

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

**June 16, 2009
Room 311, State Capitol**

The first meeting of the Tobacco Settlement Revenue Oversight Committee (TSROC) was called to order on June 16, 2009 at 10:00 a.m. in Room 311, State Capitol, by Representative Gail Chasey and Senator Mary Jane M. Garcia, co-chairs.

Present

Rep. Gail Chasey, Co-Chair
Sen. Mary Jane M. Garcia, Co-Chair
Rep. Danice Picraux.
Rep. Gloria C. Vaughn

Absent

Sen. Dede Feldman
Sen. John C. Ryan

Advisory Members

Sen. Rod Adair
Sen. Sue Wilson Beffort
Rep. Ray Begaye
Rep. Karen E. Giannini
Sen. Linda M. Lopez
Sen. Mary Kay Papen

Staff

Sandy Mitchell, Legislative Council Service (LCS)
Michael Hely, LCS
Roxanne Knight, LCS
Brent Earnest, Legislative Finance Committee (LFC) Analyst
Ellie Ortiz, LFC Analyst

Interim Legislative Committee Protocols

Raúl Burciaga, assistant director for drafting services for the LCS, addressed questions and concerns regarding interim committee protocols. He reminded the committee that four voting members constitute a quorum. Without a quorum, a subcommittee may be formed to conduct the hearing without voting. Once established, a quorum is presumed to exist until roll is called or it is challenged by a voting member.

Mr. Burciaga explained the stacking rules and the rules for establishing a subcommittee.

A member may resign at any time; a voting member will be replaced by the New Mexico Legislative Council (LC) as soon as possible. If the member is advisory, the LC may not replace the person immediately.

New Mexico Attorney General (NMAG) Presentation Regarding Tobacco Litigation, the Master Settlement Agreement (MSA) and New Legislation

Claudia Ravanelli, special projects coordinator, and Nan Erdman, assistant attorney general, provided an overview of the MSA and reviewed some of the enforcement and litigation issues involving tobacco settlement revenues. The MSA was reached pursuant to a 1994 lawsuit begun by the Mississippi attorney general. Other states, including New Mexico, joined. The MSA was reached to reimburse states for extra health care costs related to tobacco use. The original settlement involved four large companies as defendants. Since 1998, 48 additional tobacco manufacturers have joined in the settlement. The MSA encompasses 46 states and several territories. From 1999 until 2003, the MSA and manufacturer payments were not challenged. The state receives an annual MSA payment on April 15. PricewaterhouseCoopers compiles sales information and calculates and determines all payments owed under the MSA. Each state's MSA receipts are in accordance with a formula agreed to in the MSA. Through April 2009, New Mexico has received \$413 million in MSA payments.

Many tobacco manufacturers did not take part in the MSA. States have had to pass laws to ensure that manufacturers that signed on to the MSA would not lose market share due to a competitive disadvantage with nonparticipating manufacturers. The MSA requires that states set up an interest-bearing escrow account and that manufacturers comply with an excise stamp regime by making payments to the escrow account. The escrow payments and interest do not accrue to the state automatically. The state must sue to collect from escrow in order to collect for smoking-related health care costs, enforce excise stamp requirements and collect the excise tax.

If New Mexico is not diligent in enforcing stamp requirements against nonparticipating manufacturers and the participating manufacturers can show a loss of over two percent in market share, then participating manufacturers can retrieve some of their MSA money from the state.

A question was raised about the possibility of revenue reductions due to less tobacco use. The NMAG staff said that the participating tobacco manufacturers would be likely to argue that their tobacco revenues are declining and that is due to lack of diligence on the state's part. This could involve a \$370 million potential payback. For reasons such as this, the NMAG requires adequate staff to enforce the MSA and to defend against allegations of lack of diligence.

National arbitration was ordered with respect to the 2003 MSA payment. Now New Mexico is faced with a challenge by participating tobacco manufacturers and must fight alongside other states. Deputy Attorney General David Thomson is on the Arbitration Negotiating Committee. Arbitration is scheduled for 2010; the state must litigate and provide evidence refuting the manufacturers' evidence that New Mexico allowed contraband to be sold in this state and did not diligently enforce its laws.

The NMAG requested \$300,000 for expert witnesses and travel expenses (none for

salaries) in the last session, and the NMAG was allocated nothing. The NMAG staff explained that, given its current budget, the NMAG cannot protect the \$370 million in MSA receipts. Current litigation staff can only devote a small amount of time to tobacco litigation. The NMAG is gravely concerned that without more money for litigation expenses, the state will lose. The NMAG also requests funds so that IT systems may be updated to allow the NMAG to download Taxation and Revenue Department (TRD) forms online. A committee member suggested that the NMAG make the funding requests to the LFC.

The NMAG staff then discussed relevant legislation passed during the last legislative session. Senate Bill 219 makes tremendous changes in civil investigative demand authority — meaning that New Mexico would not be forced to file a lawsuit in order to investigate contraband sales. The bill would allow the NMAG to collect bonds from companies. It would allow the NMAG to collect escrow not only on stamped cigarettes but also on exempt cigarettes. Tobacco manufacturers would be forced to pay into escrow even for sales taking place on property belonging to Indian nations, tribes and pueblos.

The committee asked questions about how the NMAG handles opinion requests, litigation resources and budgetary matters and how it cooperates with Indian tribes, nations and pueblos. In response, the NMAG staff explained that its civil division responds to opinion requests. Some requesters want an opinion on SB 219, but the NMAG cannot respond to this request because the NMAG is litigating two lawsuits on that bill. A committee member raised doubts about the impropriety of speaking about the matters in litigation, arguing with the assumption that the court is concerned with the NMAG's opinions on these matters. As for relations with Indian tribes, nations and pueblos, rapport is excellent and mutual cooperation is increasing, yet there are some challenges because each government has its own protocol regarding enforcement and wishes to meet with the attorney general or governor rather than with legislators. Representative Begaye offered to investigate this matter.

The NMAG informed the committee that there are only seven lawyers on staff in the litigation division, including one who does antitrust full time. The civil division must provide general counsel to agencies that do not have their own. This is why the NMAG is requesting \$500,000 in supplemental funding for application to litigation expenses, none of which will be applied to staff salaries.

Questions were raised about online cigarette sales and the enforceability of age provisions. The NMAG staff answered that this is mostly a federal issue. A federal bill, S. 1147, is moving through Congress. It would shut down tobacco internet sales nationwide. With the recently passed federal Family Tobacco Act, the U.S. Food and Drug Administration has authority to regulate those internet sales as well.

Update on Tobacco-Related Issues Nationwide

Nathan Bush, vice president of government relations, and Traci Cadigan, New Mexico government relations director, both of the American Cancer Society, presented on issues related to tobacco cessation and policy trends.

Mr. Bush related that the "number one myth" about MSA payments is that they will stop. He emphasized that the payments will not stop as long as the MSA is in effect. However, to avoid paying back any payments, states must make smart use of them in accordance with the MSA.

New Mexico is at about 50 percent of the Centers for Disease Control and Prevention (CDC) funding recommendations for tobacco cessation. New Mexico is eleventh-best in tobacco-control funding.

Ms. Cadigan reported that tobacco taxes are one of the most effective vehicles for tobacco cessation because smoking decreases when costs rise. Each pack of cigarettes represents a \$2.78 burden on the state's Medicaid funds. New Mexico has only a \$.91 cigarette tax; the national average is \$1.27 per pack. This places New Mexico at thirty-first in the nation, and the state receives \$63 million in revenue per annum.

Arizona, with a \$2.00 tax, has shown a four percent decrease in tobacco use, attributable to extremely strict ordinances on nonsmoking and to its tax increase of \$1.00 per pack. The federal tax increase adds to the cost. The federal tax increase is now \$.616 on manufacturers and applies to both tribal and nontribal sales.

Funding Levels and Changes in Distributions to Address Budget Solvency Issues

Ms. Mitchell, staff attorney with the LCS, distributed and discussed a spreadsheet showing recommendations for appropriations and actual appropriations of tobacco settlement program funds for fiscal years 2009 and 2010. She also discussed the changes in distributions that were made to address budget solvency issues.

Work Plan

The committee adopted the work plan, which Ms. Mitchell will present to the LC for approval.

Public Comment

A member of the public raised the issue of whether the state sometimes promotes tobacco use through its investments and whether anyone has looked into this. Mr. Bush said that this is difficult to investigate. The American Cancer Society does not have complete data about the government's dealings with tobacco manufacturers.

The committee adjourned at 12:25 p.m.