to be predisposed to a greater incidence of depression. Nicotine helps decrease anxiety and delusions among individuals with schizophrenia, but nicotine patches and gum may reduce the harm of smoking.
- There have been significant pharmacological advances in treating depression and schizophrenia, but the panel stated that it was unaware of any substitutes for tobacco.

**TUPAC Program Report; Recommendations for Efficiency; Epidemiological Data on Smoking; Update on CDC Program Elements; CDC Guidance on Handling Cutbacks to State Tobacco Cessation Programs; Spotlight on Quit Line and Youth Programs**

—Larry Elmore, Program Manger, TUPAC, DOH

—Shelley A. Mann-Lev, M.P.H., Santa Fe Public Schools (SFPS)

Mr. Elmore reported that 17.9 percent of adult New Mexicans use tobacco. U.S. adult smoking rates increased slightly to 20.6 percent, or about 46 million people, in 2008 from 19.8 percent in 2007. This represents the first increase in the adult smoking rate since 1994.

Insurers are offering quit lines with health plans that they offer.

Sixty-two percent of quit line callers had incomes lower than 25 percent of the federal poverty level.

Secondary benefits to tobacco cessation include fewer missed work days and secondary hospitalizations.

Prevention Coordinator and Project Director for Tobacco-Free Schools and TUPAC contractor, Ms. Mann-Lev spoke to the committee. She said that 15 percent fewer youth have

started smoking, which, she said, is not an insignificant figure. SFPS has been working with youth to encourage cessation and prevent tobacco use because marketing is heavily directed at youth. Nicotine addiction usually starts before the age of 20, and most adults who smoke started before the age of 20. Smoking before age 13 is much more likely to lead to serious health consequences. Addiction can occur by smoking between three and 20 cigarettes, and the tobacco industry designs products to addict people. According to Ms. Mann-Lev, school policy is a critical piece of tobacco prevention and cessation. She said that schools need to create norms, that tobacco use is not acceptable. Ten years ago, schools decided their tobacco policies were not important enough to enforce them. Now, SFPS has smoke-free campuses, and SFPS wants to ensure that the prohibition is enforced by conducting extensive outreach and diversion among youth. Life skills and evidence-based curricula are implemented to teach about tobacco and resistance to tobacco. SFPS teaches youth self-regulation, socialization and conflict management to help them avoid tobacco.

Questions and comments from the committee included the following:

- Funds often take a long time to get to tobacco diversion programs, and this is a challenge.
- There was a discussion of studies showing that the human brain does not fully develop until people are in their twenties or as late as 30. Smoking has an impact on brain functioning.

#### **HIV/AIDS Program Report; Recommendations for Efficiency**

##### **—Dominick Zurlo, Program Manager, Harm Reduction Program, DOH**

The HIV/AIDS services programs at the DOH will use federal and other program revenues to offset TSF reductions. Federal funds include funds pursuant to the federal Ryan White Comprehensive AIDS Resources Emergency Act, and federal Health Resources and Services Administration (HRSA) funds are among the federal funds the DOH receives for these services. These are for direct services for HIV/AIDS that total \$4 million. The CDC provides \$1 million. Harm reduction, syringe exchange programs, etc., are not funded by any federal funds.

The funds are allocated through a variety of contracts for prevention, testing and partner services for those who test positive for HIV/AIDS. The DOH allocates these services geographically according to where population centers are and aims to fund prevention in rural areas. The DOH must have a sense of how many people are living with HIV/AIDS in the state and their locations throughout the state. DOH makes provider agreements based on the numbers in specific areas. Funding is proportionate to the number of people needing services, but the DOH will provide the TSROC with figures at a later meeting.

#### **Diabetes Program Report; Recommendations for Efficiency**

##### **—Judith Gabriele, Program Manager, DOH**

##### **—Patty Morris, Director, Healthy Kids New Mexico Program, DOH**

This presentation concerned budget cuts from FY2010 and FY2011. According to the presenters, it will take several years to catch up after budget cuts from FY2010 and FY2011.

The DOH takes a coordinated approach to children's health. In FY2010, it provided children's health funding in 31 schools; in FY2011, it provided this funding to only 20 schools.

There have been cuts to programs helping people with diabetes in self-management, including the Kitchen Creations cooking school. The DOH aims to have one such program in every county every year. This is not likely to occur in FY2011 due to budget cuts.

Educational campaigns have been cut. There is no radio campaign, and the DOH has interrupted distribution of the instructional Spanish-language *photonovelas* (comic-book-style narratives) that have proven to be effective. The pre-diabetes prevention campaign has been cut as well. The DOH has been unable to translate the CDC's national diabetes education program into a culturally appropriate New Mexico-specific program.

Professional development for providers has been greatly reduced. In FY2010, the DOH trained 1,000 providers in motivational interviewing on pre-diabetes. It provided two online training sessions regarding diabetes and depression and diabetes and smoking. In FY2011, the DOH is mostly focusing on online trainings but may be able to do one live training. These trainings may reach 700 professionals. Other reductions are listed on page 10 of the handout.

The DOH recommends continuing collaboration with TUPAC and other programs at the DOH and other agencies and community-based organizations. Utah, Arizona, Colorado and New Mexico are working together on such programs by increasing the use of technology and using online training and public education. The DOH is hiring a health educator/tribal liaison to work with New Mexico's Native American population and to address the disproportionate number of Native Americans affected by diabetes.

According to Ms. Morris, \$200,000 in TSF were used for the healthy kids/healthy communities program started in fall 2007 in Las Cruces. The program has been running for two and one-half years. It has been identified as one of the country's 10 best obesity prevention programs. It is now found in Chaves County as well as the places listed on page 11 of the DOH handout. The DOH wants to expand this program to McKinley County, to more tribal communities and to border areas, but cuts will not allow this now. In Las Cruces, discussions are underway to allow different populations to use recreational facilities; roads are designated for multiple uses; fruits and vegetables have been promoted in schools; there is a safe routes to school program to facilitate walking.

Questions and comments from the committee included the following:

- Regarding efforts in the Navajo Nation, the initial strategy is to raise awareness regarding diabetes and cardiovascular disease in step with a movement in the Navajo Nation to raise awareness of secondhand smoke dangers. The DOH is working with a number of groups in the Navajo Nation and with other tribes, nations, pueblos and reservations, using the Special Diabetes Project and tribal diabetes programs.
- There was a discussion of an "enormous increase" in the incidence of diabetes and diabetes services in the Navajo Nation. Some of this is attributed to the western diet.

People do not see a correlation with diabetes, smoking, chewing tobacco and even alcohol use. Historical traumas are still having an impact. Motivational interviewing is in-person, and the telemedicine program has reached a lot of Native American providers. The DOH is concerned about the funding of a program that has been very helpful.

- Regarding telehealth, there will be three online trainings on diabetes and depression; diabetes and smoking; and pre-diabetes during FY2011. UNM's successful telemedicine program, Project ECHO, may be used for motivational interviewing. The DOH's budget for online training has not been cut.

**Breast and Cervical Cancer Program Report; Recommendations for Efficiency**  
—Gena Love, Manager, Breast and Cervical Cancer Early Detection Program, DOH  
—Julie Weinberg, Deputy Director, Medical Assistance Division, Human Services  
Department (HSD)

The DOH's breast and cervical cancer (BCC) screening program provides the sole access to the HSD's Medicaid Program for breast and cervical cancer. The Medicaid benefits provided are full Medicaid benefits and are not limited to cancer-related services. Cuts to this DOH program will likely mean that women will not be screened and thus not be eligible for the HSD Medicaid program. The DOH will integrate staff and resources between colorectal and BCC screening programs.

Ms. Weinberg said that program expenses have decreased recently. The HSD is unsure as to why this has occurred, except for the possibility that provider reimbursement reductions have produced this effect. The HSD is considering other cost-containment measures, including provider reimbursement methodologies and tighter pharmacy management.

**Public Comment**

Mr. Horwitz contended that the one-twelfth allotment works well for the DFA but not from an appropriation perspective. One-twelfth installment funding would make planning difficult.

There being no further business, the committee adjourned at 4:00 p.m.