

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

**June 18, 2014
Room 321, State Capitol**

The first meeting of the Tobacco Settlement Revenue Oversight Committee for the 2014 interim was called to order by Representative Elizabeth "Liz" Thomson, co-chair, on June 18, 2014 at 9:43 a.m. in Room 321 of the State Capitol.

Present

Sen. Cisco McSorley, Co-Chair
Rep. Elizabeth "Liz" Thomson, Co-Chair
Sen. John C. Ryan
Rep. Monica Youngblood

Absent

Rep. Gail Chasey
Sen. John Arthur Smith

Advisory Members

Rep. Kelly K. Fajardo
Sen. Linda M. Lopez
Rep. Jim R. Trujillo

Rep. Paul C. Bandy
Sen. Mary Kay Papen

Staff

Caela Baker, Staff Attorney, Legislative Council Service (LCS)
Amy Chavez-Romero, Assistant Director for Drafting Services, LCS
Randy Taylor, LCS

Guests

The guest list is in the meeting file.

Handouts

Copies of all handouts are in the meeting file.

Wednesday, June 18

Representative Thomson called the meeting to order and welcomed those in attendance. Committee members and staff then introduced themselves.

History of the Master Settlement Agreement in New Mexico

Sandra Adondakis, New Mexico government relations director of the American Cancer Society Cancer Action Network, began by introducing herself and explaining her organization's goal, which is to raise tobacco control funding in New Mexico to levels recommended by the

Centers for Disease Control and Prevention (CDC). Ms. Adondakis explained that the CDC recommends that New Mexico spends \$16 million a year on tobacco control programs. She explained that tobacco control programs save the state money in the long run through reduced health care costs.

Ms. Adondakis emphasized that tobacco use prevention programs are effective and have successfully reduced smoking rates; however, she explained that insufficiently funded programs are less effective. Ms. Adondakis used Florida's "Truth" campaign as an example. The campaign successfully lowered youth tobacco use and spawned a national anti-smoking campaign. Conversely, in Ohio — a state that cut its prevention programs in 2009 — youth and adult smoking rates have risen.

Ms. Adondakis then turned to tobacco use in New Mexico. According to the Behavioral Risk Factor Surveillance System, the adult-use-of-tobacco rate rose from 2009 to 2011 in New Mexico and then fell in 2012. New Mexico's adult-use-of-tobacco rate is about the national average, Ms. Adondakis stated. She further stated that New Mexicans in the highest percentage category of tobacco use have an average household income of less than \$15,000, while those in the second-highest category of tobacco use have average incomes between \$15,000 and \$24,000. Ms. Adondakis stated that the Master Settlement Agreement (MSA) requires that the participating manufacturers release internal documents, including advertising and marketing documents. Those documents reveal that the participating manufacturers specifically target those living in poverty. Ms. Adondakis sees this as evidence that the "easy" quitters have already stopped using tobacco and that preventing tobacco use in lower income brackets will be more difficult as time goes on.

Ms. Adondakis then compared tobacco-related spending in New Mexico with projected revenues. Overall, smoking-related costs in New Mexico total \$954 million — \$461 million in medical costs and \$493 million in lost productivity. Estimated tobacco tax revenue is \$95 million for fiscal year (FY) 2014, and the projected tobacco settlement revenue is \$25.8 million. New Mexico's smoking-related Medicaid costs total \$56.6 million, while the CDC-recommended level of spending for tobacco control is only \$16 million.

Ms. Adondakis next described changes in Medicaid coverage under the federal Patient Protection and Affordable Care Act (ACA). Medicaid now offers comprehensive smoking cessation benefits, including medications for smoking cessation and cessation counseling. There is no prior authorization required to obtain these cessation benefits. The ACA further requires that these benefits be offered at no cost to employees.

Ms. Adondakis concluded this part of her presentation by recommending that New Mexico restore tobacco control program funding in order to realize savings in tobacco-related health costs and that New Mexico return to retaining 50 percent of MSA payments in the Tobacco Settlement Permanent Fund.

Federal Food and Drug Administration Proposed "Deeming" Rules

Ms. Adondakis next provided an overview of the newly proposed federal Food and Drug Administration's (FDA's) "deeming" rules for tobacco products. The FDA's proposed rules would bring non-cigarette tobacco products under its authority, including dissolvable tobacco products, gels, hookah tobacco, electronic cigarettes, cigars and pipe tobacco. Three additional provisions would apply to newly deemed tobacco products: sales to persons under the age of 18 would be prohibited; sales would be prohibited in vending machines in buildings where minors are allowed to enter; and new requirements for warning statements would go into effect. Ms. Adondakis emphasized that although the new deeming rules would subject other tobacco products to some of the same rules as cigarettes, the proposed rules do not regulate the marketing, advertising or flavoring of newly deemed tobacco products. Ms. Adondakis explained that the proposed rules are still in a 75-day public comment period, after which the FDA will review the comments, amend the rules as it sees fit and then gradually phase in the new rules.

Committee members requested public comment on Ms. Adondakis' presentation, but no comments were offered.

Post-Session Update on the Tobacco Settlement Permanent and Program Funds

Peter van Moorsel, chief economist at the Legislative Finance Committee (LFC), briefed the committee on the status of the Tobacco Settlement Permanent Fund (Permanent Fund) and the Tobacco Settlement Program Fund (Program Fund). Mr. van Moorsel explained that the projected revenue estimate was \$39.5 million, all of which was appropriated in the General Appropriation Act of 2013 (GAA): 50 percent to state agencies for tobacco cessation and other programs; 25 percent to the Lottery Tuition Fund; and 25 percent to early childhood care and education programs. However, tobacco settlement revenues were reduced to \$21 million in FY 2014 due to an adverse arbitration decision.

Mr. van Moorsel then reviewed legislative efforts to account for the arbitration settlement against New Mexico. First, the GAA contains language providing that any shortfall of the \$19.3 million appropriated to the Program Fund would be supplemented by more funds from the Permanent Fund. Second, the GAA contains language that transfers the 25 percent appropriation to the Lottery Tuition Fund back to the Permanent Fund, but this provision was vetoed. Finally, in the event of a shortfall, the appropriation to early childhood education would be replaced by funds from the federal Temporary Assistance for Needy Families program.

Mr. van Moorsel explained that there are a number of uncertainties governing future revenue. First, Mr. van Moorsel identified language in Senate Bill 313 from the 2014 session that is ambiguous. Second, Mr. van Moorsel pointed out that investments may be an upside risk in the future; the State Investment Council (SIC) projected a return average of 7.5 percent, but FY 2014 first quarter through third quarter earnings have averaged 14.2 percent. Finally, participating manufacturers under the MSA have challenged New Mexico's enforcement of the

MSA every year since 2003. Given these challenges, it is uncertain whether or when there will be future arbitration rulings and penalties.

Committee members then questioned Mr. van Moorsel and David Abbey, director of the LFC, on the following topics.

- Although the legislature planned to repay the appropriation to the Lottery Tuition Fund from the Permanent Fund, the appropriation of \$5.275 million is still in the Lottery Tuition Fund because the governor vetoed the repayment.
- Any plan to gradually repay the Permanent Fund would require legislative action; however, there are conflicting opinions regarding whether to spend or save the money.
- The general fund operating reserve includes the Permanent Fund, so a potential conflict could occur if the Permanent Fund investments are made by the SIC. The general fund operating reserve is needed to cover budget shortfalls and emergency appropriations, so it may not be wise to invest the Permanent Fund in assets that are not easy to liquidate.
- A committee member questioned whether the estimate of \$56.6 million in smoking-related health care costs sounds plausible. Mr. van Moorsel and Mr. Abbey agreed that the figure is roughly five percent to six percent of the state's Medicaid spending, so the number is plausible.
- Measuring the efficacy of a smoking cessation program would require studying how much the program actually affected usage rates. For the most part, New Mexico appears to track with the national average in adult tobacco usage rates.
- Questions were raised as to whether there have been efforts to track the efficacy of the roughly \$6 million already used for tobacco control programs; whether there is a threshold spending amount that control programs must spend in order to see results; and whether the Indian Affairs Department (IAD) tobacco control program has been effective.
- Committee members discussed the necessity of growing the Permanent Fund and how that might happen. Ideas included transferring money from the general fund; slowly reducing Medicaid spending and reinvesting it in tobacco control programs; and saving further investment earnings.
- Committee members discussed the possibility that the Medicaid expansion under the ACA and the addition of tobacco cessation programs may combine to reduce tobacco-related spending by the state.
- Committee members raised concerns regarding the regressive nature of excise taxes on cigarettes. A committee member was particularly concerned with the prospect of taxing electronic cigarettes, which may discourage their use as a smoking cessation tool. Another committee member responded that research has not indicated that electronic cigarettes are effective as a smoking cessation tool.

The committee again requested public comment, but no comments were offered.

Review of 2014 Legislation

Shawn Mathis, staff attorney, LCS, provided an overview of legislation from the 2014 session that pertained to tobacco products. House Bill 15 would have prohibited the sale of electronic cigarettes to minors. Senate Bill 232 would have prohibited the use and possession of electronic cigarettes by minors and would also have prohibited the sale of electronic cigarettes to minors. Both bills failed to pass in the 2014 legislative session. Ms. Mathis explained that the differences between the bills were in how they defined "electronic cigarette", "tobacco product", and "tobacco-containing product". The committee then questioned Ms. Mathis on the following topics.

- Ms. Mathis did not recommend reintroducing either bill "as is" in light of the FDA's proposed new deeming rules.
- Although the FDA has its own regulations concerning tobacco products, states are free to regulate tobacco products more stringently if they so desire.
- A committee member expressed the opinion that if members are concerned with minors possessing electronic cigarettes, the simple solution is to ban the sale of electronic cigarettes to minors, not to tax electronic cigarettes as a deterrent to their use.
- Questions were raised concerning how to take action in accordance with FDA regulations that are not yet final and are subject to change. Ms. Mathis answered that the LCS would need to carefully study the proposed FDA rules as well as other state statutes in order to draft legislation that accomplishes the committee's goals while also giving leeway for later amendment.
- Ms. Mathis mentioned that "tobacco products" are subject to taxation in New Mexico, but electronic cigarettes are not "tobacco products" for the purpose of taxation.

The committee then paused for public comment. Ms. Adondakis raised the point that statutes often have different definitions for the same word, so it should be possible for multiple definitions of "tobacco products" to exist in statutes.

Review and Adoption of Interim 2014 Work Plan and Meeting Schedule

Ms. Baker presented the proposed work plan and meeting schedule to the committee and then asked for revisions or additions.

Committee members expressed an interest in obtaining testimony from experts concerning different approaches to defining the terms "electronic cigarette" and "tobacco product" and whether nicotine may be derived from non-tobacco plants, which would complicate the definitions. Scott Scanland, lobbyist for New Mexico Government Affairs, directed the committee's attention to the web site www.greensmartliving.com, which is the web site for a company that markets electronic cigarettes with a nicotine component that is not derived from tobacco plants.

The committee expressed an interest in the scope of the Medicaid expansion and the tobacco cessation programs now offered under Medicaid. The committee also requested a presentation on the findings and recommendations of the Tobacco Use and Employer Costs Task Force, as well as a presentation concerning potential application of the Dee Johnson Clean Indoor Air Act to electronic cigarettes. Finally, the committee decided to change one of its meetings from Albuquerque to the Pueblo of Laguna in order to examine the progress of tobacco cessation programs that are funded through the IAD using tobacco settlement revenues. Upon a motion of Representative Youngblood, seconded by Senator McSorley, the committee voted unanimously to adopt the work plan and meeting schedule, as amended.

Adjournment

There being no further business before the committee, the committee adjourned at 12:43 p.m.