

Chapter 22

Model Tobacco Settlement Act

Part 1

Title

59-22-101 Title.

This chapter is known as the "Model Tobacco Settlement Act."

Amended by Chapter 9, 2001 General Session

Part 2

Model Tobacco Settlement Statute

59-22-201 Findings and purpose.

- (1) Cigarette smoking presents serious public health concerns to the State and to the citizens of the State. The Surgeon General has determined that smoking causes lung cancer, heart disease and other serious diseases, and that there are hundreds of thousands of tobacco-related deaths in the United States each year. These diseases most often do not appear until many years after the person in question begins smoking.
- (2) Cigarette smoking also presents serious financial concerns for the State. Under certain health-care programs, the State may have a legal obligation to provide medical assistance to eligible persons for health conditions associated with cigarette smoking, and those persons may have a legal entitlement to receive such medical assistance.
- (3) Under these programs, the State pays millions of dollars each year to provide medical assistance for these persons for health conditions associated with cigarette smoking.
- (4) It is the policy of the State that financial burdens imposed on the State by cigarette smoking be borne by tobacco product manufacturers rather than by the State to the extent that such manufacturers either determine to enter into a settlement with the State or are found culpable by the courts.
- (5) On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," with the State. The Master Settlement Agreement obligates these manufacturers, in return for a release of past, present, and certain future claims against them as described therein, to pay substantial sums to the State (tied in part to their volume of sales); to fund a national foundation devoted to the interests of public health; and to make substantial changes in their advertising and marketing practices and corporate culture, with the intention of reducing underage smoking.
- (6) It would be contrary to the policy of the State if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the State will have an eventual source of recovery from them if they are proven to have acted culpably. It is thus in the interest of the State to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise.

Renumbered and Amended by Chapter 229, 2000 General Session

59-22-202 Definitions.

As used in this part:

- (1) "Adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement.
- (2) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns," "is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, of 10% or more, and the term "person" means an individual, partnership, committee, association, corporation, or any other organization or group of persons.
- (3) "Allocable share" means Allocable Share as that term is defined in the Master Settlement Agreement.
- (4) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains:
 - (a) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or
 - (b) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or
 - (c) any roll of tobacco wrapped in any substance containing tobacco that, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (a) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco that, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette."
- (5) "Master Settlement Agreement" means the settlement agreement (and related documents) entered into on November 23, 1998, by the State and leading United States tobacco product manufacturers.
- (6) "Qualified escrow fund" means an escrow arrangement with a federally or State chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least \$1,000,000,000 where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds' principal except as consistent with Subsection 59-22-203(2).
- (7) "Released claims" means Released Claims as that term is defined in the Master Settlement Agreement.
- (8) "Releasing parties" means Releasing Parties as that term is defined in the Master Settlement Agreement.
- (9)
 - (a) "Tobacco product manufacturer" means an entity that after the date of enactment of this Act directly (and not exclusively through any affiliate):
 - (i) manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the Master Settlement Agreement) that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of Subsection 11(mm) of the Master Settlement Agreement and that pays the taxes specified in

- Subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);
- (ii) is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or
 - (iii) becomes a successor of an entity described in Subsection (9)(a)(i) or (ii).
- (b) "Tobacco product manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within any Subsection (9)(a)(i) through (iii).
- (10)
- (a) "Units sold" means the number of individual cigarettes sold in the state by an applicable tobacco product manufacturer during the year in question for which the state is not prohibited from taxing under federal law.
 - (b) "Units sold" includes a cigarette or "roll your own" tobacco product sold by a tobacco product manufacturer through a distributor, a retailer, or a similar intermediary.
 - (c) The State Tax Commission may make rules establishing how to determine the number of units sold in the state.

59-22-203 Requirements.

- (1) Any tobacco product manufacturer selling cigarettes to consumers within the State (whether directly or through a distributor, retailer or similar intermediary or intermediaries) after the date of enactment of this Act shall do one of the following:
- (a) become a participating manufacturer (as that term is defined in Section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or
 - (b) place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):
 - (i) 1999: \$.0094241 per unit sold after the date of enactment of this Act;
 - (ii) 2000: \$.0104712 per unit sold;
 - (iii) for each of 2001 and 2002: \$.0136125 per unit sold;
 - (iv) for each of 2003 through 2006: \$.0167539 per unit sold; and
 - (v) for each of 2007 and each year thereafter: \$.0188482 per unit sold.
- (2) A tobacco product manufacturer that places funds into escrow pursuant to Subsection (1) (b) shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:
- (a) to pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the State or any releasing party located or residing in the State. Funds shall be released from escrow under this Subsection (2)(a):
 - (i) in the order in which they were placed into escrow; and
 - (ii) only to the extent and at the time necessary to make payments required under such judgment or settlement;
 - (b) to the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the State in a particular year was greater than the Master Settlement Agreement payments, as determined pursuant to Section IX(i) of that Agreement including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or

- (c) to the extent not released from escrow under Subsection (2)(a) or (b), funds shall be released from escrow and revert back to such tobacco product manufacturer 25 years after the date on which they were placed into escrow.
- (3) Each tobacco product manufacturer that elects to place funds into escrow pursuant to Subsection (1)(b) shall annually certify to the commission that it is in compliance with Subsection (1)(b) and Subsection (2). The commission may bring a civil action on behalf of the State against any tobacco product manufacturer that fails to place into escrow the funds required under Subsection (1)(b) and Subsection (2). Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this Subsection (1)(b) and Subsection (2) shall:
 - (a) be required within 15 days to place such funds into escrow as shall bring it into compliance with Subsection (1)(b) and Subsection (2). The court, upon a finding of a violation of Subsection (1)(b) or Subsection (2), may impose a civil penalty to be paid to the General Fund in an amount not to exceed 5% of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 100% of the original amount improperly withheld from escrow;
 - (b) in the case of a knowing violation, be required within 15 days to place such funds into escrow as shall bring it into compliance with Subsection (1)(b) and Subsection (2). The court, upon a finding of a knowing violation of Subsection (1)(b) or Subsection (2), may impose a civil penalty to be paid to the General Fund of the State in an amount not to exceed 15% of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 300% of the original amount improperly withheld from escrow; and
 - (c) in the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the State (whether directly or through a distributor, retailer or similar intermediary) for a period not to exceed 2 years.
- (4) Each failure to make an annual deposit required under Subsection (1)(b) shall constitute a separate violation.
- (5) A court shall award the State its costs and attorneys fees incurred in bringing any action in which the State establishes that a tobacco product manufacturer has violated this section.

Amended by Chapter 53, 2004 General Session

Part 3

Master Settlement Agreement Provisions

59-22-301 Construction of this part.

This part sets forth definitions in the Master Settlement Agreement that are cross-referenced in Part 2, Model Tobacco Settlement Statute. This part is intended for convenience only and may not be construed as substantively or otherwise altering Part 2, Model Tobacco Settlement Statute, or the Master Settlement Agreement. Where Part 2, Model Tobacco Settlement Statute, instructs that a term be given the same definition as that term is given in the Master Settlement Agreement, the definition shall be that set forth in the Master Settlement Agreement, as it may be amended from time to time.

Renumbered and Amended by Chapter 229, 2000 General Session

59-22-302 Formula for inflation adjustments.

The formula for calculating inflation adjustments, which is referenced in Subsection 59-22-202(1), is set forth in Exhibit C of the Master Settlement Agreement as follows, with the exception of Subsection (7) which is omitted:

Exhibit C

Formula For Calculating Inflation Adjustment

- (1) Any amount that, in any given year, is to be adjusted for inflation pursuant to this Exhibit, the "Base Amount," shall be adjusted upward by adding to such Base Amount the Inflation Adjustment.
- (2) The Inflation Adjustment shall be calculated by multiplying the Base Amount by the Inflation Adjustment Percentage applicable in that year.
- (3) The Inflation Adjustment Percentage applicable to payments due in the year 2000 shall be equal to the greater of 3% or the CPI%. For example, if the Consumer Price Index for December 1999, as released in January 2000, is 2% higher than the Consumer Price Index for December 1998, as released in January 1999, then the CPI% with respect to a payment due in 2000 would be 2%. The Inflation Adjustment Percentage applicable in the year 2000 would thus be 3%.
- (4) The Inflation Adjustment Percentage applicable to payments due in any year after 2000 shall be calculated by applying each year the greater of 3% or the CPI% on the Inflation Adjustment Percentage applicable to payments due in the prior year. Continuing the example in subsection (3) above, if the CPI% with respect to a payment due in 2001 is 6%, then the Inflation Adjustment Percentage applicable in 2001 would be 9.1800000%, an additional 6% applied on the 3% Inflation Adjustment Percentage applicable in 2000, and if the CPI % with respect to a payment due in 2002 is 4%, then the Inflation Adjustment Percentage applicable in 2002 would be 13.5472000%, an additional 4% applied on the 9.1800000% Inflation Adjustment Percentage applicable in 2001.
- (5) "Consumer Price Index" means the Consumer Price Index for All Urban Consumers as published by the Bureau of Labor Statistics of the U.S. Department of Labor, or other similar measures agreed to by the Settling States and the Participating Manufacturers.
- (6) The "CPI%" means the actual total percent change in the Consumer Price Index during the calendar year immediately preceding the year in which the payment in question is due.

Renumbered and Amended by Chapter 229, 2000 General Session

59-22-303 Allocable share.

- (1) "Allocable Share," which is referenced in Subsection 59-22-202(3), is defined in the Master Settlement Agreement as follows:
"Allocable Share" means the percentage set forth for the State in question as listed in Exhibit A hereto, without regard to any subsequent alteration or modification of such State's percentage share agreed to or by or among any States; or, solely for the purpose of calculating payments under subsection IX(c)(2) (and corresponding payments under subsection IX(i)), the percentage disclosed for the State in question pursuant to subsection IX(c)(2)(A) prior to June 30, 1999, without regard to any subsequent alteration or modification of such State's percentage share agreed to by or among any States.
- (2) The percentage set forth for Utah in Exhibit A to the Master Settlement Agreement is 0.4448869%.

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

Renumbered and Amended by Chapter 229, 2000 General Session

59-22-304 Released claims.

- (1) "Released Claims," which is referenced in Subsection 59-22-202(7), is defined in the Master Settlement Agreement as follows:

""Released Claims" means:

- (1) for past conduct, acts or omissions, including any damages incurred in the future arising from such past conduct, acts or omissions, those Claims directly or indirectly based on, arising out of or in any way related, in whole or in part, to (A) the use, sale, distribution, manufacture, development, advertising, marketing or health effects of, (B) the exposure to, or (C) research, statements, or warnings regarding, Tobacco Products, including, but not limited to, the Claims asserted in the actions identified in Exhibit D, or any comparable Claims that were, could be or could have been asserted now or in the future in those actions or in any comparable action in federal, state or local court brought by a Settling State or a Releasing Party, whether or not such Settling State or Releasing Party has brought such action, except for claims not asserted in the actions identified in Exhibit D for outstanding liability under existing licensing, or similar, fee laws or existing tax laws, but not excepting claims for any tax liability of the Tobacco-Related Organizations or of any Released Party with respect to such Tobacco-Related Organizations, which claims are covered by the release and covenants set forth in this Agreement;

- (2) for future conduct, acts or omissions, only those monetary Claims directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business, including without limitation any future Claims for reimbursement of health care costs allegedly associated with the use of or exposure to Tobacco Products."

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

Amended by Chapter 306, 2007 General Session

59-22-305 Releasing parties.

"Releasing Parties," which is referenced in Subsection 59-22-202(8), is defined in the Master Settlement Agreement as follows:

- (1) "Releasing Parties" means each Settling State and any of its past, present and future agents, officials acting in their official capacities, legal representatives, agencies, departments, commissions and divisions; and also means, to the full extent of the power of the signatories hereto to release past, present and future claims, the following: (1) any Settling State's subdivisions, political or otherwise, including, but not limited to, municipalities, counties, parishes, villages, unincorporated districts and hospital districts, public entities, public instrumentalities and public educational institutions; and (2) persons or entities acting in a parens patriae, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or any other capacity, whether or not any of them participate in this settlement, (A) to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the

general public in such Settling State or the people of the State, as opposed solely to private or individual relief for separate and distinct injuries, or (B) to the extent that any such entity, as opposed to an individual, is seeking recovery of health-care expenses, other than premium or capitation payments for the benefit of present or retired state employees, paid or reimbursed, directly or indirectly, by a Settling State.

Renumbered and Amended by Chapter 229, 2000 General Session

59-22-306 Original participating manufacturer and related terms.

(1) "Original Participating Manufacturer," which is referenced in Subsection 59-22-202(9)(a)(i), is defined in the Master Settlement Agreement as follows:

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

(2) Subsection II(mm) of the Master Settlement Agreement, which is referenced in Subsection 59-22-202(9)(a)(i), is the following definition of "relative market share":

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

(3) Subsection II(z) of the Master Settlement Agreement, which is referenced in Subsection 59-22-202(9)(a)(i), is the following definition of "market share":

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

Renumbered and Amended by Chapter 229, 2000 General Session

59-22-307 Participating manufacturer.

(1) "Participating Manufacturer," which is referenced in Subsection 59-22-203(1), is defined in the Master Settlement Agreement as follows:

"Participating Manufacturer" means a Tobacco Product Manufacturer that is or becomes a signatory to this Agreement, provided that (1) in the case of a Tobacco Product Manufacturer that is not an Original Participating Manufacturer, such Tobacco Product Manufacturer is bound by this Agreement and the Consent Decree, or, in any Settling State that does not permit amendment of the Consent Decree, a Consent Decree containing terms identical to those set forth in the Consent Decree, in all Settling States in which this Agreement and the Consent Decree binds Original Participating Manufacturers, provided, however, that such Tobacco Product Manufacturer need only become bound by the Consent Decree in those Settling State in which the Settling State has filed a Released Claim against it, and (2) in the case of a Tobacco Product Manufacturer that signs this Agreement after the MSA Execution Date, such Tobacco Product Manufacturer, within a reasonable period of time after signing this Agreement, makes any payments, including interest thereon at the Prime Rate, that it would have been obligated to make in the intervening period had it been a signatory as of the MSA Execution Date. "Participating Manufacturer" shall also include the successor of a Participating Manufacturer. Except as expressly provided in this Agreement, once an entity becomes a Participating Manufacturer such entity shall permanently retain the status of Participating Manufacturer. Each Participating Manufacturer shall regularly report its shipments of Cigarettes in or to the 50 United States, the District of Columbia and Puerto Rico to Management Science Associates, Inc., or a successor entity as set forth in Subsection (mm). Solely for purposes of calculations pursuant to Subsection IX(d), a Tobacco Product Manufacturer that is not a signatory to this Agreement shall be deemed to be a "Participating Manufacturer" if the Original Participating Manufacturers unanimously consent in writing."

(2) Subsection IX(d) relates to Nonparticipating Manufacturer Adjustments.

Amended by Chapter 306, 2007 General Session

59-22-308 Payments by subsequent participating manufacturers.

Section XI(i)(2) and IX(i)(3) of the Master Settlement Agreement involve payments by subsequent participating manufacturers and providers as follows:

- (1) A Subsequent Participating Manufacturer shall have payment obligations under this Agreement only in the event that its Market Share in any calendar year exceeds the greater of (1) its 1998 Market Share or (2) 125% of its 1997 Market Share, subject to the provisions of subsection (i) (4). In the year following any such calendar year, such Subsequent Participating Manufacturer shall make payments corresponding to those due in that same following year from the Original Participating Manufacturers pursuant to subsections VI(c), except for the payment due on March 31, 1999, IX(c)(1), IX(c)(2) and IX(e). The amounts of such corresponding payments by a Subsequent Participating Manufacturer are in addition to the corresponding payments that are due from the Original Participating Manufacturers and shall be determined as described in subsection (2) and (3) below. Such payments by a Subsequent Participating Manufacturer shall (A) be due on the same dates as the corresponding payments are due from Original Participating manufacturers; (B) be for the same purpose as such corresponding payments; and (C) be paid, allocated and distributed in the same manner as such corresponding payments.
- (2) The base amount due from a Subsequent Participating Manufacturer on any given date shall be determined by multiplying (A) the corresponding base amount due on the same date from all of the Original Participating Manufacturers, as such base amount is specified in the corresponding subsection of this agreement and is adjusted by the Volume Adjustment, except for the provisions of subsection (B)(ii) of Exhibit E, but before such base amount is modified

by any other adjustments, reductions or offsets, by (B) the quotient produced by dividing (i) the result of (x) such Subsequent Participating Manufacturer's Applicable Market Share, the applicable Market Share being that for the calendar year immediately preceding the year in which the payment in question is due, minus (y) the greater of (1) its 1998 Market Share or (2) 125% of its 1997 Market Share, by (ii) the aggregate Market Shares of the Original Participating Manufacturers, the applicable Market Shares being those for the calendar year immediately preceding the year in which the payment in question is due.

- (3) Any payment due from a Subsequent Participating Manufacturer under subsections (1) and (2) above shall be subject, up to the full amount of such payment, to the Inflation Adjustment, the Nonsettling States Reduction, the NPM Adjustment, the offset for miscalculated or disputed payments described in subsection XI(i), the Federal Tobacco Legislation Offset, the Litigating Releasing Parties Offset and the offsets for claims over described in subsections XII(a)(4) (B) and XII(a)(8), to the extent that such adjustments, reductions or offsets would apply to the corresponding payment due from the Original Participating Manufacturers. Provided, however, that all adjustments and offsets to which a Subsequent Participating Manufacturer is entitled may only be applied against payments by such Subsequent Participating Manufacturer, if any, that are due within 12 months after the date on which the Subsequent Participating Manufacturer becomes entitled to such adjustment or makes the payment that entitles it to such offset, and shall not be carried forward beyond that time even if not fully used.
- (4) For purposes of this Subsection (i), the 1997, or 1998, as applicable, Market Share, and 125% thereof, of those Subsequent Participating Manufacturers that either (A) became a signatory to the Agreement more than 60 days after the MSA Execution Date or (B) had no Market Share in 1997, or 1998, as applicable, shall equal zero.

Amended by Chapter 53, 2004 General Session

Part 4 Miscellaneous Provisions

59-22-401 Availability of master settlement agreement.

The commission shall provide a copy of the Master Settlement Agreement for review or purchase to any person upon request and may charge a fee for doing so in accordance with Subsection 59-1-210(26).

Enacted by Chapter 229, 2000 General Session