

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

**October 30, 2013  
Room 321, State Capitol  
Santa Fe**

The fourth meeting of the Tobacco Settlement Revenue Oversight Committee (TSROC) for the 2013 interim was called to order by Senator Cisco McSorley, co-chair, on Wednesday, October 30, 2013, at 10:10 a.m. in Room 321 of the State Capitol in Santa Fe.

**Present**

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

**Absent**

Sen. John Arthur Smith

**Advisory Members**

Rep. Paul C. Bandy  
Rep. Kelly K. Fajardo  
Rep. Jim R. Trujillo

Sen. Linda M. Lopez  
Sen. Mary Kay Papen  
Sen. Lisa A. Torracco

**Staff**

Shawn Mathis, Legislative Council Service (LCS)  
Jennifer Dana, LCS  
Branden Ibarra, LCS

**Guests**

The guest list is in the meeting file.

**Handouts**

Copies of all handouts are in the meeting file.

**Wednesday, October 30**

**Call to Order**

Senator McSorley called the meeting to order and welcomed the committee members, staff, presenters and audience members to the meeting. Upon his request, committee members and staff then introduced themselves.

## **Approval of Minutes of August 28, 2013 Meeting**

A motion was made and seconded, and the minutes from the August 28, 2013 meeting were unanimously approved.

### **Indian Affairs Department**

Arthur P. Allison, secretary of Indian affairs, Duane Duffy, deputy secretary of Indian affairs, and Allie Moore, tobacco program coordinator, Indian Affairs Department (IAD), presented to the committee a performance report on the 2012-2013 tobacco cessation and prevention program operated under the IAD. Secretary Allison shared the program vision and goals with the committee. Ms. Moore then provided an overview of the funding focus of the program, including the grant application and award process. Ms. Moore told the committee that the IAD received 12 grant proposals totaling \$492,687 and awarded a total of six grants, amounting to \$253,257, to tribal and community-based organizations for the purpose of delivering tobacco cessation and prevention services to Native Americans in New Mexico. Funds were distributed accordingly across all programs: prevention (56%); cessation (35%); administration (8%); and policy (1%). The funded programs for the 2012-2013 year were:

- Albuquerque Indian Center, \$60,000;
- Pueblo of San Ildefonso, \$55,000;
- People Living Through Cancer, \$49,000;
- Pueblo of Laguna, \$40,000;
- Pueblo of Pojoaque, \$30,000; and
- Keres Consulting, Inc., \$19,257.

Ms. Moore shared notable achievements of the funded programs for the 2012-2013 year, which included achievements in the areas of cessation, policy and advocacy, tobacco prevention, collaboration and capacity building. Additionally, IAD programs directly affected 31% of New Mexico Indian nations, tribes and pueblos; placed 100% focus on cultural preservation; placed 100% emphasis on reaching disparate populations; and directly served more than 3,000 individuals.

Ms. Moore told the committee that the IAD has identified areas for improvement regarding the grant award process; Department of Finance and Administration expense limitations; and the request for payment process for grantees. To address these issues, Ms. Moore said that the IAD will:

- collaborate with the Department of Health's (DOH) New Mexico Tobacco Use Prevention and Control program;
- train grantees on the latest Centers for Disease Control and Prevention (CDC) best practices in tobacco control;
- identify funding that can fulfill the needs of all grant applicants; and
- watch closely the federal Food and Drug Administration's (FDA) and other states' decisions regarding electronic cigarettes (e-cigarettes) and vaporizers.

Members of the committee asked questions about and discussed:

- traditional versus cultural tobacco use in Indian nations, tribes and pueblos;
- conversations taking place to ban smoking in casinos;
- the lack of CDC best practices in tobacco control for Native American communities;
- actual funding needs for IAD tobacco cessation and prevention programs;
- the IAD tobacco cessation and prevention program 2013-2014 budget request; and
- improving the contract award process.

The committee requested that Ms. Moore write a letter to the committee containing the names of the 2012-2013 contract awardees; the rates of tobacco use among the New Mexico Native American population relative to the United States population, the United States Native American population and the New Mexico population; a breakdown of the cost to treat clients in the IAD tobacco cessation and prevention program; and a list of the Indian nations, tribes and pueblos in New Mexico that have permanent tobacco prevention and cessation programs.

The committee also requested that LCS staff research and draft legislation to ban e-cigarette sales to youth. The draft legislation will then be considered at the next meeting.

### **Electronic Cigarettes**

Ari Biernoff, assistant attorney general of the Litigation Division in the Office of the Attorney General (OAG), provided information about e-cigarettes. Mr. Biernoff explained that e-cigarettes are electronic inhalers meant to simulate tobacco smoking. They are operated by a small battery and use a heating element that vaporizes a liquid or gel solution. Some e-cigarette liquids and gels contain and release nicotine; others release flavor. Mr. Biernoff told the committee that the benefits and risks of smoking e-cigarettes are still unclear, and laws that regulate the sale and use of e-cigarettes vary widely.

Mr. Biernoff told the committee that while most states are waiting for FDA guidance before imposing e-cigarette regulations, there have been some regulatory responses to e-cigarettes as follows:

- 20 states have restrictions on youth access to e-cigarettes and vaporizers;
- two states regulate e-cigarettes as "other tobacco products"; and
- one state imposes excise taxes on the purchase of e-cigarettes.

Mr. Biernoff urged that the legislature consider both what is known and unknown about e-cigarettes and the e-cigarette market when considering related legislation. It is known that:

- the market for e-cigarettes and vaporizers is growing, netting approximately \$300 million in 2011, \$2 billion in 2013 and an estimated \$3 billion to \$5 billion in the future;
- a growing number of tobacco companies are investing in the e-cigarette market;
- three e-cigarette companies control approximately 85% of the e-cigarette market; and

- a CDC study shows that one in 10 students in the United States has tried e-cigarettes.

Unknown information includes:

- the sale and usage rates of e-cigarettes and vaporizers in New Mexico;
- the contents of e-cigarette liquid and gel solutions; and
- the long-term risks and consequences of using e-cigarettes.

Members of the committee asked questions about and discussed:

- the reasons for using e-cigarettes and vaporizers;
- the cost to purchase e-cigarettes and "cartridges";
- the addictive nature of e-cigarettes;
- the use of e-cigarette and vaporizer devices to partake of illicit substances;
- data collection on the manufacture and sale of e-cigarettes;
- internet sales of e-cigarettes;
- methods to regulate and/or restrict access to e-cigarettes; and
- taxation of e-cigarettes.

### **Master Settlement Agreement Arbitration Decision**

Mr. Biernoff explained the decision by the Master Settlement Agreement (MSA) arbitration panel and outlined the implications of the decision for New Mexico. Mr. Biernoff told the committee that the arbitration panel found that, in 2003, New Mexico was not diligent in its enforcement of the "Qualifying Statute" to "level the playing field" by imposing payment obligations upon nonparticipating manufacturers (NPMs) similar to those of participating manufacturers pursuant to the MSA, thereby neutralizing the "MSA-related cost disadvantage imposed on" participating manufacturers. Mr. Biernoff explained that the arbitration panel considered a number of factors in reaching its determination on diligent enforcement, including: excise tax collection rate; lawsuits filed against noncompliant NPMs; documentation kept by the state to demonstrate diligence; resources allocated to enforcement; preventing noncompliant NPMs from future sales; legislation enacted; actions of short legislation; efforts to keep abreast of the National Association of Attorneys General; and enforcement efforts of other states.

Mr. Biernoff explained that, as a result of the decision, New Mexico will see a reduction in its annual payment of approximately \$39 million. He told the committee that there are few avenues to challenge the arbitration decision, but the OAG has filed a proceeding to challenge the way the amount of the penalty is calculated and is seeking to reduce the penalty. If the OAG is successful in challenging the amount of the penalty, Mr. Biernoff estimates that the April 2014 payment from the participating manufacturers would be reduced by approximately \$12 million. If the OAG is unsuccessful, Mr. Biernoff estimates that the amount of the annual payment will be reduced by approximately \$24 million.

Mr. Biernoff emphasized that the arbitration decision was only applied to the year 2003. The participating manufacturers have formulated challenges to every year after 2003 and have them on file. These challenges will most likely be arbitrated each year. Mr. Biernoff stated that the 2003 arbitration decision is not binding or precedential on subsequent arbitrations of challenges for later years, so it is possible that different decisions might be reached every year. Additionally, Mr. Biernoff told the committee that New Mexico's system of enforcement of the qualifying statute did not substantially change for several years after 2003. Accordingly, the tobacco settlement payment could be reduced for a number of years in the event of future adverse arbitration decisions.

Members of the committee asked questions about and discussed:

- the motion filed in state court to modify the arbitration award;
- the possibility of joining the settlement with participating manufacturers;
- New Mexico's 2003 compliance rate;
- lawsuits filed against noncompliant NPMs; and
- the roles and respective responsibilities of the OAG, the Taxation and Revenue Department and the legislature in securing positive future arbitration decisions.

#### **Legislative Finance Committee (LFC) Appropriations Considerations**

David Abbey, director of the LFC, taking into consideration the recent MSA arbitration decision and possible future adverse decisions against New Mexico, shared appropriation concerns on behalf of the LFC. Mr. Abbey urged the committee to consider the following:

- the DFA's interpretation of the language in Senate Bill 113 (2013) is that the transfer to the Lottery Tuition Fund will occur after the spring 2014 distribution is received;
- additional appropriations beyond the standard funded programs (the DOH, the IAD, the Human Services Department and the University of New Mexico) are probably not warranted, given the uncertainty over distributions; and
- given the uncertainty about distributions, the legislature may want to reconsider continuing a 50% distribution of settlement revenue to the Tobacco Settlement Permanent Fund (TSPF).

Members of the committee asked questions about and discussed:

- the settlement with participating manufacturers to ensure a steady income stream of MSA payments;
- the reintroduction of House Bill 412 from the 2013 legislative session; and
- growing the corpus of the TSPF to allow for future distributions at current levels without disruption.

## **TSPF Asset Allocation**

Steven Moise, state investment officer for the State Investment Council (SIC), and Vince Smith, deputy state investment officer with the SIC, shared the current TSPF investment asset allocation and presented an alternative asset allocation plan for the committee's consideration. Mr. Moise told the committee that the TSPF has assets totaling \$178.6 million. In June 2013, \$39.3 million was distributed, pursuant to Senate Bill 113, to tobacco education and health programs (50%), the Lottery Tuition Fund (25%) and early childhood education programs (25%).

Mr. Moise reported the current fund investment asset allocation: equities (67%); core bonds (23%); and absolute return (10%). Mr. Moise proposed a new asset allocation plan for the committee's consideration. Under the new asset allocation plan, funds would be invested accordingly: equities (55%); core bonds (15%); absolute return (10%); private equity (10%); and real estate (10%). Mr. Moise told the committee that the proposed investment plan: would yield an increased 0.68% expected return on investment (ROI); has a lower liquidity metric; and has 2% decreased probability of a one-year negative ROI. Assuming zero net contributions to the permanent fund and fiftieth percentile returns, Mr. Moise told the committee that 20-year projections predict that changing to the proposed asset allocation plan could result in a net value of \$394.5 million for the TSPF, versus a value of \$340.6 million if the asset allocation remains the same.

Mr. Moise told the committee that the SIC has several concerns regarding the proposed asset allocation plan:

- the proposed asset allocation plan gives up some liquidity in exchange for improved diversification and performance;
- should the TSPF be called on as a reserve fund by the legislature, there would be a larger financial impact on the fund; and
- the SIC is reluctant to implement the proposed asset allocation plan without reassurance that the TSPF corpus will not be utilized to address any shortfalls caused by the recent MSA arbitration decision.

Members of the committee asked questions about and discussed:

- a time line for approving the proposed asset allocation plan;
- protecting the TSPF from improper use; and
- the possibility of constitutionally protecting the TSPF.

## **Public Comment**

Lacey Daniell, American Cancer Society Cancer Action Network, spoke to the committee on behalf of her family and community. Ms. Daniell told the committee that her brother passed away at the age of 32 of tobacco-induced cancer, leaving behind his wife and children. She stated that tobacco is the leading cause of preventable cancer and requested that the committee

sustain funding to tobacco prevention and cessation programs to reduce the costs of smoking-related illnesses to New Mexicans and the state.

Maria Otero, Nuestra Luz, stated that Nuestra Luz works for tobacco prevention, cessation and control statewide. Ms. Otero told the committee that more funds spent on tobacco prevention and cessation will result in a greater impact in New Mexico communities. She urged the committee to continue funding tobacco prevention and cessation programs.

### **Adjournment**

There being no further business before the committee, the fourth meeting of the TSROC for the 2013 interim adjourned at 3:00 p.m.