

**COLORADO GENERAL ASSEMBLY
JOINT BUDGET COMMITTEE**



**FY 2016-17 STAFF BUDGET BRIEFING
TOBACCO MASTER SETTLEMENT AGREEMENT**

**JBC Working Document - Subject to Change
Staff Recommendation Does Not Represent Committee Decision**

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TOBACCO MASTER SETTLEMENT AGREEMENT

Overview

The Tobacco Master Settlement Agreement (MSA) provides Colorado with an annual revenue stream which is directed via a statutory formula to a wide variety of programs. The revenue is the result of a 1998 legal settlement between tobacco manufacturers and the states who sued tobacco manufacturers to recover the Medicaid and other health-related costs incurred by the states as a result of treating smoking related illnesses. MSA revenue is comprised of the following:

- *Base Settlement Agreement Payment (Base Payment):* The base payment represents the participating manufactures core settlement agreement payment. The MSA indicates the base payments continue in perpetuity, and are adjusted annually based on tobacco sales and inflationary factors.
- *Strategic Contribution Payment:* The Strategic Contribution Payment is allocated among states based on their level of participation in the original Tobacco lawsuit. These payments are for a ten year period only (April 2007 through April 2016).
- *Disputed Payments:* Pursuant to the Non-Manufacturers Dispute, Participating Manufacturers have been withholding a portion of their annual payments because the Participating Manufacturers saw a market share lost to Non-Participating Manufacturers.

Current there are over sixty manufacturers who have agreed to be bound to the terms of the MSA. Manufacturers who signed the MSA after the original three are called Subsequent Participating Manufacturers. Manufacturers who have not signed the MSA are called Non-Participating Manufacturers.

Each Participating Manufacture makes a single annual payment based on that manufacturers' nationwide annual cigarette sales volume. Payments are calculated by an independent auditor and are due on April 15 of the following year. Payments are adjusted by an inflation adjustments and sales volume. The following table summarizes the total payments by Participating Manufacturers since 2003, as well as and the total non-participating manufacturer (NPM) adjustments (i.e. disputed payments withheld by Participating Manufacturers).

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National Tobacco MSA Payments and NPM Adjustments¹				
Sales Year	Payment Year	Total Payment Without NPM	Total NPM Adjustment	NPM adjustments as % Total
2003	2004	\$6,436,152,916	\$1,147,566,065	17.83%
2004	2005	6,480,888,462	1,137,395,925	17.55%
2005	2006	6,567,965,458	753,345,638	11.47%
2006	2007	6,740,562,252	700,344,418	10.39%
2007	2008	7,554,018,770	749,358,662	9.92%
2008	2009	7,580,287,756	888,409,725	11.72%
2009	2010	7,070,579,984	859,075,468	12.15%
2010	2011	6,952,130,518	872,492,380	12.55%
2011	2012	6,924,102,864	727,723,211	10.51%
2012	2013	6,976,510,238	791,136,261	11.34%
2013	2014	6,827,625,201	815,218,449	11.94%
2014	2015	6,819,505,780	825,842,150	12.11%
Total		\$82,930,330,199	\$10,267,908,352	

General Factors Driving the Budget

Annual MSA Payments

The table below reflects the amount of MSA revenue Colorado has received in recent years.

Colorado Tobacco Master Settlement Agreement Payments					
Sales Year	Payment Year	Appropriation Year	MSA Revenue Received by Colorado	Disputed Payment²	Released Disputed Payments
2007	2008	FY 2008-09	\$103,640,385	(\$11,413,328)	
2008	2009	FY 2009-10	105,419,647	(13,995,449)	\$7,411,531
2009	2010	FY 2010-11	94,587,045	(13,081,760)	
2010	2011	FY 2011-12	89,065,763	(12,781,879)	
2011	2012	FY 2012-13	90,809,964	(10,665,021)	
2012	2013	FY 2013-14	90,769,997	(11,609,878)	
2013	2014	FY 2014-15	89,037,054	(12,072,478)	\$11,367,403
2014	2015	FY 2015-16	88,079,225	(11,977,943)	

¹ Information from National Association of Attorneys General, June 10, 2015 "Tobacco Product Manufacturers Market Shares and Potential NPM Adjustment Amounts."

² The 2015 Disputed Payments is an estimate.

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Annual payments are received by the State in April of each year. The Long Bill appropriations of MSA revenue are based on an estimate prepared by Legislative Council. Annual payments are driven by the following three factors:

- The number of units sold³ nationwide is used to calculate each Participating Manufacturers MSA payment.
- The amount of disputed payments withheld by Participating Manufacturers. To the extent the State is successful in arbitration proceedings for calendars years 2004 and beyond, as it was for the 2003 arbitration, Colorado should ultimately receive funds withheld from the base payment by the participating manufactures. MSA funds received through successful arbitrations are one-time.
- The inflation adjustment, calculated by multiplying the base payment by the inflation adjustment, is equal to the greatest of 3.0 percent or the Consumer Price Index percentage change (therefore if the CPI percentage is lower than 3.0 percent, the inflation adjustment for that year is 3.0 percent). The 2015 MSA payment included an inflation adjustment equal to 63.8 percent of the base payment.

Future MSA Revenue Factors

The Strategic Contribution Fund payments (payments that are allocated to states based on their level of participation in the original Tobacco lawsuit) will not be received after the April 2016 MSA revenue distribution. Therefore the MSA funds available for appropriation in FY 2017-18 will be \$15.0 to \$17.0 million lower than the amount available in FY 2016-17.

Accelerated Payments

Prior to FY 2007-08, the Long Bill appropriation of MSA revenue was based on MSA revenue received in the prior year (i.e. the appropriation was based on funds already received by the state.) In response to the economic downturn, the General Assembly, starting in FY 2008-09, changed statute to rely on current year Strategic Contribution Fund payments to support current year allocations, allowing for a one-time redirect of \$15.4 million to other purposes without reducing support for MSA-funded programs. Starting in FY 2010-11, the General Assembly expanded the use of current year revenue to support MSA funded programs, requiring MSA-funded programs to operate for most of the fiscal year before the majority of MSA was received in April.⁴ The FY 2010-11 changes allowed for access to \$65.0 million in one-time funding without reducing support for MSA programs. .

House Bill 12-1247 began to gradually reduce the use of such advances from the Treasury by reducing the use of current year revenue and increasing the use of prior year revenue for tobacco MSA allocations. This act requires spending from current year revenue to be reduced each year

³ Pursuant to Section 39-28-202 (10), C.R.S., "units sold" means the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, during the year in question, as measured by excise taxes collected by the state on containers of roll-your-own tobacco, and on packs of cigarettes bearing the excise tax stamp of the state.

⁴ This is accomplished through advances from the Treasury which were then repaid in April.

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by any unallocated MSA funds and other residual funds in the Tobacco Litigation Settlement Cash Fund (approximately \$1.4 million per year total, but varies by year). Statute was also amended in 2014 to require disputed payments be used to reduce the amount of spending from current year revenue. A total of \$11.4 million received in April 2014 was used for this purpose.

Distribution of MSA Revenue

Section 24-75-1104.5, C.R.S., divides Master Settlement funded programs into two tiers. Settlement moneys are first allocated among the tier 1 programs, which will use approximately two-thirds of the total. The remainder is allocated among the tier 2 programs. The tables in Appendix B list the tier 1 and tier 2 settlement programs and provide an overview of each program's statutory funding rule.

Issue: Master Settlement RFI Responses

Included in the FY 2015-16 request for information was a multi-department request about programs funding with Master Settlement Agreement (MSA) funds. Departments were asked to include recommendations about the amount of MSA funds the program should receive in FY 2016-17. Of the six responses received, three may be of particular interest to the Committee.

SUMMARY:

- Senate Bill 15-189 (Repeal Consolidated Tobacco Program Reporting Requirement) repealed the statutory requirement that the Department of Public Health and Environment submit a statewide report on all programs funded with MSA funds, including recommendations on future MSA funding levels.
- The statewide report repealed by S.B. 15-189 was replaced by a request for information sent to each department with an MSA-funded program.
- Seven departments were sent the request for information; staff received responses from six of them. Responses from three of the Departments are discussed in detail in this issue.

DISCUSSION:

The request for information sent to the seven departments with programs funded with Master Settlement moneys asked the following:

Each Department is requested to provide the following information to the Joint Budget Committee by November 1, 2015, for each program funded with Tobacco Master Settlement moneys:

- The name of the program;
- The amount of Tobacco Settlement moneys received for the program for the preceding fiscal year;
- A description of the program including the actual number of persons served and the services provided through the program;
- Information evaluating the operation of the program, including the effectiveness of the program in achieving its stated goals; and
- A recommendation regarding the amount of Tobacco Master Settlement funds the program requires for FY 2016-17 and why.

Staff received responses from all departments except the Department of Military and Veterans Affairs. Below is a summary and recommended hearing questions for three departments (the Department of Health Care Policy and Financing has two programs).

Department of Health Care Policy and Financing

Program #1 - Children's Basic Health Plan

The Children's Basic Health Plan Trust Fund (Trust Fund) will receive 25.0 percent Tier 1 and 14.5 percent Tier 2 distribution in FY 2016-17. The Trust Fund's Tier 1 distribution was reduced by 2.0 percent to ensure sufficient funding for the Tobacco Defense Account.⁵ The reduction of Tier 1 moneys was possible because the Department of Health Care Policy and Financing projected the Trust Fund would not require all the MSA moneys because of changes to the federal match rate for the Children's Basic Health Plan. The Affordable Care Act added 23.0 percentage points to the match rate for the Children's Basic Health Plan from October 1, 2015 through September 30, 2019. The Trust Fund is projected to have expenditure equal to \$15.1 million compares to revenues of \$29.0 million, of which \$27.5 million is Tobacco Master Settlement dollars in FY 2016-17.

The Department's RFI response cites an enrollment increase of 1,000 clients due to the implementation of H.B. 09-1353, which removed the five year bar on legal immigrants being eligible for the Children's Basic Health Plan as one way the program will use the MSA moneys. Even with the addition of 1,000 clients (the current caseload is 54,386), it is not clear the Children's Basic Health Plan requires all the MSA revenues they are receiving (\$27.5 million). The Department's response indicates a continued need for the \$27.5 million in MSA revenues. **Staff recommends the Committee discuss with the Department during their hearing if there really is a continued need for \$27.5 million MSA revenues and why.**

Program #2 - Home- and Community-Based Services for Children with Autism

The Autism Treatment Fund receives \$1.0 million of MSA revenues for services provided through the Home- and Community-Based Services for Children with Autism (Autism Waiver). The Centers for Medicare and Medicaid Services (CMS) denied the Department's expansion to the Autism Waiver pursuant to H.B. 15-1186, and instead directed the state to provide the services through the Early, Periodic, Screening, Diagnosis and Treatment for kids. Based on the Department's request to comply with CMS, it will cost the Autism Treatment Fund approximately \$3.7 in FY 2015-16, \$2.7 in FY 2016-17, and \$1.1 in FY 2017-18. This additional funding would deplete the Autism Treatment Fund by FY 2017-18, and the ongoing costs of at least \$1.1 million would exceed the \$1.0 million of annual MSA revenue. **Staff recommends the Committee discuss with the Department at their hearing the feasibility of adjusting MSA revenue to the Children's Basic Health Plan and the Colorado Autism Treatment Fund.**

Department of Human Services

Program - Colorado Nurse Home Visitor Program

The Nurse Home Visitor Program provides grants to public or private organizations in Colorado to provide health education and counseling services by specially trained nurse home visitors to first-time, low-income women, beginning in pregnancy through the child's second birthday.⁶ The Nurse Home Visitor Program received \$15,688,792 MSA funds in FY 2014-15 but only expended \$14,494,356. The Department's response indicated an 18.0 percent turnover rate in

⁵ This Fund funds the state's cost of enforcing the MSA terms and defending Colorado in the arbitration processes

⁶ <http://www.coloradoofficeofearlychildhood.com/#!nurse-home-visitor-program/c1hey>

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nurses who provide the services as one explanation for not expending the full amount of MSA funds. Additionally, the response stated there are not enough graduating nurses to meet demand. The Department is working with the University of Colorado to create a specialized training and development curriculum for recent nursing graduates. The Department is also exploring the creation of a specialized nursing management program in which to enroll all supervisors in the Nurse Home Visitor Program. It is unclear how the creation of additional training for nursing graduates will increase the number of nursing graduates who could work for the Nurse Home Visitor Program. **Staff recommends the Committee discuss with the Department of Human Services during the hearing for the Office of Children Youth and Families the feasibility of the Nurse Home Visitor Program expending all the MSA funds in in FY 2015-16 and FY 2016-17, and what specific steps the Department is pursuing to reduce the nurse turnover rate.**

Department of Personnel

Program - Supplemental State Contribution Program

The Supplemental State Contribution Program is designed to provide access to affordable and adequate health insurance offered by the state to as many children of lower-income state employees as possible, and to encourage lower-income employees with dependent children to enroll in health insurance plans by supplementing the plan premiums. A state employee must apply and meet eligibility requirements for the supplement based on criteria established by Section 24-50-603(5), C.R.S. An employee is eligible if they are enroll in a group benefit plan, have an annual household income of less than 300.0 percent of the Federal Poverty Level, and has at least one dependent other than a legal spouse.

The Department must use available funds in the following order:

- First (Level 1) to provide each eligible state employee who has an annual household income of less than 200.0 percent FPL (Level 1) with a supplement in the amount needed to reduce the employee contribution to all qualifying group benefit plans to zero.
- Second (Level 2) to provide a supplement to an eligible state employee who has an annual income of 200.0 to 249.0 percent of the FPL (Level 2); and
- Third (Level 3) to provide a supplement for an eligible state employee who has an annual income of 250.0 to 299.0 percent of the FPL (Level 3).

Of the 813 applications received for FY 2014-15:

- 150 were denied because the employee did not meet eligibility criteria
- 423 were approved for Level 1; and
- 240 were denied for Levels 2 and 3 because of insufficient funding.

The following table reflects the participation level in the supplemental state health and dental contribution program for FY 2014-15:

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Number of eligible state employees receiving the supplemental contribution	Total amount of supplements paid	Average monthly amount of the individual supplements provided	Average yearly amount of the individual supplements provided	Number of dependent children of eligible state employees	Amount of increased non-supplemental state contributions
410	\$1,355,270	\$275.46	\$3,306	1,046	\$43,644

The response included the following Department recommendation: "The Department recommends that funding for FY 2016-17 be increased by approximately \$665,000 in order to achieve a level of funding sufficient to provide a supplement or partial supplement to all levels of applicants. The Department has been unable to provide supplements to all three levels of applicants since the original year of the program in FY 2008-09." During figure setting for MSA revenues, staff will make a recommendation on this issue.

Appendix A - Recent Legislation

2014 Session Bills

S.B. 14-104 (Tobacco Settlement Disputed Payments): Requires that disputed tobacco litigation settlement moneys received be credited to the Tobacco Litigation Settlement Cash Fund and be used to reduce the annual amount of accelerated payments from the Fund. Previously, disputed tobacco litigation settlement moneys were credited to the General Fund. A total of \$11,367,403 in disputed payments was received in April 2014 and was subject to this change.

H.B. 14-1394 (Allocation of Tobacco Settlement Disputed Payments): Makes technical corrections to the statutory changes in S.B. 14-104.

2014 Session Bills

S.B. 15-188 (Tier 1 Tobacco Settlement Money Allocation): Makes a new annual statutory allocation of 2.0 percent of tobacco litigation settlement money to the Tobacco Settlement Defense Account (Account) of the Litigation Settlement Cash Fund and an offsetting 2.0 percent reduction in the annual statutory allocation of such money to the Children's Basic Health Plan Trust. Authorizes the Department of Revenue to also use money in the Account to help administer, coordinate, and support the activities of the Departments of Revenue and Law, including the investigation of and response to settlement agreement manufacture and distribution reporting irregularities identified by the Department of Law. Appropriates \$69,453 cash funds and 1.0 FTE to the Department of Revenue for FY 2015-16.

S.B. 15-189 (Repeal Consolidated Tobacco Program Reporting Requirements): Repeals requirements that the State Board of Health and the Department of Public Health and Environment annually report on the operation and effectiveness of tobacco settlement programs. Reduces the Department's FY 2015-16 appropriation by \$25,000 reappropriated funds from various MSA-supported programs.

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Appendix B -
Distribution of Master Settlement Agreement Revenue

Tier 1 Programs	
Recipient	Portion of the Total Amount Distributed
Children's Basic Health Plan	27.0% in FY 2015-16, 25.0% in FY 2016-17, not to exceed \$33.0 million and not less than \$17.5 million
Nurse Home Visitor (NHV) Program and the General Fund (GF)	19.0% less \$1.0 million in FY 2015-16, and 19.0% in FY 2016-17 and thereafter, not to exceed \$19.0 million in any year
Fitzsimons lease purchase	8.0%, not to exceed the lesser of \$8.0 million or the actual lease purchase payment
Early Literacy Program (H.B. 12-1238)	5.0%, not to exceed \$8.0 million
Tony Gramsas Youth Services Program	4.0%, not to exceed \$5.0 million
HIV/AIDS Drug Assistance Program	3.5%, not to exceed \$5.0 million
HIV and AIDS Prevention Grant Program	2.0%, not to exceed \$2.0 million
Tobacco Defense Account	Starting in FY 2016-17 - 2.0%
State Veterans Trust Fund	1.0%, not to exceed \$1.0 million (10.0% of the state veterans allocation is retained in the State Veterans Trust Fund and the remaining 90.0%, plus interest earned by the trust, is expended)
Litigation Settlement Defense Account	\$1,000,000 (fixed) in FY 2013-14, FY 2014-15, and FY 2015-16
Autism Treatment Fund	\$1,000,000 annually (fixed)
Child Mental Health Treatment Act	\$300,000 annually (fixed)
Dental Loan Repayment Program	\$200,000 annually (fixed)

Tier 2 Programs	
Recipient	Portion of the Residual Distributed after Tier 1 Program Allocations
University of Colorado Health Sciences Center	49.0%
Children's Basic Health Plan	14.5%
Mental health services for juvenile and adult offenders	12.0%
Local public health services	7.0%
Supplemental state contribution for state employee group benefit plans	4.5%
Colorado Immunization Program	4.0%
Alcohol and drug abuse and treatment programs	3.0%
Health Services Corps (Health Care Professional Loan Forgiveness Program)	\$250,000 (fixed)
State Auditor's Office	\$89,000 (fixed)
Retained in Tobacco Litigation Settlement Cash Fund	6.0% less fixed Tier 2 allocations
Total	100.0%