



Informational Paper 76

**Tobacco Settlement
and Securitization**

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Tobacco Settlement and Securitization

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History of the Master Settlement Agreement with Tobacco Manufacturers

On February 5, 1997, the State of Wisconsin filed suit in Dane County Circuit Court against certain tobacco manufacturers. The State of Wisconsin retained three private law firms (Habush, Habush, Davis & Rottier, S.C.; Brennan, Steil, Basting & MacDougall, S.C.; and Whyte, Hirschboeck & Dudek, S.C.) as special counsel to work with, and under the direction of, the Department of Justice (DOJ) in prosecuting the litigation against the tobacco manufacturers.

In its lawsuit, Wisconsin alleged that:

- Tobacco companies engaged in a conspiracy to mislead, deceive and confuse the public regarding the evidence that the use of tobacco products causes debilitating and fatal disease and that the nicotine in tobacco is a powerfully addictive substance;
- Tobacco companies concealed material information and waged an aggressive campaign of disinformation about the health consequences of their products, despite the fact that they had known, based on their own research, that their products often injured or killed consumers when used exactly as intended;
- Certain tobacco companies manipulated the amount of nicotine delivered by their products to create and sustain addiction;
- The defendants engaged in this conduct, despite their knowledge that the vast majority of new tobacco product users are children and adolescents. In addition, the defendants spent millions of dollars marketing to attract children

and adolescents to use their products (despite the fact that minors cannot/could not legally purchase tobacco products);

- The state spent millions on medical and related services for Wisconsin residents for tobacco-related diseases and thousands of residents died each year from the products, while tobacco manufacturers reaped huge profits from sales to residents;
- It was a long-standing policy of the state to prevent children from using tobacco products, and to prevent facilitating children's access to, or desire for, such products; and
- The state had a policy of paying health care costs for its residents who could not afford to pay those costs themselves. In addition, the state also had a policy of recovering the costs from those who should have paid for them.

On March 21, 1997, the Joint Committee on Finance approved 8.0 program revenue (PR), two-year project positions to provide DOJ additional personnel to coordinate the litigation efforts of special counsel and to oversee the tobacco litigation generally. Funding for the positions came from private, non-profit, anti-tobacco groups (such as the American Cancer Society, the American Heart Association and the Wisconsin Medical Society). When the positions were approved in March, 1997, the Wisconsin Division of the American Cancer Society had pledged \$150,000 and the American Cancer Society had pledged to generate as much as \$500,000 annually from other organizations to support the state's tobacco litigation effort. Under the agreement, if the state was successful in its litigation against the tobacco industry, the state would reimburse the private, non-profit, anti-

tobacco groups the sums they had advanced to support the state's tobacco litigation effort.

In the state's amended complaint filed in Dane County Circuit Court on May 29, 1997, the state sued the defendants for deceptive advertising/fraudulent representations, intentional misrepresentations, negligent misrepresentations, strict responsibility for misrepresentations, conspiracy in restraint of trade, undertaking of and failure to perform a special duty, unjust enrichment, restitution, public nuisance, conspiracy and concert of action, and for violations of Wisconsin's Organized Crime Control Act. The state sought monetary damages, civil penalties, declaratory and injunctive relief, restitution for the alleged conduct of the defendants and punitive damages. The requested injunction sought to require the defendants to cease marketing tobacco products to children, to disclose their research on smoking, addiction and health and to fund a remedial public education campaign of the health consequences of smoking and smoking cessation programs.

On November 23, 1998, Wisconsin and 45 other states, Puerto Rico, the U.S. Virgin Islands, American Samoa, the Northern Mariana Islands, Guam and the District of Columbia (collectively referred to as the "settling states") entered into the Master Settlement Agreement (MSA) with Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Commonwealth Tobacco, and Liggett & Myers. The MSA followed earlier tobacco industry settlements with Mississippi, Florida, Texas, and Minnesota. As a result of the agreement, Wisconsin's pending lawsuit was dismissed.

Significant Non-Payment Terms

While the MSA is primarily known for the payments it requires the settling tobacco manufacturers to make to the settling states, the agreement

also places many contractual restrictions on the settling tobacco manufacturers, including restrictions on their marketing efforts.

Restrictions on Brand Name Sponsorships. With limited exception, the MSA prohibits settling tobacco manufacturers from using their product brand names to sponsor concerts, events with a significant youth audience, or team sports (football, basketball, baseball, hockey, or soccer). The MSA also prohibits settling tobacco manufacturers from sponsoring events where the paid participants or contestants are underage.

General Advertising and Marketing Restrictions. The MSA bans the use of cartoon characters (such as Joe Camel), but not human subjects, in the advertising, promotion, packaging or labeling of tobacco products, effective May 22, 1999. The MSA also prohibits settling tobacco manufacturers from naming future cigarette brands after recognized non-tobacco brand or trade names (such as Cartier) or nationally recognized individual celebrities, entertainment groups, or sports teams.

Restrictions on Outdoor Advertising. With the exception of billboards, signs, and placards no larger than a poster in arenas, stadiums, shopping malls, and video game arcades, the MSA bans all transit and outdoor advertising of tobacco products. The settling tobacco manufacturers may not use the permitted poster-sized signs and placards to target children.

Corporate Culture and Compliance. Settling tobacco manufacturers are required to make a corporate commitment to reduce youth access to and consumption of tobacco products. The settling tobacco manufacturers are prohibited from entering into agreements to suppress tobacco research and are prohibited from making material misrepresentations of fact regarding the health consequences of using any tobacco product.

Trade Associations and Lobbying. The MSA

requires that the Council for Tobacco Research, the Tobacco Institute, and the Council for Indoor Air Research be disbanded. The MSA also requires that the records of these organizations that relate to any lawsuit be preserved.

Under the MSA, the settling tobacco manufacturers also contractually obligate themselves not to oppose any of the following:

1. Limitations on youth access to vending machines;
2. Inclusion of cigars within the definition of tobacco products;
3. Enhancement of enforcement efforts to identify and prosecute violations of laws prohibiting retail sales to youth;
4. The use of technology to increase the effectiveness of age-of-purchase laws, such as, without limitation, the use of programmable scanners, scanners to read drivers' licenses, or use of other age/ID databanks;
5. Limitations on promotional programs for non-tobacco goods using tobacco products as prizes or give-aways;
6. Enforcement of access restrictions through penalties on youth for possession or use;
7. Limitations on tobacco product advertising in or on school facilities, or wearing of tobacco logo merchandise in or on school property;
8. Limitations on non-tobacco products which are designed to look like tobacco products, such as bubble gum cigars and candy cigarettes; and
9. Legislation banning the manufacture and sale of cigarette packs containing fewer than 20 cigarettes.

Youth Access Restrictions. Under the MSA,

settling tobacco manufacturers can no longer distribute free samples in a facility unless the operator of the facility ensures that no underage individuals are present. Gifts cannot be offered to minors in exchange for the purchase of tobacco products, coupons, or proofs of purchase. Gifts cannot be distributed through the mail without proof of age.

Public Disclosure. Finally, the MSA requires the settling tobacco manufacturers to establish a user-friendly website that includes all documents produced in state and other smoking and health-related lawsuits. These manufacturers must maintain the website through June 30, 2010, and must add to the website all documents produced in future civil actions involving smoking and health cases.

Settlement Payments to the States

Subsequent Participating Manufacturers

The MSA allows for tobacco product manufacturers, in addition to the Original Participating Manufacturers (OPMs), to join the MSA. Such tobacco product manufacturers are known as Subsequent Participating Manufacturers (SPMs). (The definition of OPMs and SPMs under the MSA can be found in the Appendix.) Subsequent participating manufacturers generally share the liability of OPMs under the MSA in the event that their individual market shares in any calendar year exceed 125 percent of their 1997 individual market shares. For purposes of the MSA, however, the 1997 market share (and 125 percent of that market share) equals zero for those SPMs that either: (a) became a signatory to the MSA more than 60 days after the MSA execution date; or (b) had no market share in 1997.

A number of tobacco manufacturers have joined the MSA as SPMs and have met the criteria for making payments under the MSA. As a result,

annual payments to the states include SPM payments.

Unrestricted Settlement Payments to the States

Unrestricted settlement payments to the settling states under the MSA are made up of initial payments, annual payments, and strategic contribution payments. The MSA does not specify or restrict how the states may use these payments under the agreement.

Initial Payments. The MSA contains a schedule of five initial payments, through 2003, that the OPMs must pay to the settling states. The schedule of initial payments under the MSA is detailed in Table 1.

Table 1: Initial Payments to Settling States

Payment Date	Amount
1998*	\$2,400,000,000
January 10, 2000	2,472,000,000
January 10, 2001	2,546,160,000
January 10, 2002	2,622,544,800
January 10, 2003	2,701,221,100

* Held in escrow and released in December, 2000.

The settling states, however, are not guaranteed to receive these sums under the MSA. The initial payments made by the OPMs are subject to a volume adjustment, a non-settling states reduction, and an offset for miscalculated or disputed payments. These variables affecting payment amounts are discussed below.

Annual Payments. As with initial payments, a schedule of annual payments that the OPMs will pay to the settling states was established under the MSA. Unlike the initial payments that were made only until 2003, the annual payments will be made in perpetuity. The schedule of annual payments under the MSA is detailed in Table 2.

As with initial payments, the settling states are

Table 2: Annual Payments to Settling States

Date	Amount
April 15, 2000	\$4,500,000,000
April 15, 2001	5,000,000,000
April 15, 2002	6,500,000,000
April 15, 2003	6,500,000,000
April 15, 2004	8,000,000,000
April 15, 2005	8,000,000,000
April 15, 2006	8,000,000,000
April 15, 2007	8,000,000,000
April 15, 2008	8,139,000,000
April 15, 2009	8,139,000,000
April 15, 2010	8,139,000,000
April 15, 2011	8,139,000,000
April 15, 2012	8,139,000,000
April 15, 2013	8,139,000,000
April 15, 2014	8,139,000,000
April 15, 2015	8,139,000,000
April 15, 2016	8,139,000,000
April 15, 2017	8,139,000,000
2018 and thereafter	9,000,000,000

not guaranteed to receive the full amount of the annual payments provided for under the schedule. The annual payments made by the OPMs are subject to an inflation adjustment, a volume adjustment, a previously settled states reduction, a non-settling states reduction, a non-participating manufacturer adjustment, the offset for miscalculated or disputed payments, a federal tobacco legislation offset, a litigating releasing parties offset and an offset for claims-over. These variables affecting payment amounts are discussed below.

Strategic Contribution Payments. Finally, the MSA provides for a series of strategic contribution payments that the OPMs will pay to the settling states. Beginning April 15, 2008, and on April 15th of each year thereafter through 2017, the OPMs are to make a yearly strategic contribution payment totaling \$861,000,000. The strategic contribution payments are subject to an inflation adjustment, a volume adjustment, the non-participating manufacturer adjustment, the offset for miscalculated or disputed payments, the federal tobacco legislation offset, the litigating releasing parties offset, and the offset for claims-over. These variables affecting

payment amounts are discussed below.

Adjustments, Reductions and Offsets to Unrestricted Settlement Payments

The MSA calls for the following adjustments, reductions and offsets to the unrestricted payments to the settling states. Generally, these are applied in the order listed below.

Inflation Adjustment. The annual and strategic contribution payments are subject to an inflation adjustment. The inflation adjustment percentage applicable to payments in 2000 was equal to the greater of 3% or the "Consumer Price Index Percentage" (CPI%). The CPI% is 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. As 2000 CPI% was equal to 2.68456%, payments under the MSA for that year were subject to an inflation adjustment percentage of 3%.

The inflation adjustment percentage applicable to payments due in years after 2000 is calculated by applying each year the greater of 3% or the CPI% to the inflation adjusted percentage applicable to payments due in the prior year. For example, the inflation adjustment percentage in 2007 was 33.20594% and the CPI% for payments due in 2008 was 3%. Thus, the inflation adjustment percentage applicable in 2008 was 37.20212% (the product of the 3% inflation adjustment applied to the 33.20594% inflation adjustment percentage applicable in 2007, plus the sum of the 2007 inflation adjustment percentage, 33.20594%, and 3%).

Volume Adjustment. The initial, annual and strategic contribution payments are all subject to a volume adjustment. The volume adjustment is primarily based on the aggregate number of cigarettes shipped in or to the fifty United States, the District of Columbia, and Puerto Rico by the OPMs in a given year compared to the base year of 1997. Depending on the change in the aggregate

number of cigarettes shipped in or to these jurisdictions by the OPMs, the volume adjustment may either increase or decrease the initial, annual and strategic contribution payments.

Previously Settled States Reduction. Only annual payments are subject to a previously settled states reduction. Florida, Texas, Mississippi and Minnesota settled with the major tobacco manufacturers prior to the MSA. The previously settled states reduction is determined by multiplying the applicable settlement payment by 12.45%, in the case of payments due in or prior to 2007; by 12.2373756%, in the case of payments due after 2007 but before 2018; and by 11.0666667% in the case of payments due in or after 2018.

Non-Settling States Reduction. The initial and annual payments are subject to a non-settling states reduction. If any state that settled with the OPMs under the MSA was to become a non-settling state through a failure to have the settlement approved in state court, any given initial or annual payment due to the states would be reduced by the subtotal of the payment that would have gone to the non-settling state if it had remained a settling state. This reduction may reduce the overall value of a given initial or annual payment, but does not reduce payments to individual settling states in any way. No settling state has been subject to this reduction.

Non-Participating Manufacturer Adjustment. The annual and strategic contribution payments are subject to a non-participating manufacturer adjustment. The MSA provides for a "model statute" to be enacted by the settling states. The model statute provides for the creation of an escrow fund, requiring non-settling tobacco manufacturers, known as non-participating manufacturers (NPMs), to pay money into the escrow fund as a reserve for future claims. The required escrow fund payments by the NPMs under the model statute is designed to level the playing field between settling tobacco manufacturers and NPMs by requiring that both make similar payments regardless of settlement status under the MSA. A state statute is con-

sidered a model statute if it is enacted exactly as drafted in the MSA, except for particularized state procedural or technical requirements, as a stand-alone piece of legislation. A state statute is considered a qualifying statute if it effectively and fully neutralizes the cost disadvantages that the participating manufacturers experience vis-à-vis non-participating manufacturers as a result of the MSA, but is not a model statute.

If a state does not pass the model statute or a qualifying statute, the state is subject to a reduction in its share of annual and strategic contribution payments. This reduction is known as the non-participating manufacturer adjustment. If a state passes a model statute, but it is subsequently overturned or invalidated by court action, under the MSA a state will risk losing no more than 65% of its payment as a result of the non-participating manufacturer adjustment. If a qualifying statute is enacted by a state but the qualifying statute is subsequently overturned or invalidated by court action, a state's payments would be subject to the complete non-participating manufacturer adjustment.

A state that passes the model statute or a qualifying statute must diligently enforce its provisions to exempt itself from the NPM adjustment. All settling states passed either a model or qualifying statute.

For those states subject to the non-participating manufacturer adjustment, it is applied as follows: if in any year the total aggregate market share of the OPMs (settling tobacco manufacturers) decreases more than 2% from their total aggregate 1997 market share, and an economic consulting firm determines that the provisions of the MSA were a significant factor contributing to their market share loss, payments to states may be reduced based on that loss.

The Wisconsin model statute (1999 Wisconsin Act 122) became effective on May 23, 2000. However, diligent enforcement of the statute (by the Departments of Revenue and Justice) is still

necessary to avoid NPM adjustments.

Offset for Miscalculated or Disputed Payments. The initial, annual and strategic contribution payments are all subject to an offset for miscalculated or disputed payments. If the independent auditor is notified within four years of a payment due date that an OPM has made an underpayment or overpayment, the independent auditor is to promptly determine what payment is due the OPM in the case of an overpayment or what payment is owed the escrow account in the case of an underpayment. There is a separate account within the escrow account for disputed payments. When resolution has been reached regarding a disputed payment, the independent auditor directs the funds be deposited in the appropriate account.

Since the independent auditor must calculate payments before all final data is received, offsets for previous payments can be expected.

Federal Tobacco Legislation Offset. The annual and strategic contribution payments are subject to a federal tobacco legislation offset. Under the MSA, if federal tobacco-related legislation is enacted on or before November 30, 2002, and if such legislation requires settlement payments, taxes or any other payments to be paid by the OPMs, all or a part of which payments are actually made available to settling states, each OPM shall receive a continuing dollar-for-dollar offset for any and all amounts paid by the OPM under the legislation and actually made available to the settling states. If the federal tobacco legislation offset to which an OPM is entitled exceeds the annual and strategic contribution payments owed by an OPM in a given year, the OPM may carry forward any unused federal tobacco legislation offset, and offset future annual and strategic contribution payments with the unused federal tobacco legislation offset balance.

The federal tobacco legislation offset only applies to that portion of federal funds received from OPMs and going to the settling states that are

either unrestricted as to their use, or restricted to any form of health care or to any use related to tobacco (including, but not limited to, tobacco education, cessation, control or enforcement). The federal tobacco legislation offset would not apply if: (a) the funds were earmarked for assistance to tobacco growers or impacted communities; or (b) grant conditions that would require states to take some significant actions or to provide matching funds were placed on the federal funds and a state chose not to participate in the grant program.

This offset will not impact any past or future payments under the MSA as no federal tobacco-related legislation was enacted on or before November 30, 2002.

Litigating Releasing Parties Offset. The annual and strategic contribution payments are subject to a litigating releasing parties offset. Under the MSA, if a releasing party (such as the state, a county or municipality, or a taxpayer) files suit on a released claim and wins a judgment or a settlement against an OPM, the judgment or settlement amount shall give rise to a litigating releasing parties offset that may be used dollar-for-dollar to offset the annual and strategic contribution payments that the OPM would otherwise owe. If the litigating releasing parties offset to which an OPM is entitled exceeds the annual and strategic contribution payments owed by an OPM in a given year, the OPM may carry forward any unused litigating releasing parties offset, and offset future annual and strategic contribution payments with the unused litigating releasing parties offset balance. (The definitions of releasing parties and released claims are included in the Appendix.)

Offset for Claims-Over. The annual and strategic contribution payments are subject to an offset for claims-over (amounts that would be legally owed by an OPM to a non-settling third party for legal claims previously settled between the states and the OPMs under the MSA). If a releasing party wins a judgment or settlement on a released claim against a non-settling party under the MSA, and the non-settling party has a claim-

over against an OPM in regards to the judgment or settlement on the released claim, the OPM shall receive a dollar-for-dollar offset for any amounts paid by the OPM to the non-settling party. If the offset for claims-over to which an OPM is entitled exceeds the annual and strategic contribution payments owed by an OPM in a given year, the OPM may carry forward any unused offset for claims-over, and offset future annual and strategic contribution payments with the unused offset for claims-over balance.

Dedicated Payments

In addition to the unrestricted payments to the states, the MSA provides settlement money for a series of specific purposes.

American Legacy Foundation. The MSA provides for the creation of a non-profit national foundation, which has been created and is called the American Legacy Foundation. The purposes of the American Legacy Foundation are to support: (a) the study of and programs to reduce youth tobacco product usage and youth substance abuse in the states; and (b) the study of and educational programs to prevent diseases associated with the use of tobacco products in the states. The MSA provides base foundation payments of \$250 million over 10 years to support the foundation. The base foundation payments are not subject to any adjustments, reductions, or offsets.

The MSA also provides for the following national public education fund payments to support the work of the foundation: (a) \$250 million on March 31, 1999; and (b) \$300 million annually on each successive March 31, from 2000 through 2003.

The March 31, 1999, payment was not subject to adjustment, while subsequent payments are subject to the inflation adjustment, the volume adjustment and the offset for miscalculated or disputed payments, as described above.

Finally, beginning on April 15, 2004, and on April 15th of each year thereafter, if the sum of the market shares of the participating manufacturers during the entire calendar year immediately preceding the year in which the payment would be due equals or exceeds 99.05%, the OPMs shall make a supplemental payment of \$300 million to fund the national public education functions of the American Legacy Foundation. These supplemental payments are subject to the inflation adjustment, the volume adjustment, the non-settling states reduction and the offset for miscalculated or disputed payments. (The definition of participating manufacturer is included in the Appendix.)

States' Antitrust/Consumer Protection Tobacco Enforcement Fund. The MSA provides for the creation of a States' Antitrust/Consumer Protection Tobacco Enforcement Fund, which is to be established and maintained by the Attorneys General of the settling states, acting through the National Association of Attorneys General (NAAG). Under the MSA, the purpose of the fund is to supplement the settling states': (a) enforcement and implementation of the terms of the MSA and the associated consent decrees; and (b) investigation and litigation of potential violations of laws with respect to tobacco products. The MSA provided for a one-time payment of \$50 million on March 31, 1999 from the OPMs to support this fund.

Annual Payments to the National Association of Attorneys General. The MSA provides that, beginning on December 31, 1998, and on December 31st of each year thereafter, through December 31, 2007, the OPMs must pay \$150,000 to NAAG to support its efforts to coordinate and facilitate the implementation and enforcement of the MSA.

Attorneys' Fees. The MSA provides that the OPMs reimburse for reasonable costs and expenses, as well as the time reasonably expended by internal government attorneys and paralegals in connection with the MSA litigation for the following governmental entities: (a) the Office of the Attorney General of each settling state; (b) the office

of the governmental prosecuting authority for any political subdivision of a settling state with a lawsuit pending against any participating manufacturer as of July 1, 1998; and (c) other appropriate agencies of a settling state and such litigating political subdivision. The MSA provides an aggregate cap of \$150 million for such payments made to the settling states and their political subdivisions and provides that the payments are separate and apart from any other amounts due pursuant to the MSA.

In 1999-00, Wisconsin received \$2,715,700 in one-time reimbursement of government costs and expenses in connection with the MSA litigation. Of this amount, \$230,000 reimbursed the private, non-profit groups that advanced moneys to support the state's tobacco litigation effort. Of the \$2,485,700 remainder, 90% (\$2,237,100) was deposited to the general fund and 10% (\$248,600) was retained by DOJ to offset the costs of prosecution.

Finally, the MSA also provides that the OPMs reimburse reasonable attorneys' fees paid to private outside counsel, if any, retained by settling states in connection with the MSA litigation. These payments to outside counsel are not subject to the \$150 million cap that applies to reimbursement of internal government costs and attorney and paralegal time associated with the MSA litigation. The OPMs and the private firms retained as special counsel in Wisconsin reached independent settlements as to the reimbursement of private counsels' costs and attorneys' fees incurred in connection with the MSA litigation.

Ongoing Enforcement and Implementation Issues

National Association of Attorneys General. The National Association of Attorneys General (NAAG) has an ongoing responsibility to oversee the implementation and enforcement of the MSA. Under the MSA, NAAG will also convene at least

two meetings per year and one major national conference every three years for the purpose of evaluating the success of the MSA, and coordinating efforts by the Attorneys General and the participating tobacco manufacturers to reduce youth smoking.

Independent Auditor. The MSA also provides that, beginning with payments due in 2000, an independent auditor will calculate and determine the amount of all payments owed pursuant to the MSA, the adjustments, reductions and offsets thereto (and all resulting carry-forwards, if any), the allocation of such payments, adjustments, reductions, offsets and carry-forwards among the participating tobacco manufacturers and among the settling states. Pricewaterhouse Coopers has been selected as the independent auditor.

Diligent Enforcement of Wisconsin's Model Statute. In order to avoid a non-participating manufacturer adjustment under the MSA which would reduce the settlement payments owed to Wisconsin, the state must diligently enforce its model statute, s. 995.10 of the statutes. Under the model statute, any tobacco manufacturer selling cigarettes or "roll-your-own" tobacco products to consumers in Wisconsin, either directly or indirectly, after May 23, 2000, must either: (a) become a participating manufacturer under the MSA and, thus, become obligated to make settlement payments under the MSA; or (b) deposit into a qualified escrow fund, by April 15th of every year, the following amounts of money for prior calendar year sales as adjusted for inflation: (1) for 2000, \$.0104712 per cigarette sold after May 23, 2000; (2) for 2001 and 2002, \$.0136125 per cigarette sold; (3) for 2003 through 2006, \$.0167539 per cigarette sold; and (4) for each year after 2006, \$.0188482 per cigarette sold.

A non-participating manufacturer depositing money in escrow receives the interest earned on the escrowed funds. These escrowed funds may only be released to either: (a) pay a court judgment or legal settlement on any released claim (as de-

finied under the MSA) brought against the NPM by the state; or (b) refund the NPM for escrow payments that were greater than legally required. (As a result, these escrowed funds cannot be accessed by the state barring successful legal action). To the extent that escrowed funds are not released under the above provisions, the escrowed funds revert to the relevant NPM 25 years after the date on which the money was placed in escrow. As of October, 2008, NPMs selling cigarettes and "roll-your-own" tobacco products in Wisconsin have escrowed \$2.1 million.

Under s. 995.12 of the statutes, every tobacco product manufacturer whose cigarettes are sold directly or indirectly in Wisconsin, must certify to the Department of Revenue and to the Attorney General, by April 30th of each year, that as of that date the tobacco manufacturer is either a participating manufacturer under the MSA, or is fully compliant with Wisconsin's model statute and annually escrowing required funds. A tobacco product manufacturer must include in its certification a list of its brand families. [A "brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, such as "menthol", "lights", or "kings".] An NPM must include a list of all of its brand families, and, in addition, the number of units sold for each brand family that were sold in the state during the preceding calendar year.

In accordance with s. 995.12 of the statutes, beginning March 1, 2004, the Attorney General was required to develop and make available for public inspection a directory listing all tobacco product manufacturers that have provided current and accurate certifications as required by the Act. The directory was required to also contain a listing of the brand families for these tobacco product manufacturers. It is unlawful to sell any cigarette of a brand family that is not included in the directory.

As of October, 2008, participating manufacturers under the MSA have withheld or paid into a

disputed payments account \$42 million in settlement payments, alleging that these amounts are not owed to Wisconsin under the non-participating manufacturer adjustment. It is the conclusion of DOJ that the state has diligently enforced its model statute and that most, if not all, of these funds will ultimately be released to the state.

MSA are primarily being utilized to make payments to bond holders under the state's initial tobacco securitization transactions. Under the 2007 Act 226 securitization transactions, described in Chapter 2 of this paper, the state will again begin to receive \$50 million annually in unrestricted MSA settlement payments beginning in the 2009-11 biennium.

Settlement Payments to Wisconsin

Under the MSA, Wisconsin's share of unrestricted settlement payments is 2.072039%. Table 3 identifies all unrestricted settlement payments received by the State of Wisconsin under the MSA. Through calendar year 2003, these monies were generally deposited to the general fund as general fund revenues.

Beginning with calendar year 2004, unrestricted settlement payments owed to Wisconsin under the

Table 3: Payments to Wisconsin 1999 Through 2008

Calendar Year	Amount
1999	\$95,721,400
2000	111,779,100
2001	125,563,000
2002	148,156,700
2003	121,976,800
2004	130,254,300
2005	132,092,800
2006	120,855,500
2007	125,776,100
2008	<u>149,184,300</u>
Total	\$1,261,360,000

TOBACCO SECURITIZATION

During two separate legislative sessions, the state has enacted legislation to use its tobacco settlement revenues to support bond issues. Such bond issues are called tobacco securitizations, whereby the state sells the rights to, or uses, its ongoing tobacco settlement revenue stream to support a bond issue. In exchange, the state receives significant up-front funds, in the form of bond proceeds, which are available for expenditure by the state. To date, the Department of Administration (DOA) Secretary was provided authority to securitize the state tobacco settlement revenues to support bond issues in both the 2001 and 2007 legislative sessions. Funding associated with the state's tobacco securitization transactions was included as part of the biennial budgets and biennial budget adjustment bills enacted during these two legislative sessions.

Tobacco Securitization -- 2001 Acts 16 and 109

Under 2001 Act 16 (the 2001-03 budget), the Secretary of DOA was authorized to securitize the state's rights to its tobacco settlement payments. The Secretary can sell, transfer or assign the rights to the Wisconsin Health and Educational Facilities Authority (WHEFA) or to a nonstock, nonprofit corporation formed by WHEFA or the state. After receiving the rights to the state's tobacco settlement payments, the corporation would use the newly-acquired revenue stream to back the issuance of revenue bonds. In return for the tobacco settlement payment revenue, the corporation would provide the state with the proceeds from those bonds. The DOA Secretary was provided the authority to structure the tobacco securitization transaction, including the type of bonds to be issued, the

maturity of the bonds and the timing of the bond issue.

Under Act 16, the securitization transaction was to result in \$450 million in bond proceeds being deposited to the state's general fund in 2001-02. During legislative deliberations on Act 16, it was indicated that the remaining available bond proceeds (estimated at \$570 million at that time) would be deposited to a permanent endowment fund created under the Act. Act 16 would have required that annually 8.5% of the value of the permanent endowment fund, including investment earnings, would be transferred to the general fund. These provisions were modified by 2001 Act 109 (the 2001-03 budget adjustment act), to fully expend all of the proceeds of the securitization transaction in the 2001-03 biennium.

Using its authority under Act 16, DOA carried out the initial securitization transaction, which involved only tax exempt bonds. On April 18, 2002, DOA formed a nonstock, nonprofit corporation called the Badger Tobacco Asset Securitization Corporation (BTASC). The Corporation is governed by a Board of Directors made up of the three individuals appointed by the DOA Secretary. On May 1, 2002, the Corporation priced the tobacco securitization bonds backed by the newly-assigned rights to the state's tobacco settlement payments. Based on that pricing, the state received \$1.567 billion in total bond proceeds with \$1.275 billion of these proceeds available to the state after establishing required reserves and consideration of capitalized interest and issuance costs. The transaction was finalized on May 23, 2002. Under the securitization transaction, the true cost of financing was approximately 6.5% on the \$1.567 billion in revenue bonds issued. Table 4 indicates use of the bond proceeds under the transaction.

Table 4: Uses of Tobacco Securitization Bond Proceeds (Under 2001 Act 109)

Purpose	Amount (In Millions)
Proceeds Available to the State	\$1,275
Debt Service and Other Reserves	137
Capitalized Interest and Expenses	140
Costs of Issuance	15
Total	\$1,567

Under the securitization transaction, the state assigned the rights to the next 30 years of its tobacco settlement payments to BTASC. While 30 years of tobacco settlement payments were pledged to support the bonds issued by the Corporation, fewer years of payments were likely to be needed. Under the securitization undertaken by the state and BTASC, estimates indicated that the bonds could be repaid by as early as 2017, at which time the state would regain the rights to its annual tobacco settlement payments.

Under the provisions of Act 109, \$681.0 million of the bond proceeds available to the state were transferred to the general fund in 2001-02. The remaining \$594.0 million in bond proceeds, which were initially deposited in the permanent endowment fund, as well as \$4.3 million in interest earnings, were used to make a portion of the November, 2002, state shared revenue payments to counties and municipalities across the state in lieu of using GPR to make these payments.

2002 Securitization Transaction Cash Flows

In securitizing its tobacco settlement payments in 2002, the state pledged an estimated \$5.4 billion in tobacco payments over the next 30 years. However, it was expected that the state would actually forego only \$2.5 billion of those payments because 30 years of tobacco payments would not be needed to retire the bonds issued under the securitization transaction. Table 5 indicates the

flow of tobacco settlement payments through 2017-18 under the 2002 transaction. The \$140.5 million in securitization proceeds shown for 2017-18 indicates the release of the debt reserve funds and related interest earnings required to be held until the bonds are repaid. These amounts were expected to be used instead to make the last debt service payments on the bonds. As indicated Table 5, under the 2002 transaction, tobacco payment revenues would not be available to the state until 2017-18, at which time it was estimated that the bonds would be repaid, or 2016-17, if the debt service reserve funds were used to make the final principal and interest payments on the bonds.

Table 5: Flow of Tobacco Payment Funds Under Tobacco Securitization (\$ in Millions)

	Tobacco Payments	Securitization Proceeds	Net Debt Service Costs	Funds Available to State
2001-02	\$0	\$681.0	\$0.0	\$681.0
2002-03	0	594.0	0.0	594.0
2003-04	135.6	0	135.6	0.0
2004-05	137.1	0	137.1	0.0
2005-06	138.9	0	138.9	0.0
2006-07	140.7	0	140.7	0.0
2007-08	167.6	0	167.6	0.0
2008-09	170.0	0	170.0	0.0
2009-10	172.2	0	172.2	0.0
2010-11	174.7	0	174.7	0.0
2011-12	177.2	0	177.2	0.0
2012-13	179.5	0	179.5	0.0
2013-14	181.8	0	181.8	0.0
2014-15	184.0	0	184.0	0.0
2015-16	186.6	0	186.6	0.0
2016-17	189.2	0	189.2	0.0
2017-18	186.5	140.5	76.6	250.4

In analyzing the 2002 transaction, total cash flows available to the state under the tobacco settlement and the securitization transaction were compared. In addition, a comparison of the present value of cash flow streams under the settlement payments and securitization was provided during legislative deliberations on the transaction. Present value is the value in today's dollars assigned to an amount of money or stream of payments to be re-

ceived in the future at a specified discount rate. Table 6 compares the expected cash flows to the state and the present value of those cash flows under the tobacco settlement payments and under the 2002 securitization taxation. An annual discount rate of 6.5% was used in calculating the present value of the cash flow streams under each scenario.

As indicated in Table 6, under the 2002 tobacco securitization transaction carried out by the state, total cash flows to the state were expected to be reduced by \$996.4 million when compared to just receiving its tobacco settlement revenues through 2018, the year in which the 2002 tobacco securitization bonds are estimated to be repaid. Based on these estimated cash flows, under this transaction, the state would receive approximately 60.5 cents back for every \$1 of tobacco payments it would have otherwise received if the securitization transaction had not taken place. On a present value basis, which compares the discounted value to the state of the cash flows under each transaction and is believed to be the better measure for determining whether such a transaction is beneficial to the state, the tobacco securitization transaction was expected

Table 6: Comparison of Cash Flows and Present Value under the 2002 Tobacco Securitization (\$ in Millions)

	Total Cash Flow	Present Value
No Securitization		
Tobacco Payments*	\$2,521.8	\$1,404.7
2002 Tobacco Securitization		
Proceeds Expended in 2001-03	\$1,275.0	\$1,275.0
Reserves and Residual Amounts	<u>250.4</u>	<u>88.5</u>
Total	\$1,525.4	\$1,363.5
Impact of the Securitization		
Securitization	\$1,525.4	\$1,363.5
Less No Securitization	<u>-2,521.8</u>	<u>-1,404.7</u>
Difference in Value	-\$996.4	-\$41.2

*Indicates only the tobacco payments from 2003-04 through 2017-18 that are estimated to be needed to retire the tobacco securitization bonds. Total payments through 2031-32, the period for which the payments are pledged for the repayment of the bonds, are \$5.4 billion.

to cost the state \$41.2 million in value compared to not securitizing its tobacco settlement payments.

**Securitization Transaction --
2007 Acts 20 and 226**

Under 2007 Act 20, a second securitization transaction was proposed by DOA, using the current law authority provided to BTASC. The second securitization transaction considered at that time would have involved BTASC refinancing its existing bonds and restructuring the repayment of those bonds to generate \$50 million annually. The \$50 million annually would have been deposited to the permanent endowment fund and, under Act 20, transferred each year to the medical assistance (MA) trust fund. This transaction was never carried out and was modified by 2007 Act 226 (the 2007-09 budget adjustment act).

Under Act 226, the state, rather than BTASC, was provided authority to issue up to \$1.7 billion in appropriation obligations to refund the outstanding BTASC bonds, fund an upfront deposit of \$309 million in 2008-09 to the MA trust fund, and repurchase the rights to the state tobacco settlement revenues. Appropriation obligations are not considered public debt of the state, but rather are backed by a pledge of the state to appropriate funds in an amount sufficient to meet the annual debt service payment on the bonds. Under the Act 226 transaction, the debt service on the appropriation obligations would be repaid from a general fund appropriation through 2028-29. These costs to the general fund are to be offset by the annual deposit of most of the repurchased tobacco settlement revenues to the general fund during that same period.

Under the Act 226 transaction, the state expects to pay a lower interest rate on the appropriation obligation bonds compared to the existing BTASC revenue bonds, which would lower the required

annual debt service costs associated with the bonds. Further, the expected final repayment date on the bonds issued under the transaction is expected to be extended from the current repayment date of 2018 to 2029, which will also significantly lower the annual debt service payment needed to retire the bonds. The final maturity of the bonds could be extended from 2032 under the existing securitization transaction, to 2037, the projected date of rated final maturity of the state issued appropriation obligation bonds.

2007 Act 226 Expected Cash Flows

By extending the expected final repayment date by twelve years, the required debt service payment on the bonds issued under this securitization proposal is expected to be reduced by \$50 million annually beginning in 2009-10. As part of the transaction, the state is expected to issue appropriation obligation bonds sufficient to generate additional revenues in 2008-09. In total, the transaction is expected to provide the state a one-time amount of \$309 million in 2008-09 (\$209 million in additional funds compared to 2007 Act 20) for deposit in the permanent endowment fund, a segregated fund established in 2001 Act 16 to which securitization bond proceeds are to be deposited. These funds would then be transferred to the MA trust fund. The \$309 million in MA trust fund revenues in 2008-09 will be used to fund medical assistance costs in 2008-09. A corresponding reduction in the general purpose revenue (GPR) appropriation for MA expenditures of \$50 million in 2007-08 and \$259 million in 2008-09 was made under 2007 Acts 20 and 226.

Table 7 presents an illustration of the potential tobacco settlement revenues to be received by the state through 2029-30 under the 2002 securitization transaction and under the proposed Act 226 transaction.

Table 7: Example of Potential Tobacco Settlement Revenues Available to the State Under the 2002 Securitization Transaction and Under the Expected Act 226 Transaction (\$ in Millions)

Fiscal Year	Estimated GPR Under 2002 Securitization	Act 226 Structure of Net Revenues		
		MA Trust Fund	General Fund Net of Debt Service	Total
2008-09	\$0	\$309	\$0	\$309
2009-10	0	50	0	50
2010-11	0	50	0	50
2011-12	0	50	0	50
2012-13	0	50	0	50
2013-14	0	50	0	50
2014-15	0	50	0	50
2015-16	0	50	0	50
2016-17	0	50	0	50
2017-18	115	50	0	50
2018-19	179	50	0	50
2019-20	181	50	0	50
2020-21	183	50	0	50
2021-22	185	50	0	50
2022-23	188	50	0	50
2023-24	190	50	0	50
2024-25	192	50	0	50
2025-26	195	50	0	50
2026-27	197	50	0	50
2027-28	200	50	0	50
2028-29	203	50	111	161
2029-30	206	50	156	206

As indicated in the table, the Act 226 tobacco securitization transaction is expected to involve the restructuring of the timing of future cash flows to the state. The MA trust fund is to receive \$309 million in 2008-09, and \$50 million in tobacco settlement revenues annually from 2009-10 through 2029-30 through transfers from the permanent endowment fund. In exchange, the state will effectively forgo its expected annual tobacco settlement payments ranging from \$115 million to \$200 million from 2017-18 through 2027-28. These revenues will be used to offset the costs of the GPR debt service payments on the appropriation obligation bonds.

Under the Act 226 transaction, the state is expected to receive \$1,626 million from 2008-09

through 2029-30, but would effectively forgo \$2,414 million over the same period. This results in a net reduction of \$788 million in revenues to the state over that period. A comparison can be made of the two expected cashflow streams using a net present value calculation, and an annual discount rate of 5.23%, which was the projected interest rate on the bonds at the time that Act 226 was considered by the Legislature. This calculation indicates that the revenues under the transaction from 2008-09 through 2029-30 would have an estimated net present value of \$980 million. This compares to an estimated net present value of \$1,068 million for the expected tobacco settlement revenues under the 2002 transaction. Based on these calculations, the net present value of the revenues that would be received by the state under the Act 226 transaction would be an estimated \$88 million less than under prior law. Table 8 provides a comparison of the cash flows and present value of the Act 226 transaction with existing law.

Table 8: Comparison of Cash Flows and Present Value Through 2029-30 (\$ in Millions)

	Total Cash Flow	Present Value
Existing Law		
Tobacco Payments	\$2,414	\$1,068
Act 226 Transaction		
Proceeds Expended in 2007-09	\$309	\$309
Annual Residual Tobacco Payments	<u>1,317</u>	<u>671</u>
Total	\$1,626	\$980
Impact of Act 226 Transaction		
Act 226 Transaction	\$1,626	\$980
Less No Transaction	<u>-2,414</u>	<u>-1,068</u>
Difference in Value	-\$788	-\$88

The information included in Tables 7 and 8 is based on the market conditions that existed at the time of legislative deliberations on the proposed transaction. Because the financial markets have been extremely volatile in 2008, the actual cashflows and costs of financing could vary significantly from those used in the description of the transactions. As of December, 2008, the state had

yet to issue the appropriation bonds needed to carry out the Act 226 transaction.

Analysis of State Risk Under the Act 226 Transaction

The state may take on some additional risk associated with the Act 226 tobacco securitization transaction. Under the 2002 tobacco securitization transaction, the state, from a legal standpoint, had no legal liability associated with the BTASC bonds in the event the tobacco settlement revenues are not sufficient to meet the debt service payments on the bonds. However, due to the close association of the state with BTASC, it may have been difficult from a bond market perspective for the state to allow BTASC to default on the bonds. From a practical standpoint, tobacco settlement revenues would have had to decline significantly before BTASC would have been in default on its tobacco bonds. BTASC would have been only considered in default on the tobacco bonds if it failed to make the annual debt service payments that were based on the 30-year repayment schedule, not under the schedule for the projected pre-payment date of 2018. It was unlikely that annual tobacco settlement revenues would experience such a significant reduction that BTASC would default on the 30-year repayment schedule, which requires significantly lower annual debt service payments.

Under the Act 226 securitization transaction, the state, by issuing appropriation obligation bonds, is fully reassuming the risk associated with any potential decline in future tobacco settlement revenues. Each year the state will appropriate GPR to pay debt service on the bonds. It is intended that the cost of this debt service will be offset each year by the receipt of tobacco settlement moneys by the state. However, even if the tobacco settlement revenues would decline to a level in any year that is below the amounts necessary to make the annual principal and interest payments on the appropria-

tion obligations, the state would still have to appropriate the full amount of GPR needed to pay the debt service.

Transfer of Securitization Revenues to the Medical Assistance Trust Fund

Under the provisions of 2007 Act 20, \$50 million annually, beginning in 2007-08, would have been transferred from the permanent endowment fund to the MA trust fund. The permanent endowment fund was a segregated fund established under 2001 Act 16 for the deposit of bond proceeds associated with the state's 2002 securitization transaction. Act 20 increased funding for MA benefits by \$50 million SEG in 2007-08 and 2008-09 from the MA trust fund, and reduced GPR funding budgeted for MA benefits by a corresponding amount in each year.

The 2007 Act 20 provisions were modified by 2007 Act 226, by increasing the amount that would be transferred in the 2007-09 biennium by \$209 million, so that a total of \$309 million would be transferred to the MA trust fund in the 2007-09 biennium. Act 226 reduced GPR funding budgeted for MA benefits by \$209 million GPR in 2008-09 and

increased funding budgeted for MA benefits correspondingly from the MA trust fund to reflect the additional transfer of funds from the permanent endowment fund to the MA trust fund. Act 226 modified the Act 20 provision that required that \$50 million be transferred annually from the permanent endowment fund to the MA trust fund so that the \$50 million annual transfer would first occur in the 2009-10 fiscal year.

The MA trust fund supports state MA benefits costs that would otherwise be funded with GPR. In the 2007-09 biennium, the primary sources of revenue to the MA trust fund include: (a) revenue transferred from the permanent endowment fund (\$309 million); (b) revenue transferred from the injured patients and families compensation fund (\$200 million); (c) federal MA revenue the state collects under the nursing home certified expenditure program (\$77 million); (d) revenue collected from an assessment on licensed beds in nursing homes and intermediate care facilities for the mentally retarded assessment (\$83 million); and (e) program revenues transferred from the University of Wisconsin System's general program operations receipts appropriation under an intergovernmental transfer program created in 2007 Act 20 (\$30 million).

APPENDIX

Selected Definitions Under the Master Settlement Agreement

"Participating manufacturer" means a tobacco product manufacturer that is or becomes a signatory to this agreement, provided that: (a) in the case of a tobacco product manufacturer that is not an original participating manufacturer, such tobacco product manufacturer is bound by the MSA and the consent decree carrying out the MSA (or, in any settling state that does not permit amendment of the original consent decree, a consent decree containing terms identical to those set forth in the original consent decree) in all settling states in which the MSA 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 states in which the settling state has file a released claim against it); and (b) in the case of a tobacco product manufacturer that signs the MSA after the MSA execution date, such tobacco product manufacturer, within a reasonable period of time after signing the MSA, 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".

"Original participating manufacturers" means the following: Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated and R.J. Reynolds Tobacco Company, and the respective successors of each of the foregoing.

"Subsequent participating manufacturer" means a tobacco product manufacturer (other than an "original participating manufacturer") that: (a) is a "participating manufacturer"; and (b) is a signatory to this agreement, regardless of when

such tobacco product manufacturer became a signatory to the MSA. "Subsequent participating manufacturer" shall also include the successors of a "subsequent participating manufacturer".

"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. "Releasing parties" also means, to the full extent of the power of the settling states to release past, present and future claims, the following: (a) 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 (b) 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 participated in the MSA, (1) 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 (2) 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.

"Released claims" means either of the following:

For past conduct, acts or omissions (including any damages incurred in the future arising from such past conduct, acts or omissions), they refer to 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 brought by the settling states and settled by the MSA, 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 settling states actions settled by the MSA for outstanding liability under existing licensing (or similar) fee laws or ex-

isting 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 the MSA); or

For future conduct, acts or omissions, they refer only to 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.