

1 **TOBACCO MANUFACTURERS SETTLEMENT**
2 **AND RESPONSIBILITY ACT**

3 1999 GENERAL SESSION

4 STATE OF UTAH

5 **Sponsor: Patrice M. Arent**

6 Greg J. Curtis

7 AN ACT RELATING TO HEALTH; ENACTING THE MODEL TOBACCO SETTLEMENT
8 STATUTE; SEPARATELY INCORPORATING PROVISIONS OF THE MASTER
9 SETTLEMENT AGREEMENT THAT ARE REFERENCED IN THE MODEL TOBACCO
10 SETTLEMENT STATUTE; REQUIRING THE DEPARTMENT OF HEALTH TO MAKE
11 COPIES OF THE MASTER SETTLEMENT AGREEMENT AVAILABLE AND ALLOWING
12 THE DEPARTMENT TO CHARGE A FEE; REQUIRING THE REPORTING OF
13 MANUFACTURER DATA; PROVIDING FOR THE AVAILABILITY OF DATA TO
14 MANUFACTURERS; AND PROVIDING AN EFFECTIVE DATE.

15 This act affects sections of Utah Code Annotated 1953 as follows:

16 AMENDS:

17 **59-1-403**, as last amended by Chapter 95, Laws of Utah 1998

18 **59-14-401**, as last amended by Chapter 1, Laws of Utah 1993, Second Special Session

19 **63-2-206**, as last amended by Chapter 234, Laws of Utah 1997

20 ENACTS:

21 **26-44-101**, Utah Code Annotated 1953

22 **26-44-201**, Utah Code Annotated 1953

23 **26-44-202**, Utah Code Annotated 1953

24 **26-44-203**, Utah Code Annotated 1953

25 **26-44-301**, Utah Code Annotated 1953

26 **26-44-302**, Utah Code Annotated 1953

27 **26-44-303**, Utah Code Annotated 1953

- 28 **26-44-304**, Utah Code Annotated 1953
- 29 **26-44-305**, Utah Code Annotated 1953
- 30 **26-44-306**, Utah Code Annotated 1953
- 31 **26-44-307**, Utah Code Annotated 1953
- 32 **26-44-308**, Utah Code Annotated 1953
- 33 **26-44-401**, Utah Code Annotated 1953
- 34 **26-44-402**, Utah Code Annotated 1953
- 35 **59-14-407**, Utah Code Annotated 1953

36 *Be it enacted by the Legislature of the state of Utah:*

37 Section 1. Section **26-44-101** is enacted to read:

38 **CHAPTER 44. TOBACCO MANUFACTURERS SETTLEMENT AND**
 39 **RESPONSIBILITY ACT**

40 **Part 1. Tobacco Manufacturers Settlement and Responsibility Act**

41 **26-44-101. Title.**

42 The chapter is known as the "Tobacco Manufacturers Settlement and Responsibility Act."

43 Section 2. Section **26-44-201** is enacted to read:

44 **Part 2. Model Tobacco Settlement Statute**

45 **26-44-201. Findings and purpose.**

46 (1) Cigarette smoking presents serious public health concerns to the State and to the
 47 citizens of the State. The Surgeon General has determined that smoking causes lung cancer, heart
 48 disease and other serious diseases, and that there are hundreds of thousands of tobacco-related
 49 deaths in the United States each year. These diseases most often do not appear until many years
 50 after the person in question begins smoking.

51 (2) Cigarette smoking also presents serious financial concerns for the State. Under certain
 52 health-care programs, the State may have a legal obligation to provide medical assistance to
 53 eligible persons for health conditions associated with cigarette smoking, and those persons may
 54 have a legal entitlement to receive such medical assistance.

55 (3) Under these programs, the State pays millions of dollars each year to provide medical
 56 assistance for these persons for health conditions associated with cigarette smoking.

57 (4) It is the policy of the State that financial burdens imposed on the State by cigarette
 58 smoking be borne by tobacco product manufacturers rather than by the State to the extent that such

59 manufacturers either determine to enter into a settlement with the State or are found culpable by
60 the courts.

61 (5) On November 23, 1998, leading United States tobacco product manufacturers entered
62 into a settlement agreement, entitled the "Master Settlement Agreement," with the State. The
63 Master Settlement Agreement obligates these manufacturers, in return for a release of past, present,
64 and certain future claims against them as described therein, to pay substantial sums to the State
65 (tied in part to their volume of sales); to fund a national foundation devoted to the interests of
66 public health; and to make substantial changes in their advertising and marketing practices and
67 corporate culture, with the intention of reducing underage smoking.

68 (6) It would be contrary to the policy of the State if tobacco product manufacturers who
69 determine not to enter into such a settlement could use a resulting cost advantage to derive large,
70 short-term profits in the years before liability may arise without ensuring that the State will have
71 an eventual source of recovery from them if they are proven to have acted culpably. It is thus in
72 the interest of the State to require that such manufacturers establish a reserve fund to guarantee a
73 source of compensation and to prevent such manufacturers from deriving large, short-term profits
74 and then becoming judgment-proof before liability may arise.

75 Section 3. Section **26-44-202** is enacted to read:

76 **26-44-202. Definitions.**

77 As used in this part:

78 (1) "Adjusted for inflation" means increased in accordance with the formula for inflation
79 adjustment set forth in Exhibit C to the Master Settlement Agreement.

80 (2) "Affiliate" means a person who directly or indirectly owns or controls, is owned or
81 controlled by, or is under common ownership or control with, another person. Solely for purposes
82 of this definition, the terms "owns," "is owned" and "ownership" mean ownership of an equity
83 interest, or the equivalent thereof, of 10% or more, and the term "person" means an individual,
84 partnership, committee, association, corporation or any other organization or group of persons.

85 (3) "Allocable share" means Allocable Share as that term is defined in the Master
86 Settlement Agreement.

87 (4) "Cigarette" means any product that contains nicotine, is intended to be burned or heated
88 under ordinary conditions of use, and consists of or contains (a) any roll of tobacco wrapped in
89 paper or in any substance not containing tobacco; or (b) tobacco, in any form, that is functional in

90 the product, which, because of its appearance, the type of tobacco used in the filler, or its
91 packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (c)
92 any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance,
93 the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or
94 purchased by, consumers as a cigarette described in clause (a) of this definition. The term
95 "cigarette" includes "roll-your-own," (i.e., any tobacco which, because of its appearance, type,
96 packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers
97 as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of
98 "roll-your-own" tobacco shall constitute one individual "cigarette."

99 (5) "Master Settlement Agreement" means the settlement agreement (and related
100 documents) entered into on November 23, 1998, by the State and leading United States tobacco
101 product manufacturers.

102 (6) "Qualified escrow fund" means an escrow arrangement with a federally or State
103 chartered financial institution having no affiliation with any tobacco product manufacturer and
104 having assets of at least \$1,000,000,000 where such arrangement requires that such financial
105 institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the
106 tobacco product manufacturer placing the funds into escrow from using, accessing, or directing
107 the use of the funds' principal except as consistent with Section 26-44-203.

108 (7) "Released claims" means Released Claims as that term is defined in the Master
109 Settlement Agreement.

110 (8) "Releasing parties" means Releasing Parties as that term is defined in the Master
111 Settlement Agreement.

112 (9) (a) "Tobacco product manufacturer" means an entity that after the date of enactment
113 of this Act directly (and not exclusively through any affiliate):

114 (i) manufactures cigarettes anywhere that such manufacturer intends to be sold in the
115 United States, including cigarettes intended to be sold in the United States through an importer
116 (except where such importer is an original participating manufacturer (as that term is defined in
117 the Master Settlement Agreement) that will be responsible for the payments under the Master
118 Settlement Agreement with respect to such cigarettes as a result of the provisions of Subsections
119 II(mm) of the Master Settlement Agreement and that pays the taxes specified in Subsection II(z)
120 of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does

121 not market or advertise such cigarettes in the United States);

122 (ii) is the first purchaser anywhere for resale in the United States of cigarettes
123 manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

124 (iii) becomes a successor of an entity described in Subsection (9)(a)(i) or (ii).

125 (b) "Tobacco product manufacturer" shall not include an affiliate of a tobacco product
126 manufacturer unless such affiliate itself falls within any Subsection (9)(a)(i) through (iii).

127 (10) "Units sold" means the number of individual cigarettes sold in the State by the
128 applicable tobacco product manufacturer (whether directly or through a distributor, retailer or
129 similar intermediary or intermediaries) during the year in question, as measured by excise taxes
130 collected by the State on packs (or "roll-your-own" tobacco containers) bearing the excise tax
131 stamp of the State. The State Tax Commission shall promulgate such regulations as are necessary
132 to ascertain the amount of State excise tax paid on the cigarettes of such tobacco product
133 manufacturer for each year.

134 Section 4. Section **26-44-203** is enacted to read:

135 **26-44-203. Requirements.**

136 (1) Any tobacco product manufacturer selling cigarettes to consumers within the State
137 (whether directly or through a distributor, retailer or similar intermediary or intermediaries) after
138 the date of enactment of this Act shall do one of the following:

139 (a) become a participating manufacturer (as that term is defined in Section II(jj) of the
140 Master Settlement Agreement) and generally perform its financial obligations under the Master
141 Settlement Agreement; or

142 (b) place into a qualified escrow fund by April 15 of the year following the year in
143 question the following amounts (as such amounts are adjusted for inflation):

144 (i) 1999: \$.0094241 per unit sold after the date of enactment of this Act;

145 (ii) 2000: \$.0104712 per unit sold;

146 (iii) for each of 2001 and 2002: \$.0136125 per unit sold;

147 (iv) for each of 2003 through 2006: \$.0167539 per unit sold; and

148 (v) for each of 2007 and each year thereafter: \$.0188482 per unit sold.

149 (2) A tobacco product manufacturer that places funds into escrow pursuant to Subsection
150 (1)(b) shall receive the interest or other appreciation on such funds as earned. Such funds
151 themselves shall be released from escrow only under the following circumstances:

152 (a) to pay a judgment or settlement on any released claim brought against such tobacco
153 product manufacturer by the State or any releasing party located or residing in the State. Funds
154 shall be released from escrow under this Subsection (2)(a):

155 (i) in the order in which they were placed into escrow; and

156 (ii) only to the extent and at the time necessary to make payments required under such
157 judgment or settlement;

158 (b) to the extent that a tobacco product manufacturer establishes that the amount it was
159 required to place into escrow in a particular year was greater than the State's allocable share of the
160 total payments that such manufacturer would have been required to make in that year under the
161 Master Settlement Agreement (as determined pursuant to Section IX(i)(2) of the Master Settlement
162 Agreement, and before any of the adjustments or offsets described in Section IX(i)(3) of that
163 Agreement other than the Inflation Adjustment) had it been a participating manufacturer, the
164 excess shall be released from escrow and revert back to such tobacco product manufacturer; or

165 (c) to the extent not released from escrow under Subsection (2)(a) or (b), funds shall be
166 released from escrow and revert back to such tobacco product manufacturer 25 years after the date
167 on which they were placed into escrow.

168 (3) Each tobacco product manufacturer that elects to place funds into escrow pursuant to
169 this Subsection (1)(b) shall annually certify to the executive director that it is in compliance with
170 Subsection (1)(b). The executive director may bring a civil action on behalf of the State against
171 any tobacco product manufacturer that fails to place into escrow the funds required under
172 Subsection (1)(b). Any tobacco product manufacturer that fails in any year to place into escrow
173 the funds required under this Subsection (1)(b) shall:

174 (a) be required within 15 days to place such funds into escrow as shall bring it into
175 compliance with this section. The court, upon a finding of a violation of this Subsection (3)(a),
176 may impose a civil penalty to be paid to the General Fund in an amount not to exceed 5% of the
177 amount improperly withheld from escrow per day of the violation and in a total amount not to
178 exceed 100% of the original amount improperly withheld from escrow;

179 (b) in the case of a knowing violation, be required within 15 days to place such funds into
180 escrow as shall bring it into compliance with Subsection (1)(b). The court, upon a finding of a
181 knowing violation of this Subsection (3)(b), may impose a civil penalty to be paid to the General
182 Fund of the State in an amount not to exceed 15% of the amount improperly withheld from escrow

183 per day of the violation and in a total amount not to exceed 300% of the original amount
184 improperly withheld from escrow; and

185 (c) in the case of a second knowing violation, be prohibited from selling cigarettes to
186 consumers within the State, whether directly or through a distributor, retailer or similar
187 intermediary, for a period not to exceed 2 years.

188 (4) Each failure to make an annual deposit required under Subsection (1)(b) shall
189 constitute a separate violation.

190 (5) A court shall award the State its costs and attorneys fees in any action in which the
191 State establishes that a tobacco product manufacturer has violated Subsection (3).

192 Section 5. Section **26-44-301** is enacted to read:

193 **Part 3. Master Settlement Agreement Provisions**

194 **26-44-301. Construction of this part.**

195 This part incorporates provisions of the Master Settlement Agreement that are referenced
196 in Part 2, Model Tobacco Settlement Statute. This part may not be construed as substantively or
197 otherwise altering Part 2, Model Tobacco Settlement Statute, or the Master Settlement Agreement.

198 Section 6. Section **26-44-302** is enacted to read:

199 **26-44-302. Formula for inflation adjustments.**

200 The formula for calculating inflation adjustments, which is referenced in Subsection
201 26-44-202(1), is set forth in Exhibit C of the Master Settlement Agreement as follows, with the
202 exception of Subsection (7) which is omitted:

203 Exhibit C

204 Formula For Calculating Inflation Adjustment

205 (1) Any amount that, in any given year, is to be adjusted for inflation pursuant to
206 this exhibit, the "base amount," shall be adjusted upward by adding to such base amount
207 the inflation adjustment.

208 (2) The inflation adjustment shall be calculated by multiplying the base amount by
209 the inflation adjustment percentage applicable in that year.

210 (3) The inflation adjustment percentage applicable to payments due in the year
211 2000 shall be equal to the greater of 3% or the CPI%. For example, if the Consumer Price
212 Index for December 1999, as released in January 2000, is 2% higher than the Consumer
213 Price Index for December 1998, as released in January 1999, then the CPI% with respect

214 to a payment due in 2000 would be 2%. The inflation adjustment percentage applicable
215 in the year 2000 would thus be 3%.

216 (4) The inflation adjustment percentage applicable to payments due in any year
217 after 2000 shall be calculated by applying each year the greater of 3% or the CPI% on the
218 inflation adjustment percentage applicable to payments due in the prior year. Continuing
219 the example in Subsection (3) above, if the CPI% with respect to a payment due in 2001
220 is 6%, then the inflation adjustment percentage applicable in 2001 would be 9.1800000%,
221 an additional 6% applied on the 3% inflation adjustment percentage applicable in 2000,
222 and if the CPI% with respect to a payment due in 2002 is 4%, then the inflation adjustment
223 percentage applicable in 2002 would be 13.5472000%, an additional 4% applied on the
224 9.1800000% inflation adjustment percentage applicable in 2001.

225 (5) "Consumer Price Index" means the Consumer Price Index for All Urban
226 Consumers as published by the Bureau of Labor Statistics of the U.S. Department of
227 Labor, or other similar measures agreed to by the settling states and the participating
228 manufacturers.

229 (6) The "CPI%" means the actual total percent change in the Consumer Price Index
230 during the calendar year immediately preceding the year in which the payment in question
231 is due.

232 Section 7. Section **26-44-303** is enacted to read:

233 **26-44-303. Allocable Share.**

234 (1) "Allocable Share," which is referenced in Subsection 26-44-202(3), is defined in the
235 Master Settlement Agreement as follows:

236 "Allocable Share" means the percentage set forth for the state in question as listed in
237 Exhibit A hereto, without regard to any subsequent alteration or modification of such
238 state's percentage share agreed to or by or among any States; or, solely for the purpose of
239 calculating payments under subsection IX(c)(2) (and corresponding payments under
240 subsection IX(i)), the percentage disclosed for the state in question pursuant to subsection
241 IX(c)(2)(A) prior to June 30, 1999, without regard to any subsequent alteration or
242 modification of such state's percentage share agreed to by or among any states.

243 (2) The percentage set forth for Utah in Exhibit A to the Master Settlement Agreement is
244 0.4448869%.

245 (3) The percentage for calculating "Strategic Contribution Payments" to Utah under
246 subsection IX(c)(2) is to be determined by a three-member Allocation Committee in accordance
247 with Exhibit U of the Master Settlement Agreement.

248 Section 8. Section **26-44-304** is enacted to read:

249 **26-44-304. Released claims.**

250 (1) "Released Claims," which is referenced in Subsection 26-44-202(7), is defined in the
251 Master Settlement Agreement as follows:

252 "Released Claims" means:

253 (1) for past conduct, acts or omissions, including any damages incurred in the
254 future arising from such past conduct, acts or omission, those claims directly or indirectly
255 based on, arising out of or in any way related, in whole or in part, to (A) the use, sale,
256 distribution, manufacture, development, advertising, marketing or health effects of, (B)
257 the exposure to, or (C) research, statements, or warnings regarding, tobacco products,
258 including, but not limited to, the claims asserted in the actions identified in Exhibit D, or
259 any comparable claims that were, could be or could have been asserted now or in the future
260 in those actions or in any comparable action in federal, state or local court brought by a
261 settling state or a releasing party, whether or not such settling state or releasing party has
262 brought such action, except for claims not asserted in the actions identified in Exhibit D
263 for outstanding liability under existing licensing, or similar, fee laws or existing tax laws,
264 but not excepting claims for any tax liability of the tobacco-related organizations or of any
265 released party with respect to such tobacco-related organizations, which claims are covered
266 by the release and covenants set forth in this agreement.

267 (2) for future conduct, acts or omissions, only those monetary claims directly or
268 indirectly based on, arising out of or in any way related to, in whole or in part, the use of
269 or exposure to tobacco products manufactured in the ordinary course of business, including
270 without limitation any future claims for reimbursement of health care costs allegedly
271 associated with the use of or exposure to tobacco products.

272 (2) Exhibit D is a list of the titles and docket numbers of the lawsuits brought by states
273 against tobacco manufacturers and the courts in which those lawsuits were filed as of the date that
274 the Master Settlement Agreement was entered into.

275 Section 9. Section **26-44-305** is enacted to read:

276 **26-44-305. Releasing party.**

277 "Releasing Parties," which is referenced in Subsection 26-44-202(8), is defined in the
278 Master Settlement Agreement as follows:

279 (1) "Releasing Parties" means each settling state and any of its past, present and
280 future agents, officials acting in their official capacities, legal representatives, agencies,
281 departments, commissions and divisions; and also means, to the full extent of the power
282 of the signatories hereto to release past, present, and future claims, the following: (1) any
283 settling state's subdivisions, political or otherwise, including, but not limited to,
284 municipalities, counties, parishes, villages, unincorporated districts and hospital districts,
285 public entities, public instrumentalities and public educational institutions; and (2) persons
286 or entities acting in a parens patriae, sovereign, quasi-sovereign, private attorney general,
287 qui tam, taxpayer, or any other capacity, whether or not any of them participate in this
288 settlement, (A) to the extent that any such person or entity is seeking relief on behalf of or
289 generally applicable to the general public in such settling state or the people of the state,
290 as opposed solely to private or individual relief for separate and distinct injuries, or (B) to
291 the extent that any such entity, as opposed to an individual, is seeking recovery of
292 health-care expenses, other than premium or capitation payments for the benefit of present
293 or retired state employees, paid or reimbursed, directly or indirectly, by a settling state.

294 Section 10. Section **26-44-306** is enacted to read:

295 **26-44-306. Original participating manufacturer and related terms.**

296 (1) "Original participating manufacturer," which is referenced in Subsection
297 26-44-202(9)(a)(i), is defined in the Master Settlement Agreement as follows:

298 "Original participating manufacturer" means Brown & Williamson Tobacco
299 Corporation, Lorillard Tobacco Company, Phillip Morris Incorporated and R.J. Reynolds
300 Tobacco Company, and the respective successors of each of the foregoing. Except as
301 expressly providing in this Agreement, once an entity becomes an Original Participating
302 Manufacturer, such entity shall permanently retain the status of Original Participating
303 Manufacturer.

304 (2) Subsection II(mm) of the Master Settlement Agreement, which is referenced in
305 Subsection 26-44-202(9)(a)(i), is the following definition of "relative market share."

306 "Relative market share" means an original participating manufacturer's respective

307 share, expressed as a percentage, of the total number of individual cigarettes shipped in or
308 to the 50 United States, the District of Columbia and Puerto Rico by all the original
309 participating manufacturers during the calendar year immediately preceding the year in
310 which the payment at issue is due, regardless of when such payment is made, as measured
311 by the original participating manufacturers' reports of shipments of cigarettes to
312 Management Science Associates, Inc., or a successor entity acceptable to both the original
313 participating manufacturers and a majority of those attorneys general who are both the
314 attorney general of a settling state and a member of the NAAG executive committee at the
315 time in question. A cigarette shipped by more than one participating manufacturer shall
316 be deemed to have been shipped solely by the first participating manufacturer to do so. For
317 purposes of the definition and determination of "relative market share," 0.09 ounces of "roll
318 your own" tobacco shall constitute one individual cigarette.

319 (3) Subsection II(z) of the Master Settlement Agreement, which is referenced in
320 Subsection 26-44-202(9)(a)(i), is the following definition of "market share."

321 "Market share" means a tobacco product manufacturer's respective share, expressed
322 as a percentage, of the total number of individual cigarettes sold in the 50 United States,
323 the District of Columbia and Puerto Rico during the applicable calendar year, as measured
324 by excise taxes collected by the federal government and, in the case of sales in Puerto Rico,
325 arbitrios de cigarillos collected by the Puerto Rico taxing authority. For purposes of the
326 definition and determination of "market share" with respect to calculations under
327 Subsection IX(i), 0.09 ounces of "roll your own" tobacco shall constitute one individual
328 cigarette; for purposes of the definition and determination of "market share" with respect
329 to all other calculations, 0.0325 ounces of "roll your own" tobacco shall constitute one
330 individual cigarette.

331 Section 11. Section **26-44-307** is enacted to read:

332 **26-44-307. Participating manufacturer.**

333 (1) "Participating manufacturer," which is referenced in Subsection 26-44-203(1), is
334 defined in the Master Settlement Agreement as follows:

335 "Participating manufacturer" means a tobacco product manufacturer that is or
336 becomes a signatory to this agreement, provided that (1) in the case of a tobacco product
337 manufacturer that is not an original participating manufacturer, such tobacco product

338 manufacturer is bound by this agreement and the consent decree, or, in any settling state
339 that does not permit amendment of the consent decree, a consent decree containing terms
340 identical to those set forth in the consent decree, in all settling states in which this
341 agreement and the consent decree binds original participating manufacturers, provided,
342 however, that such tobacco product manufacturer need only become bound by the consent
343 decree in those settling state in which the settling state has filed a released claim against
344 it, and (2) in the case of a tobacco product manufacturer that signs this agreement after the
345 MSA execution date, such tobacco product manufacturer, within a reasonable period of
346 time after signing this agreement, makes any payments, including interest thereon at the
347 prime rate, that it would have been obligated to make in the intervening period had it been
348 a signatory as of the MSA execution date. "Participating manufacturer" shall also include
349 the successor of a participating manufacturer. Except as expressly provided in this
350 agreement, once an entity becomes a participating manufacturer such entity shall
351 permanently retain the status of participating manufacturer. Each participating
352 manufacturer shall regularly report its shipments of cigarettes in or to the 50 United States,
353 the District of Columbia and Puerto Rico to Management Science Associates, Inc., or a
354 successor entity as set forth in Subsection (mm). Solely for purposes of calculations
355 pursuant to Subsection IX(d), a tobacco product manufacturer that is not a signatory to this
356 agreement shall be deemed to be a "participating manufacturer" if the original participating
357 manufacturers unanimously consent in writing.

358 (2) Subsection X(d) relates to Non-Participating Manufacturer Adjustments.

359 Section 12. Section **26-44-308** is enacted to read:

360 **26-44-308. Payments by subsequent participating manufacturers.**

361 Section XI(i)(2) and IX(i)(3) of the Master Settlement Agreement, which are referenced
362 in Subsection 26-44-203(2)(b), involve payments by subsequent participating manufacturers and
363 provide as follows:

364 (1) A subsequent participating manufacturer shall have payment obligations under
365 this agreement only in the event that its market share in any calendar year exceeds the
366 greater of (1) its 1998 market share or (2) 125% of its 1997 market share, subject to the
367 provisions of subsection (i)(4). In the year following any such calendar year, such
368 subsequent participating manufacturer shall make payments corresponding to those due in

369 that same following year from the original participating manufacturers pursuant to
370 subsections VI(c), except for the payment due on March 31, 1999, IX(c)(1), IX(c)(2) and
371 IX(e). The amounts of such corresponding payments by a subsequent participating
372 manufacturer are in addition to the corresponding payments that are due from the original
373 participating manufacturers and shall be determined as described in subsection (2) and (3)
374 below. Such payments by a subsequent participating manufacturer shall (A) be due on the
375 same dates as the corresponding payments are due from original participating
376 manufacturers; (B) be for the same purpose as such corresponding payments; and (C) be
377 paid, allocated and distributed in the same manner as such corresponding payments.

378 (2) The base amount due from a subsequent participating manufacturer on any
379 given date shall be determined by multiplying (A) the corresponding base amount due on
380 the same date from all of the original participating manufacturers, as such base amount is
381 specified in the corresponding subsection of this agreement and is adjusted by the volume
382 adjustment, except for the provisions of Subsection (B)(ii) of Exhibit E, but before such
383 base amount is modified by any other adjustments, reductions or offsets, by (B) the quotient
384 produced by dividing (i) the result of (x) such subsequent participating manufacturer's
385 applicable market share, the applicable market share being that for the calendar year
386 immediately preceding the year in which the payment in question is due, minus (y) the
387 greater of (1) its 1998 market share or (2) 125% of its 1997 market share, by (ii) the
388 aggregate market shares of the original participating manufacturers, the applicable market
389 shares being those for the calendar year immediately preceding the year in which the
390 payment is question is due.

391 (3) Any payment due from a subsequent participating manufacturer under
392 Subsection (1) and (2) above shall be subject, up to the full amount of such payment, to the
393 inflation adjustment, the nonsettling states reduction, the NPM adjustment, the offset for
394 miscalculated or disputed payments described in Subsection XI(i), the Federal Tobacco
395 Legislation Offset, the Litigating Releasing Parties Offset and the offsets for claims over
396 described in subsections XII(a)(4)(B) and XII(a)(8), to the extent that such adjustments,
397 reductions or offsets would apply to the corresponding payment due from the original
398 participating manufacturers. Provided, however, that all adjustments and offsets to which
399 a subsequent participating manufacturer is entitled may only be applied against payments

400 by such subsequent participating manufacturer, if any, that are due within 12 months after
401 the date on which the subsequent participating manufacturer becomes entitled to such
402 adjustment or makes the payment that entitles it to such offset, and shall not be carried
403 forward beyond that time even if not fully used.

404 (4) For purposes of this Subsection (i), the 1997, or 1998, as applicable, market
405 share, and 125% thereof, of those subsequent participating manufacturers that either (A)
406 became a signatory to the agreement more than 60 days after the MSA execution date or
407 (B) had no market share in 1997, or 1998, as applicable, shall equal zero.

408 Section 13. Section **26-44-401** is enacted to read:

409 **Part 4. Availability of information.**

410 **26-44-401. Availability of Master Settlement Agreement -- Fee.**

411 (1) The department shall provide a copy of the Master Settlement Agreement for review
412 or purchase to any person upon request.

413 (2) The department may charge a fee, established in accordance with Section 26-1-6, to
414 any person who desires to purchase a copy of the Master Settlement Agreement under Subsection
415 (1).

416 Section 14. Section **26-44-402** is enacted to read:

417 **26-44-402. Data available to manufacturer.**

418 Notwithstanding Title 63, Chapter 2, Government Records Access and Management Act,
419 upon request from a tobacco product manufacturer, as defined in Section 26-44-202, the executive
420 director shall report to the manufacturer the quantities of the manufacturer's cigarettes reported to
421 the executive director under Section 59-1-403(3)(e).

422 Section 15. Section **59-1-403** is amended to read:

423 **59-1-403. Confidentiality -- Penalty -- Application to property tax.**

424 (1) Any tax commissioner, agent, clerk, or other officer or employee of the commission
425 or any representative, agent, clerk, or other officer or employee of any county, city, or town may
426 not divulge or make known in any manner any information gained by him from any return filed
427 with the commission. The officials charged with the custody of such returns are not required to
428 produce any of them or evidence of anything contained in them in any action or proceeding in any
429 court, except:

430 (a) in accordance with judicial order;

431 (b) on behalf of the commission in any action or proceeding under this title or other law
432 under which persons are required to file returns with the commission;

433 (c) on behalf of the commission in any action or proceeding to which the commission is
434 a party; or

435 (d) on behalf of any party to any action or proceeding under this title when the report or
436 facts shown thereby are directly involved in such action or proceeding. In any event, the court may
437 require the production of, and may admit in evidence, any portion of reports or of the facts shown
438 by them, as are specifically pertinent to the action or proceeding.

439 (2) This section does not prohibit:

440 (a) a person or his duly authorized representative from receiving a copy of any return or
441 report filed in connection with that person's own tax;

442 (b) the publication of statistics as long as they are classified to prevent the identification
443 of particular reports or returns;

444 (c) the inspection by the attorney general or other legal representative of the state of the
445 report or return of any taxpayer:

446 (i) who brings action to set aside or review the tax based on such report or return;

447 (ii) against whom an action or proceeding is contemplated or has been instituted under this
448 title; or

449 (iii) against whom the state has an unsatisfied money judgment.

450 (3) (a) Notwithstanding Subsection (1) and for purposes of administration, the commission
451 may, by rule, provide for a reciprocal exchange of information with the United States Internal
452 Revenue Service or the revenue service of any other state.

453 (b) Notwithstanding Subsection (1) and for all taxes except individual income tax and
454 corporate franchise tax, the commission may, by rule, share information gathered from returns and
455 other written statements with the federal government, any other state, any of their political
456 subdivisions, or any political subdivision of this state, except as limited by Sections 59-12-209 and
457 59-12-210, if these political subdivisions or the federal government grant substantially similar
458 privileges to this state.

459 (c) Notwithstanding Subsection (1) and for all taxes except individual income tax and
460 corporate franchise tax, the commission may, by rule, provide for the issuance of information
461 concerning the identity and other information of taxpayers who have failed to file tax returns or

462 to pay any tax due.

463 (d) Notwithstanding Subsection (1), the commission shall provide to the Solid and
464 Hazardous Waste Control Board executive secretary, as defined in Section 19-6-102, any records,
465 returns, and other information filed with the commission under Title 59, Chapter 13, Motor and
466 Special Fuel Tax Act, or Section 19-6-410.5 regarding the environmental assurance program
467 participation fee, as requested by the executive secretary.

468 (e) (i) Notwithstanding Subsection (1), to provide information necessary for the
469 implementation of Title 26, Chapter 44, Tobacco Manufacturers Settlement and Responsibility
470 Act, the commission shall annually report to the executive director of the Department of Health
471 on or before March 1:

472 (A) the quantity of cigarettes, as defined in Section 26-44-202, produced by each
473 manufacturer and reported to the commission for the previous calendar year under Section
474 59-14-407; and

475 (B) the quantity of cigarettes, as defined in Section 26-44-202, produced by each
476 manufacturer for which a tax refund was granted during the previous calendar year under Section
477 59-14-401 and reported to the commission under Subsection 59-14-401(1)(a)(v).

478 (ii) The records received by the executive director of the Department of Health under
479 Subsection (3)(e)(i) are protected records under Title 63, Chapter 2, Government Records Access
480 and Management Act.

481 (4) Reports and returns shall be preserved for at least three years and then the commission
482 may destroy them.

483 (5) Any person who violates this section is guilty of a class A misdemeanor. If the
484 offender is an officer or employee of the state, he shall be dismissed from office and be
485 disqualified from holding public office in this state for a period of five years thereafter.

486 (6) This part does not apply to the property tax.

487 Section 16. Section **59-14-401** is amended to read:

488 **59-14-401. Refund of taxes paid -- Exemption for exported cigarettes and tobacco**
489 **products.**

490 (1) (a) When any cigarette or tobacco product taxed under this chapter is sold and shipped
491 to a regular dealer in those articles in another state, the seller in this state shall be entitled to a
492 refund of the actual amount of the taxes paid, upon condition that the seller in this state:

493 (i) is a licensed dealer [~~and~~];

494 (ii) signs an affidavit that the [~~goods were~~] cigarette or tobacco product was so sold and
495 shipped[~~-. The seller in this state shall furnish~~];

496 (iii) furnishes from the purchaser a written acknowledgment that [~~he~~] the purchaser has
497 received [~~the goods and~~];

498 (A) the cigarette or tobacco product; and

499 (B) the amount of [~~stamps, together with~~] any stamps for which a refund is requested;

500 (iv) reports the name and address of the purchaser[~~-.]; and~~

501 (v) reports the name of the manufacturer of the cigarette, as defined under Section
502 26-44-202, reported under Section 59-14-407 if the cigarette is manufactured by a manufacturer
503 required to place funds into escrow under Section 26-44-203.

504 (b) The taxes shall be refunded in the manner provided in Subsection 59-14-206 (2) for
505 unused stamps.

506 (2) Wholesalers or distributors in this state who export taxable cigarettes and tobacco
507 products to a regular dealer in another state shall be exempt from the payment of any tax upon the
508 sale of the articles upon furnishing such proof of the sale and exportation as the commission may
509 require.

510 Section 17. Section **59-14-407** is enacted to read:

511 **59-14-407. Reporting of manufacturer name.**

512 (1) As used in this section:

513 (a) "Cigarette" has the same meaning as defined in Section 26-44-202.

514 (b) "Tobacco product manufacturer" has the same meaning as defined in Section
515 26-44-202.

516 (2) Any manufacturer, distributor, wholesaler, or retail dealer who under Section
517 59-14-205 affixes a stamp to an individual package or container of cigarettes manufactured by a
518 tobacco product manufacturer required to place funds into escrow under Section 26-44-203 shall
519 report annually to the commission:

520 (a) the quantity of cigarettes in the package or container; and

521 (b) the name of the manufacturer of the cigarettes.

522 (3) Any manufacturer, distributor, wholesaler, retail dealer, or other person who is required
523 to pay the tax levied under Part 3, Tobacco Products, on a tobacco product defined as a cigarette

524 under Section 26-44-202 and manufactured by a tobacco product manufacturer required to place
525 funds into escrow under Section 26-44-203 shall report annually to the commission:

526 (a) the quantity of cigarettes upon which the tax is levied; and

527 (b) the name of the manufacturer of each cigarette.

528 (4) The reports under Subsections (2) and (3) shall be made no later than January 31 for
529 the preceding calendar year pursuant to rules established by the commission in accordance with
530 Title 63, Chapter 46a, Utah administrative Rulemaking Act.

531 Section 18. Section **63-2-206** is amended to read:

532 **63-2-206. Sharing records.**

533 (1) A governmental entity may provide a record that is private, controlled, or protected to
534 another governmental entity, a government-managed corporation, a political subdivision, the
535 federal government, or another state if the requesting entity:

536 (a) serves as a repository or archives for purposes of historical preservation, administrative
537 maintenance, or destruction;

538 (b) enforces, litigates, or investigates civil, criminal, or administrative law, and the record
539 is necessary to a proceeding or investigation;

540 (c) is authorized by state statute to conduct an audit and the record is needed for that
541 purpose; or

542 (d) is one that collects information for presentence, probationary, or parole purposes.

543 (2) A governmental entity may provide a private or controlled record or record series to
544 another governmental entity, a political subdivision, a government-managed corporation, the
545 federal government, or another state if the requesting entity provides written assurance:

546 (a) that the record or record series is necessary to the performance of the governmental
547 entity's duties and functions;

548 (b) that the record or record series will be used for a purpose similar to the purpose for
549 which the information in the record or record series was collected or obtained; and

550 (c) that the use of the record or record series produces a public benefit that outweighs the
551 individual privacy right that protects the record or record series.

552 (3) A governmental entity may provide a record or record series that is protected under
553 Subsection 63-2-304(1) or (2) to another governmental entity, a political subdivision, a
554 government-managed corporation, the federal government, or another state if:

555 (a) the record is necessary to the performance of the requesting entity's duties and
556 functions; or

557 (b) the record will be used for a purpose similar to the purpose for which the information
558 in the record or record series was collected or obtained.

559 (4) (a) A governmental entity shall provide a private, controlled, or protected record to
560 another governmental entity, a political subdivision, a government-managed corporation, the
561 federal government, or another state if the requesting entity:

562 (i) is entitled by law to inspect the record;

563 (ii) is required to inspect the record as a condition of participating in a state or federal
564 program or for receiving state or federal funds; or

565 (iii) is an entity described in Subsection 63-2-206(1)(a), (b), (c), or (d).

566 (b) Subsection (4)(a)(iii) applies only if the record is a record described in Subsection
567 63-2-304(4).

568 (5) Before disclosing a record or record series under this section to another governmental
569 entity, another state, the United States, or a foreign government, the originating governmental
570 entity shall:

571 (a) inform the recipient of the record's classification and the accompanying restrictions on
572 access; and

573 (b) if the recipient is not a governmental entity to which this chapter applies, obtain the
574 recipient's written agreement which may be by mechanical or electronic transmission that it will
575 abide by those restrictions on access unless a statute, federal regulation, or interstate agreement
576 otherwise governs the sharing of the record or record series.

577 (6) A governmental entity may disclose a record to another state, the United States, or a
578 foreign government for the reasons listed in Subsections (1), (2), and (3) without complying with
579 the procedures of Subsection (2) or (5) if disclosure is authorized by executive agreement, treaty,
580 federal statute, compact, federal regulation, or state statute.

581 (7) A governmental entity receiving a record under this section is subject to the same
582 restrictions on disclosure of the material as the originating entity.

583 (8) Notwithstanding any other provision of this section, if a more specific court rule or
584 order, state statute, federal statute, or federal regulation prohibits or requires sharing information,
585 that rule, order, statute, or federal regulation controls.

586 (9) The following records may not be shared under this section:
587 (a) except as provided under Section 59-1-403, records held by the State Tax Commission
588 that pertain to any person and that are gathered under authority of Title 59, Revenue and Taxation;
589 (b) records held by the Division of Oil, Gas and Mining that pertain to any person and that
590 are gathered under authority of Title 40, Chapter 6, Board and Division of Oil, Gas and Mining;
591 and
592 (c) records of publicly funded libraries as described in Subsection 63-2-302(1)(c).
593 (10) Records that may evidence or relate to a violation of law may be disclosed to a
594 government prosecutor, peace officer, or auditor.
595 Section 19. **Effective date.**
596 This act takes effect on July 1, 1999.

Legislative Review Note**as of 2-1-99 11:16 AM**

This legislation raises the following constitutional or statutory concerns:

This bill contains model language from the tobacco settlement agreement that the state entered into with leading tobacco manufacturers on November 23, 1998, that, if enacted and diligently enforced, protects the state against a potential three percent reduction in settlement monies for each one percent decline in the market share of participating manufacturers. In addition, the model language protects the state in the event the model language is overturned in court by capping at 65% any reduction in tobacco settlement money due to a decline in market share.

Specifically, the model language requires a tobacco manufacturer who did not participate in the tobacco settlement agreement to either accept the terms and conditions of the settlement agreement or pay a certain sum of money for each cigarette sold in the state into an escrow account established by the manufacturer. The purpose of the escrow account is to create a fund from which the state can recover, should the state choose to bring a legal action against the manufacturer, and to ensure that nonparticipating tobacco manufacturers do not enjoy a cost advantage over participating tobacco manufacturers. The escrow account terminates in 25 years. Any money remaining in the account is returned to the tobacco manufacturer at that time. Interest on the account is regularly paid to the tobacco manufacturer.

While there are similarities between the model language and other Utah laws that mandate that funds be set aside for future liabilities, there are differences as well. As such, the legal ramifications are not clear, particularly with respect to the authority of the state to (1) regulate out-of-state tobacco manufacturers whose product was brought into the state through nonaffiliated distributors; and (2) require nonparties to a lawsuit to set aside funds to (a) create an escrow account from which the state can recover in future litigation and (b) place the same financial disadvantage on nonparties as were placed on parties to the lawsuit.

Office of Legislative Research and General Counsel