

(b) 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.

(c) 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.

(d) 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.

(e) On _____, 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.

(f) 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.

Section __. Definitions.

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

(b) "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 ten percent or more, and the term "person" means an individual, partnership, committee, association, corporation or any other organization or group of persons.

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

(d) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) 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 (3) any roll of tobacco wrapped in any substance containing tobacco 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 described in clause (1) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type,

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) (1) 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) --

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

2000: \$.0104712 per unit sold after the date of enactment of this Act;

for each of 2001 and 2002: \$.0136125 per unit sold after the date of enactment of this Act;

for each of 2003 through 2006: \$.0167539 per unit sold after the date of enactment of this Act;

for each of 2007 and each year thereafter: \$.0188482 per unit sold after the date of enactment of this Act.

(2) A tobacco product manufacturer that places funds into escrow pursuant to paragraph (1) 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 subparagraph (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 in a particular year was greater than the State's allocable share of the total payments that such manufacturer would have been required to make in that year under the Master Settlement Agreement (as determined pursuant to section IX(i)(2) of the Master Settlement Agreement, and before any of the adjustments or offsets described in section IX(i)(3) of that Agreement other than the Inflation Adjustment) 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 subparagraphs (A) or (B), funds shall be released from escrow and revert back to such tobacco product manufacturer twenty-five 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 this subsection shall annually certify to the Attorney General [or other State official] that it is in

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."

(e) "Master Settlement Agreement" means the settlement agreement (and related documents) entered into on _____, 1998 by the State and leading United States tobacco product manufacturers.

(f) "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 section ___(b)-(c) of this Act.

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

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

(i) "Tobacco Product Manufacturer" means an entity that after the date of enactment of this Act directly (and not exclusively through any affiliate):

(1) 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 subsections 11(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection 11(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);

(2) 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

(3) becomes a successor of an entity described in paragraph (1) or (2).

The term "Tobacco Product Manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within any of (1) - (3) above.

(j) "Units sold" means the number of individual cigarettes sold in the State by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the State on packs (or "roll-your-own" tobacco containers) bearing the excise tax stamp of the State. The [fill in name of responsible state agency] shall promulgate such regulations as are necessary to ascertain the amount of State excise tax paid on the cigarettes of such tobacco product manufacturer for each year.

Section __. Requirements.

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

compliance with this subsection. The Attorney General [or other State official] 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 this section. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this section shall --

A. be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a violation of this subsection, may impose a civil penalty [to be paid to the general fund of the state] in an amount not to exceed 5 percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 100 percent 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 this section. The court, upon a finding of a knowing violation of this subsection, may impose a civil penalty [to be paid to the general fund of the state] in an amount not to exceed 15 percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 300 percent 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.

Each failure to make an annual deposit required under this section shall constitute a separate violation.

Source: *Master Settlement Agreement*, National Association of Attorneys General Website (<http://www.naag.org/settle.htm>)



APPENDIX C - Calculating the Inflation Adjustment Percentages

Payment Year	Hypothetical CPI%	Percentage to be applied on the Inflation Adjustment Percentage for the prior year (i.e., the greater of 3% or the CPI%)	Inflation Adjustment Percentage
2000	2.4%	3.0%	3.0000000%
2001	2.1%	3.0%	6.0900000%

2002	3.5%	3.5%	9.8031500%
2003	3.5%	3.5%	13.6462603%
2004	4.0%	4.0%	18.1921107%
2005	2.2%	3.0%	21.7378740%
2006	1.6%	3.0%	25.3900102%

Using the hypothetical Inflation Adjustment Percentages set forth the chart above:

- the base payment amount for 2002 of \$6,500,000,000 as adjusted for inflation would equal \$7,137,204,750;
- the base payment amount for 2004 of \$8,000,000,000 as adjusted for inflation would equal \$9,455,368,856;
- the base payment amount for 2006 of \$8,000,000,000 as adjusted for inflation would equal \$10,031,200,816.

Source: *Master Settlement Agreement*, National Association of Attorneys General Website
(<http://www.naag.org/settle.htm>)



APPENDIX D - CALCULATING THE NON-PARTICIPATING MANUFACTURERS ADJUSTMENT

The "NPM Adjustment Percentage" shall be calculated as follows:

- If the **Market Share Loss** for the year immediately preceding the year the payment is due is less than or equal to 0 (zero), then there will be no NPM Adjustment.
- If the **Market Share Loss** for the year immediately preceding the year the payment is due is greater than 0 (zero) and less than or equal to 16 2/3 percentage points, then the NPM Adjustment Percentage will be equal to the product of Market Share Loss (x) and 3 (y).
- If the **Market Share Loss** for the year immediately preceding the year the payment is due is greater than 16 2/3 percentage points, the NPM Adjustment Percentage will be equal to the sum of 50 percentage points (x) and (y) which is equal to the product of (1) the **Variable Multiplier** and (2) the result of **Market Share Loss** minus 16 2/3 percentage points. (See definitions below for additional detail).

Definitions:

- "Base Aggregate Participating Manufacturer Market Share" means the result of (x) the sum of the applicable Market Shares (the applicable Market Share to be that for 1997) of all present and former Tobacco Product Manufacturers that were Participating Manufacturers during the entire calendar year

immediately preceding the year in which the payment in question is due minus (y) 2 (two) percentage points.

- "Actual Aggregate Participating Manufacturer Market Share" means the sum of the applicable Market Shares of all present and former Tobacco Product Manufacturers that were Participating Manufacturers during the entire calendar year immediately preceding the year in which the payment in question is due (the applicable Market Share to be that for the calendar year immediately preceding the year in which the payment in question is due).
- "Market Share Loss" means the result of (x) the Base Aggregate Participating Manufacturer Market Share minus (y) the Actual Aggregate Participating Manufacturer Market Share.
- "Variable Multiplier" equals 50 divided by the result of (x) the Base Aggregate Participating Manufacturer Market Share minus (y) 16 2/3 percentage points.

Source: *Master Settlement Agreement*, National Association of Attorneys General Website (<http://www.naag.org/settle.htm>)



APPENDIX E – Total Payments to Each State Through 2025

Alabama	\$3,166,302,118.81
Alaska	\$668,903,056.50
Arizona	\$2,887,614,909.02
Arkansas	\$1,622,336,125.69
California	\$25,006,972,510.74
Colorado	\$2,685,773,548.89
Connecticut	\$3,637,303,381.55
Delaware	\$774,798,676.89
D.C.	\$1,189,458,105.56
Florida	\$0.00
Georgia	\$4,808,740,668.60
Hawaii	\$1,179,165,923.07
Idaho	\$711,700,479.23

Illinois	\$9,118,539,559.10
Indiana	\$3,996,355,551.01
Iowa	\$1,703,839,985.56
Kansas	\$1,633,317,646.19
Kentucky	\$3,450,438,586.10
Louisiana	\$4,418,657,915.22
Maine	\$1,507,301,275.81
Maryland	\$4,428,657,383.58
Mass.	\$7,913,114,212.77
Michigan	\$8,526,278,033.60
Minnesota	\$0.00
Mississippi	\$0.00
Missouri	\$4,456,368,286.30
Montana	\$832,182,430.63
Nebraska	\$1,165,683,457.48
Nevada	\$1,194,976,854.76
New Hampshire	\$1,304,689,150.27
New Jersey	\$7,576,167,918.47
New Mexico	\$1,168,438,809.05
New York	\$25,003,202,243.12
North Carolina	\$4,569,381,898.24
North Dakota	\$717,089,369.09
Ohio	\$9,869,422,448.51
Oklahoma	\$2,029,985,862.29
Oregon	\$2,248,476,833.11
Penn.	\$11,259,169,603.46

Rhode Island	\$1,408,469,747.28
South Carolina	\$2,304,693,119.82
South Dakota	\$683,650,008.54
Tennessee	\$4,782,168,127.09
Texas	\$0.00
Utah	\$871,616,513.42
Vermont	\$805,588,329.25
Virginia	\$4,006,037,550.26
Washington	\$4,022,716,266.79
West Virginia	\$1,736,741,427.33
Wisconsin	\$4,059,511,421.32
Wyoming	\$486,553,976.10
American Samoa	\$29,812,995.31
N. Mariana Islands	\$16,530,900.80
Guam	\$42,978,803.27
US Virgin Island	\$34,010,102.11
Puerto Rico	\$2,196,791,813.07
Total Payments	\$195,918,675,920.00

Source: *Master Settlement Agreement*, National Association of Attorneys General Website (<http://www.naag.org/settle.htm>)



APPENDIX F – STATUTORY AND REGULATORY BASIS FOR MEDICAID RECOUPMENT (Health Care Financing Administration’s Interpretation)

- Section 1903(d) of the Social Security Act (the statutory basis for the Health Care Financing

Administration's opinion that state tobacco settlement funds, attributable to Medicaid, should be subject to recoupment)

"(2)(A) The Secretary shall then pay to the State, in such installments as he may determine, the amount so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection."

"(2)(B) Expenditures for which payments were made to the State under subsection (a) shall be treated as an overpayment to the extent that the State or local agency administering such plan has been reimbursed for such expenditures by a third party pursuant to the provisions of its plan in compliance with section 1902(a)(25)..."

"(2)(3) The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection."

• Additional citations of Federal law and regulation used by the federal government to support the recoupment of state tobacco settlement funds

42 U.S. C. 1396a(a)(25)(A) – establishes that it is the State's responsibility 'to ascertain the legal liability of third parties...to pay for care and services available under the [State's Medicaid] plan.'" (Effective 3/31/68)

42 CFR 433.136 – defines 'third party' as "any individual, entity or program that is or may be liable to pay all or part of the expenditures for medical assistance furnished under a State plan."

42 CFR 433.140(c) – describes the state obligation as follows: "If the State receives FFP [Federal financial participation] in Medicaid payments for which it receives third party reimbursement, the State must pay the Federal government a portion of the reimbursement determined in accordance with the FMAP [Federal medical assistance percentage] for the State."

Source: Statement of Nancy-Ann Min DeParle, Administrator, Health Care Financing Administration, "Medicaid and Tobacco Settlements," Subcommittee on Health and the Environment, Committee on Commerce, U.S. House of Representatives, December 8, 1998.

Note: The full text of Administrator DeParle's testimony can be obtained from the Health Care Financing Administration website at <http://www.hcfa.gov/testmony/tobac1.htm>.



 **AFI Health Committee**

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Visitor counts for this page.

Nelson, Robert

From: Hughes, Ed J. [hughesej@DOJ.STATE.WI.US]
Sent: Tuesday, March 02, 1999 3:37 PM
To: Nelson, Robert
Subject: Tobacco legislation

Bob:

1. The tobacco settlement agreement was entered into on November 23, 1998.
2. Other than providing a copy of the settlement agreement to public libraries, as you mentioned, the only other way I can think of to make it available is to mention that the agreement may be downloaded from the web site of the National Association of Attorneys General at <<http://www.naag.org/tob2.htm>>.
3. The tobacco settlement agreement may be cited as Exhibit A to the Consent Decree and Final Judgment entered in State of Wisconsin v. Phillip Morris Incorporated, et al., Case No. 97-CV-326 (Dane County Circuit Court), on December 4, 1998.

I hope this is the information you're looking for. Let me know if it is not, or if there is anything else you need.

Ed Hughes



TODAY
State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-1661/Px
RPN:cmh:hmh

2

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 AN ACT *to create* 895.10 of the statutes; **relating to:** an agreement between the
2 state and tobacco product manufacturers.

regen cat

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 **SECTION 1.** 895.10 of the statutes is created to read:

4 **895.10 Tobacco product agreement. (1) DEFINITIONS.** In this section:

5 (a) "Adjusted for inflation" means increased in accordance with the formula for
6 an inflation adjustment in exhibit C of the master settlement agreement.

7 (b) "Affiliate" means a person who directly or indirectly owns or controls, is
8 owned or controlled by or is under common ownership or control with, another

9 (9) person. In this paragraph, "owns", "owned" and "ownership" means ownership of an
10 equity interest, or the equivalent of an equity interest, of 10% or more.

1 (c) "Allocable share" means the percentage set forth for Wisconsin, as listed in
2 Exhibit A of the master settlement agreement, without regard to any subsequent
3 alteration or modification of Wisconsin's percentage share agreed to by or among any
4 states or, solely for the purpose of calculating payments under subsection IX (c) (2)
5 of the master settlement agreement and corresponding payments under subsection
6 IX (i) of the master settlement agreement, the percentage disclosed for Wisconsin
7 under subsection IX (c) (2) (A) of the master settlement agreement prior to June 30,
8 1999, without regard to any subsequent alteration or modification of Wisconsin's
9 percentage share agreed to by or among any states.

****NOTE: I recreated the definitions given in the master settlement, because that document is not easily available to the public. However, some of these definitions are extremely long, complicated and difficult to understand.

10 (d) 1. "Cigarette" means any product that contains nicotine, is intended to be
11 burned or heated under ordinary conditions of use, and consists of or contains any
12 of the following:

13 a. Any roll of tobacco wrapped in paper or in any substance not containing
14 tobacco.

15 b. Tobacco, in any form, that is functional in the product, which, because of its
16 appearance, the type of tobacco used in the filler, or its packaging and labeling, is
17 likely to be offered to, or purchased by, consumers as a cigarette.

18 c. Any roll of tobacco wrapped in any substance containing tobacco which,
19 because of its appearance, the type of tobacco used in the filler, or its packaging and
20 labeling, is likely to be offered to, or purchased by, consumers as a cigarette described
21 in this subdivision.

22 2. The term "cigarette" includes "roll-your-own" tobacco which, because of its
23 appearance, type, packaging or labeling is suitable for use and likely to be offered to,

State of ✓

1 or purchased by, consumers as tobacco for making cigarettes. For purposes of this
2 paragraph, 0.09 ounces of "roll-your-own" tobacco shall constitute one individual
3 cigarette.

CV

4 (e) "Consent decree" means the decree signed by this state in the case, ~~the~~
5 ^{Dane} county circuit court, dated ^{December 4,} 1998.

~~Wisconsin v. Phillip Morris, Inc., et al., Case No. 97-CV-328~~

6 (f) "Master settlement agreement" means the settlement agreement and
7 related documents entered into on ^{November 23,} 1998, by this state and the leading U.S. tobacco
8 product manufacturers.

master settlement

****NOTE: Because many references in this bill are to the agreement, which is not readily available, perhaps additional language should be added in the statutes requiring the department of justice or some other agency to place a copy of the agreement in at least one public place in every area of the state, such as a public library, the clerk of circuit court or the county clerk or the county law library. In addition, the revisor of statutes should be required to publish the agreement in the administrative register, to give official notice to the public of its contents. ^{see Section 2 of this draft.}

9 (g) "Original participating manufacturers" means Brown & Williamson
10 Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated and
11 R.J. Reynolds Tobacco Company, and the respective successors of each of the
12 ~~companies~~ ^{these companies} Except as expressly provided in the master settlement agreement, once
13 ~~a company~~ ^{a company} becomes an original participating manufacturer, that ~~entity~~ ^{company} shall
14 permanently retain the status of original participating manufacturer.

this definition for from the master settlement

****NOTE: Although this definition is not included in list of definitions in the model statute, it is referred to in the definition of "tobacco product manufacturer", so I added it to the draft.

15 (h) 1. "Participating manufacturer" means a tobacco product manufacturer
16 that is or becomes a signatory to the master settlement agreement, provided that:

17 a. In the case of a tobacco product manufacturer that is not an original
18 participating manufacturer, the tobacco product manufacturer is bound by the
19 master settlement agreement and the consent decree or, in any settling state that
20 does not permit amendment of the ^{original} consent decree, a consent decree containing terms

SECTION 1

(1) identical to those set forth in the ^{original} consent decree in all settling states in which the
2 master settlement agreement and the consent decree binds original participating
3 manufacturers, provided, however, that the tobacco product manufacturer need only
4 become bound by the consent decree in those settling states in which the settling
5 state has filed a released claim against the tobacco product manufacturer.

6 b. In the case of a tobacco product manufacturer that signs the master
7 settlement agreement after November 23, 1998, the tobacco product manufacturer,
8 within a reasonable period of time after signing the master settlement agreement,
9 makes any payments, including interest at the prime rate, that it would have been
10 obligated to make in the intervening period had it been a signatory as of November
11 23, 1998.

(12) 2. "Participating manufacturer" ~~shall~~ also include ⁵ the successor of a
13 participating manufacturer. Except as expressly provided in the master settlement
(14) agreement, once a ^{company} ~~entity~~ becomes a participating manufacturer, that ~~entity~~ ^{company} shall
15 permanently retain the status of participating manufacturer. Each participating
16 manufacturer shall regularly report its shipments of cigarettes in or to the fifty
17 United States, the District of Columbia and Puerto Rico to Management Science
18 Associates, Inc. or a successor entity. Solely for the purpose of calculations under
19 subsection IX (d) of the master settlement agreement, a tobacco product
20 manufacturer that is not a signatory to the master settlement agreement shall be
21 deemed to be a participating manufacturer if the original participating
22 manufacturers unanimously consent in writing.

23 (i) "Qualified escrow fund" means an escrow arrangement with a federally or
24 state chartered financial institution having no affiliation with any tobacco product
(25) manufacturer and having assets of at least \$1,000,000,000 where the ^{escrow} arrangement

1 requires the financial institution to hold the escrowed funds' principal for the benefit
 2 of releasing parties and prohibits the tobacco product manufacturer placing the
 3 funds into escrow from using, accessing or directing the use of the funds' principal
 4 except as is consistent with sub. ^{(2)(b) 2. and 3 on} ~~sub. 10~~

5 (j) "Released claims" means:

6 1. For past conduct, acts or omissions, including any damages incurred in the
 7 future arising from the past conduct, acts or omissions, those claims directly or
 8 indirectly based on, arising out of or in any way related ~~to the use, sale, distribution,~~
 9 use, sale, distribution, manufacture, development, advertising, marketing or health
 10 effects of, the exposure to, or research, statements, or warnings regarding, tobacco
 11 products, including the claims asserted in the actions identified in Exhibit D of the
 12 master settlement agreement, or any comparable claims that were, could be or could
 13 have been asserted now or in the future in those actions or in any comparable action
 14 in federal ^{or} state ~~state~~ court brought by a settling state or a releasing party, whether
 15 or not ~~such~~ ^{the} settling state or releasing party has brought ~~such~~ ^{an} action, except for claims
 16 not asserted in the actions identified in Exhibit D of the master settlement
 17 agreement for outstanding liability under existing licensing or similar fee laws or
 18 existing tax laws, but not excepting claims for any tax liability of the tobacco-related
 19 organizations or of any released party with respect to the tobacco-related
 20 organizations, which claims are covered by the release and covenants set forth in the
 21 master settlement agreement.

22 2. For future conduct, acts or omissions, only those monetary claims directly
 23 or indirectly based on, arising out of or in any way related to ~~the use of or exposure to~~
 24 use of or exposure to tobacco products manufactured in the ordinary course of

SECTION 1

1 business, including without limitation any future claims for reimbursement of
2 health care costs allegedly associated with the use of or exposure to tobacco products.

3 (k) "Releasing parties" means each settling state and any of ^{a settling states} ~~the~~ past, present
4 and future agents, officials acting in their official capacities, legal representatives,
5 agencies, departments, commissions and divisions, and also means, to the full extent
6 of the power of the signatories of the master settlement agreement to release past,
7 present and future claims, all of the following:

8 1. Any settling state's subdivisions including municipalities, counties, villages,
9 unincorporated districts and hospital districts, public instrumentalities and public
10 educational institutions.

11 2. Persons acting in a sovereign, quasi-sovereign, private attorney general,
12 taxpayer, or any other capacity, whether or not any of them participate in this
13 settlement, to the extent that ~~any such~~ ^{the} person is seeking relief on behalf of or
14 generally applicable to the general public in the settling state or the people of the
15 state, as opposed solely to private or individual relief for separate and distinct
16 injuries, or is seeking recovery of health care expenses, other than premium or
17 capitation payments for the benefit of present or retired state employes, paid or
18 reimbursed, directly or indirectly, by a settling state.

19 (L) "Settling state" means any state that signs the master settlement
20 agreement on or before November 23, 1998. The term "settling state" does not
21 include the ~~the~~ States of Mississippi, Florida, Texas and Minnesota and any state as to
22 which the master settlement agreement has been terminated.

23 (m) "Tobacco products" means cigarettes and smokeless tobacco products.

Handwritten note: ****NOTE: This definition, taken from the master settlement agreement, is circular. It defines the term using the same term. Instead, the definition should read something

like "Cigarettes and smokeless products made from the leaves of the cultivated plant, genus Nicotiana, of the nightshade family".

1 (n) 1. "Tobacco product manufacturer" means an entity that after the effective
2 date of this paragraph [revisor inserts date], directly, and not exclusively through
3 any affiliate, meets any of the following criteria:

4 a. Manufactures cigarettes anywhere that the manufacturer intends to be sold
5 in the United States, including cigarettes intended to be sold in the United States
6 through an importer, except where the importer is an original participating
7 manufacturer that will be responsible for the payments under the master settlement
8 agreement with respect to those cigarettes as a result of the provisions of subsection
9 II (mm) of the master settlement agreement and that pays taxes specified in
10 subsection II (z) of the master settlement agreement, and provided that the
11 manufacturer of the cigarettes does not market or advertise those cigarettes in the
12 United States.

****NOTE: I do not understand what this long, convoluted sentence means. I also do not understand how the references to subsections II (mm) and (z) can confer duties on the manufacturers, because those subsections are definitions, which should do nothing more than define terms.

13 b. Is the first purchaser anywhere, for resale in the United States, of cigarettes
14 manufactured anywhere that the manufacturer did not intend to be sold in the
15 United States.

16 c. Becomes a successor of an entity described in subd. 1. a. or b.

17 2. "Tobacco product manufacturer" does not include an affiliate of a tobacco
18 product manufacturer unless the affiliate meets one of the criteria in subd. 1.

19 (o) "Tobacco-related organizations" means the Council for Tobacco
20 Research-U.S.A., Inc., The Tobacco Institute, Inc., the Center for Indoor Air

SECTION 1

1 Research, Inc. and the successors, if any, of The Tobacco Institute, Inc. or the Center
2 for Indoor Air Research, Inc.

3 (p) "Units sold" means the number of individual cigarettes sold in this state by
4 the applicable tobacco product manufacturer, whether directly or through a
5 distributor, retailer or similar intermediary, during the year in question, as
6 measured by the excises taxes collected by this state on packs or "roll-your-own"
7 tobacco containers bearing the excise tax stamp of this state. The department of
8 revenue shall promulgate the regulations necessary to ascertain the amount of
9 Wisconsin excise tax paid on the cigarettes of each tobacco product manufacturer for
10 each year.

11 (2) REQUIREMENTS. (a) Any tobacco product manufacturer selling cigarettes to
12 consumers within this state, whether directly or through a distributor, retailer or
13 similar intermediary, after the effective date of this subsection [revisor inserts
14 date], shall do one of the following:

15 1. Become a participating manufacturer of the master settlement agreement
16 and generally perform its financial obligations under the master settlement
17 agreement.

18 2. Place into a qualified escrow fund by April 15 of the year following the listed
19 year the following amounts, as those amounts are adjusted for inflation:

20 a. For 1999: \$.0094241 per unit sold after the effective date of this subdivision
21 [revisor inserts date].

22 b. For 2000: \$.0104712 per unit sold after the effective date of this subdivision
23 [revisor inserts date].

24 c. For each of 2001 and 2002: \$.0136125 per unit sold after the effective date
25 of this subdivision [revisor inserts date].

1 d. For each of 2003 to 2006: \$.0167539 per unit sold after the effective date of
2 this subdivision [revisor inserts date].

3 e. For 2007 and each year thereafter: \$.0188482 per unit sold after the effective
4 date of this subdivision [revisor inserts date].

****NOTE: The introduction says the manufacturer must do either 1. or
2. Is that correct in the model legislation? *smaller type*

5 (b) A tobacco product manufacturer that places money into a qualified escrow
6 fund under par. (a) 2. shall receive the interest or other appreciation on that money
7 as earned. The money shall be released from the qualified escrow fund only under
8 one of the following circumstances:

****NOTE: The term "funds" was used in this paragraph to refer both to the escrow
and the money put into escrow, so I used the word "money" instead of "funds" to
distinguish between the two.

9 1. To pay a judgment or settlement on any released claim brought against the
10 tobacco product manufacturer by this state or any releasing party located or residing
11 in this state. Moneys shall be released from escrow under this subdivision in the
12 order in which they were placed into escrow and only to the extent and at the time
13 necessary to make payments required under the judgment or settlement.

14 2. To the extent that a tobacco product manufacturer establishes that the
15 amount it was required to place into escrow in a particular year was greater than this
16 state's allocable share of the total payments that the manufacturer would have been
17 required to make in that year under the master settlement agreement, as
18 determined under subsection IX (i) (2) of the master settlement agreement, and
19 before any of the adjustments or offsets described in subsection IX (i) (3) of that
20 agreement other than the inflation adjustment had it been a participating
21 manufacturer, the excess shall be released from escrow and revert ~~to~~ to the tobacco
22 product manufacturer.

1 3. To the extent not released from escrow under subd. 1. or 2., money shall be
2 released from escrow and revert ~~back~~ to the tobacco product manufacturer
3 twenty-five years after the date on which it was placed into the qualified escrow
4 fund.

5 (c) 1. Each tobacco product manufacturer that elects to place money into a
6 qualified escrow fund under par. (a) 2. shall annually certify to the attorney general
7 that the tobacco product manufacturer has placed the money into the qualified
8 escrow fund in compliance with par. (a) 2. The attorney general may bring a civil
9 action on behalf of the state against any tobacco product manufacturer that fails to
10 place into the qualified escrow fund the money required under par. (a) 2.

to in the model
****NOTE: The first sentence merely requires an annual certification of compliance
with the subsection, but I think the intent is to be in compliance with the requirement
to place the money in the escrow fund. I rewrote the language accordingly. In addition,
the language does not say when the annual certification should begin. Perhaps "on the
first day of June and annually thereafter" or something similar would be more concise.

11 2. Any tobacco product manufacturer that fails in any year to place into a
12 qualified escrow fund the money required under par. (a) 2. shall, within 15 days,
13 place sufficient money into a qualified escrow fund to bring the tobacco product
14 manufacturer into compliance with par. (a) 2. The court, upon a finding of a violation
15 of this subdivision, may impose a civil penalty in an amount not to exceed 5% of the
16 amount improperly withheld from escrow per day of the violation and in a total
17 amount not to exceed 100% of the original amount improperly withheld from a
18 qualified escrow fund.

to
****NOTE: The model act requires placing sufficient money into escrow "within 15
days". Within 15 days of what? Fifteen days after the AG brings a lawsuit? Fifteen days
after the court finds a failure to place the money in escrow?

19 3. Any tobacco product manufacturer that knowingly fails in any year to place
20 into a qualified escrow fund the money required under par. (a) 2. shall, within 15

1 days, place sufficient money into a qualified escrow fund to bring the tobacco product
2 manufacturer into compliance with par. (a) 2. The court, upon a finding of a knowing
3 violation of this subdivision, may impose a civil penalty in an amount not to exceed
4 15% of the amount improperly withheld from escrow per day of the violation and in
5 a total amount not to exceed 300% of the original amount improperly withheld from
6 a qualified escrow fund.

7 4. Any tobacco product manufacturer that knowingly fails in any year to place
8 into a qualified escrow fund the money required under par. (a) 2. for the second time
9 shall be prohibited from selling cigarettes to consumers within this state directly or
10 through a distributor, retailer or similar intermediary for a period not to exceed 2
11 years.

****NOTE: Although this language is difficult to understand, I think the intent of
this paragraph is to allow the AG to bring an action against a tobacco manufacturer for
failure to put the proper money in escrow. If the court finds that the AG is right, the court
can order the manufacturer to: 1. If not knowingly failing to pay, to ~~pay~~ place the money into
escrow within 15 days of the court order and pay a penalty of 5-100%. 2. If knowingly
failing to pay, to ~~pay~~ place the money into escrow within 15 days of the court order and pay a
penalty of 15-300%. 3. If knowingly failing to pay for a second (or subsequent?) time, stop
selling cigarettes for up to 2 years. What about paying the money owed into escrow ~~for~~ after
a second violation? I would prefer to rewrite this paragraph so it says what I think it
means to say.

12 5. Each failure to make the annual deposit required under par. (a) 2. shall
13 constitute a separate violation.

14 **SECTION 2. Nonstatutory provisions.**

15 (1) COPIES OF THE MASTER SETTLEMENT AGREEMENT. The department of justice
16 shall provide at least one copy of the master settlement agreement to the largest
17 public library in each county in the state that is not a law library and to each law
18 library in this state if that public library or law library does not have a copy of ~~that~~ ^{the}
19 master settlement agreement. "Master settlement agreement" means the

SECTION 2*November 23*

1 settlement agreement and related documents entered into on *November 23*, 1998, by this state
2 and the leading U.S. tobacco product manufacturers.

3 (2) ADMINISTRATIVE REGISTER. The revisor of statutes shall, within 60 days after
4 the effective date of this subsection, publish a copy of the master settlement
5 agreement in the Wisconsin Administrative Register. “Master settlement
6 agreement” means the settlement agreement and related documents entered into on
7 *November 23*, 1998, by this state and the leading U.S. tobacco product manufacturers.

8

(END)



PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Ed Hughes' suggested
changes 3/19/99

1 **AN ACT to create 895.10 of the statutes; relating to: an agreement between the**
2 **state and tobacco product manufacturers.**

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 **SECTION 1.** 895.10 of the statutes is created to read:

4 **895.10 Tobacco product agreement. (1) DEFINITIONS.** In this section:

5 (a) "Adjusted for inflation" means increased in accordance with the formula for
6 an inflation adjustment in exhibit C of the master settlement agreement.

7 (b) "Affiliate" means a person who directly or indirectly owns or controls, is
8 owned or controlled by or is under common ownership or control with, another
9 person. In this paragraph, "owns", "owned" and "ownership" means ownership of an
10 equity interest, or the equivalent of an equity interest, of 10% or more.

1 (c) "Allocable share" means the percentage set forth for Wisconsin, as listed in
2 Exhibit A of the master settlement agreement, without regard to any subsequent
3 alteration or modification of Wisconsin's percentage share agreed to by or among any
4 states or, solely for the purpose of calculating payments under subsection IX (c) (2)
5 of the master settlement agreement and corresponding payments under subsection
6 IX (i) of the master settlement agreement, the percentage disclosed for Wisconsin
7 under subsection IX (c) (2) (A) of the master settlement agreement prior to June 30,
8 1999, without regard to any subsequent alteration or modification of Wisconsin's
9 percentage share agreed to by or among any states.

****NOTE: I recreated the definitions given in the master settlement, because that document is not easily available to the public. However, some of these definitions are extremely long, complicated and difficult to understand.

10 (d) 1. "Cigarette" means any product that contains nicotine, is intended to be
11 burned or heated under ordinary conditions of use, and consists of or contains any
12 of the following:

13 a. Any roll of tobacco wrapped in paper or in any substance not containing
14 tobacco.

15 b. Tobacco, in any form, that is functional in the product, which, because of its
16 appearance, the type of tobacco used in the filler, or its packaging and labeling, is
17 likely to be offered to, or purchased by, consumers as a cigarette.

18 c. Any roll of tobacco wrapped in any substance containing tobacco which,
19 because of its appearance, the type of tobacco used in the filler, or its packaging and
20 labeling, is likely to be offered to, or purchased by, consumers as a cigarette described
21 in this subdivision.

22 2. The term "cigarette" includes "roll-your-own" tobacco which, because of its
23 appearance, type, packaging or labeling is suitable for use and likely to be offered to,

1 or purchased by, consumers as tobacco for making cigarettes. For purposes of this
2 paragraph, 0.09 ounces of "roll-your-own" tobacco shall constitute one individual
3 cigarette.

4 (e) "Consent decree" means the decree ^{entered} ~~signed by this state~~ in the case, State
5 of Wisconsin v. Phillip Morris, Inc., et al., Case No. 97-CV-328 Dane County Circuit
6 Court, dated December 4, 1998.

7 (f) "Master settlement agreement" means the settlement agreement and
8 related documents entered into on November 23, 1998, by this state and the leading
9 U.S. tobacco product manufacturers.

****NOTE: Because many references in this bill are to the master settlement agreement, which is not readily available, perhaps additional language should be added in the statutes requiring the department of justice or some other agency to place a copy of the agreement in at least one public place in every area of the state, such as a public library, the clerk of circuit court or the county clerk or the county law library. In addition, the revisor of statutes should be required to publish the agreement in the administrative register, to give official notice to the public of its contents. See SECTION 2 of this draft.

10 ~~(g) "Original participating manufacturers" means Brown & Williamson
11 Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated and R.
12 J. Reynolds Tobacco Company, and the respective successors of each of these
13 companies. Except as expressly provided in the master settlement agreement, once
14 a company becomes an original participating manufacturer, that company shall
15 permanently retain the status of original participating manufacturer.~~

****NOTE: Although this definition is not included in list of definitions in the model statute, it is referred to in the definition of "tobacco product manufacturer", so I added this definition from the master settlement agreement to the draft.

16 (h) 1. "Participating manufacturer" means a tobacco product manufacturer
17 that is or becomes a signatory to the master settlement agreement, ^{and is bound by its terms.} ~~provided that:~~

18 ~~a. In the case of a tobacco product manufacturer that is not an original
19 participating manufacturer, the tobacco product manufacturer is bound by the
20 master settlement agreement and the consent decree or, in any settling state that~~

1 does not permit amendment of the original consent decree, a consent decree
2 containing terms identical to those set forth in the consent decree in all settling
3 states in which the master settlement agreement and the consent decree binds
4 original participating manufacturers, provided, however, that the tobacco product
5 manufacturer need only become bound by the consent decree in those settling states
6 in which the settling state has filed a released claim against the tobacco product
7 manufacturer.

8 b. In the case of a tobacco product manufacturer that signs the master
9 settlement agreement after November 23, 1998, the tobacco product manufacturer,
10 within a reasonable period of time after signing the master settlement agreement,
11 makes any payments, including interest at the prime rate, that it would have been
12 obligated to make in the intervening period had it been a signatory as of November
13 23, 1998.

14 2. "Participating manufacturer" also includes the successor of a participating
15 manufacturer. Except as expressly provided in the master settlement agreement,
16 once a company becomes a participating manufacturer, that company shall
17 permanently retain the status of participating manufacturer. Each participating
18 manufacturer shall regularly report its shipments of cigarettes in or to the fifty
19 United States, the District of Columbia and Puerto Rico to Management Science
20 Associates, Inc. or a successor entity. Solely for the purpose of calculations under
21 subsection IX (d) of the master settlement agreement, a tobacco product
22 manufacturer that is not a signatory to the master settlement agreement shall be
23 deemed to be a participating manufacturer if the original participating
24 manufacturers unanimously consent in writing.

1 (i) "Qualified escrow fund" means an escrow arrangement with a federally or
2 state chartered financial institution having no affiliation with any tobacco product
3 manufacturer and having assets of at least \$1,000,000,000 where the escrow
4 arrangement requires the financial institution to hold the escrowed funds' principal
5 for the benefit of releasing parties ^{as defined in the master settlement agreement,} and prohibits the tobacco product manufacturer
6 placing the funds into escrow from using, accessing or directing the use of the funds'
7 principal except as is consistent with sub. (2) (b) 2. and 3.

8 (j) "Released claims" means:

9 1. For past conduct, acts or omissions, including any damages incurred in the
10 future arising from the past conduct, acts or omissions, those claims directly or
11 indirectly based on, arising out of or in any way related to the use, sale, distribution,
12 manufacture, development, advertising, marketing or health effects of, the exposure
13 to, or research, statements, or warnings regarding, tobacco products, including the
14 claims asserted in the actions identified in Exhibit D of the master settlement
15 agreement, or any comparable claims that were, could be or could have been asserted
16 now or in the future in those actions or in any comparable action in federal or state
17 court brought by a settling state or a releasing party, whether or not the settling state
18 or releasing party has brought an action, except for claims not asserted in the actions
19 identified in Exhibit D of the master settlement agreement for outstanding liability
20 under existing licensing or similar fee laws or existing tax laws, but not excepting
21 claims for any tax liability of the tobacco-related organizations or of any released
22 party with respect to the tobacco-related organizations, which claims are covered by
23 the release and covenants set forth in the master settlement agreement.

24 2. For future conduct, acts or omissions, only those monetary claims directly
25 or indirectly based on, arising out of or in any way related to the use of or exposure

1 to tobacco products manufactured in the ordinary course of business, including
2 without limitation any future claims for reimbursement of health care costs
3 allegedly associated with the use of or exposure to tobacco products.

4 (k) "Releasing parties" means each settling state and any of a settling state's
5 past, present and future agents, officials acting in their official capacities, legal
6 representatives, agencies, departments, commissions and divisions, and also means,
7 to the full extent of the power of the signatories of the master settlement agreement
8 to release past, present and future claims, all of the following:

9 1. Any settling state's subdivisions including municipalities, counties, villages,
10 unincorporated districts and hospital districts, public instrumentalities and public
11 educational institutions.

12 2. Persons acting in a sovereign, quasi-sovereign, private attorney general,
13 taxpayer, or any other capacity, whether or not any of them participate in this
14 settlement, to the extent that the person is seeking relief on behalf of or generally
15 applicable to the general public in the settling state or the people of the state, as
16 opposed solely to private or individual relief for separate and distinct injuries, or is
17 seeking recovery of health care expenses, other than premium or capitation
18 payments for the benefit of present or retired state employees, paid or reimbursed,
19 directly or indirectly, by a settling state.

20 (L) "Settling state" means any state that signs the master settlement
21 agreement on or before November 23, 1998. The term "settling state" does not
22 include the states of Mississippi, Florida, Texas and Minnesota and any state as to
23 which the master settlement agreement has been terminated.

24 (m) "Tobacco products" means cigarettes and smokeless tobacco products.

1 (n) 1. "Tobacco product manufacturer" means an entity that after the effective
2 date of this paragraph [revisor inserts date], directly, and not exclusively through
3 any affiliate, meets any of the following criteria:

4 a. Manufactures cigarettes anywhere that the manufacturer intends to be sold
5 in the United States, including cigarettes intended to be sold in the United States
6 through an importer, except where the importer is an original participating
7 manufacturer that will be responsible for the payments under the master settlement
8 agreement with respect to those cigarettes as a result of the provisions of subsection
9 II (mm) of the master settlement agreement and that pays taxes specified in
10 subsection II (z) of the master settlement agreement, and provided that the
11 manufacturer of the cigarettes does not market or advertise those cigarettes in the
12 United States.

***NOTE: I do not understand what this long, convoluted sentence means. I also do not understand how the references to subsections II (mm) and (z) can confer duties on the manufacturers, because those subsections are definitions, which should do nothing more than define terms.

13 b. Is the first purchaser anywhere, for resale in the United States, of cigarettes
14 manufactured anywhere that the manufacturer did not intend to be sold in the
15 United States.

16 c. Becomes a successor of an entity described in subd. 1. a. or b.

17 2. "Tobacco product manufacturer" does not include an affiliate of a tobacco
18 product manufacturer unless the affiliate meets one of the criteria in subd. 1.

19 (o) ~~"Tobacco-related organizations" means the Council for Tobacco~~
20 ~~Research-U.S.A., Inc., The Tobacco Institute, Inc., the Center for Indoor Air~~
21 ~~Research, Inc. and the successors, if any, of The Tobacco Institute, Inc. or the Center~~
22 ~~for Indoor Air Research, Inc.~~

IN SEAT

A

(A)

a. Manufactures cigarettes anywhere that the manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer. The foregoing sentence shall not apply if the manufacturer of the cigarettes does not market or advertise those cigarettes in the United States, and the importer of those cigarettes is an original participating manufacturer, as defined in the master settlement agreement, that will be responsible for the payments under the master settlement agreement with respect to those cigarettes and will pay excise taxes collected by the federal government with respect to those cigarettes.

1 (p) "Units sold" means the number of individual cigarettes sold in this state by
2 the applicable tobacco product manufacturer, whether directly or through a
3 distributor, retailer or similar intermediary, during the year in question, as
4 measured by the excises taxes collected by this state on packs or "roll-your-own"
5 tobacco containers bearing the excise tax stamp of this state. The department of
6 revenue shall promulgate the regulations necessary to ascertain the amount of
7 Wisconsin excise tax paid on the cigarettes of each tobacco product manufacturer for
8 each year.

9 (2) REQUIREMENTS. (a) Any tobacco product manufacturer selling cigarettes to
10 consumers within this state, whether directly or through a distributor, retailer or
11 similar intermediary, after the effective date of this subsection [revisor inserts
12 date], shall do one of the following:

13 1. Become a participating manufacturer of the master settlement agreement
14 and generally perform its financial obligations under the master settlement
15 agreement.

16 2. Place into a qualified escrow fund by April 15 of the year following the listed
17 year the following amounts, as those amounts are adjusted for inflation:

18 a. For 1999: \$.0094241 per unit sold after the effective date of this subdivision
19 [revisor inserts date].

20 b. For 2000: \$.0104712 per unit sold ~~after the effective date of this subdivision~~
21 ~~.... [revisor inserts date].~~

22 c. For each of 2001 and 2002: \$.0136125 per unit sold ~~after the effective date~~
23 ~~of this subdivision [revisor inserts date].~~

24 d. For each of 2003 to 2006: \$.0167539 per unit sold ~~after the effective date of~~
25 ~~this subdivision [revisor inserts date].~~

1 e. For 2007 and each year thereafter: \$.0188482 per unit sold after the effective
2 ~~date of this subdivision [revisor inserts date].~~

****NOTE: The introduction says the manufacturer must do either 1. or 2. Is that correct in the model legislation?

3 (b) A tobacco product manufacturer that places money into a qualified escrow
4 fund under par. (a) 2. shall receive the interest or other appreciation on that money
5 as earned. The money shall be released from the qualified escrow fund only under
6 one of the following circumstances:

****NOTE: The term "funds" was used in this paragraph to refer both to the escrow and the money put into escrow, so I used the word "money" instead of "funds" to distinguish between the two.

7 1. To pay a judgment or settlement on any released claim, ^{as defined in the master}
8 tobacco product manufacturer by this state or any releasing party, ^{settlement agreement,} brought against the
9 in this state. Moneys shall be released from escrow under this subdivision in the
10 order in which they were placed into escrow and only to the extent and at the time
11 necessary to make payments required under the judgment or settlement. ^{as defined in the master}
12 2. To the extent that a tobacco product manufacturer establishes that the ^{settlement agreement,}
13 amount it was required to place into escrow in a particular year was greater than this
14 ^{2.072039%} ~~state's allocable share~~ of the total payments that the manufacturer would have been
15 required to make in that year under the master settlement agreement, as
16 determined under subsection IX (i) (2) of the master settlement agreement, and
17 before any of the adjustments or offsets described in subsection IX (i) (3) of that
18 agreement other than the inflation adjustment had it been a participating
19 manufacturer, the excess shall be released from escrow and revert to the tobacco
20 product manufacturer.

1 3. To the extent not released from escrow under subd. 1. or 2., money shall be
2 released from escrow and revert to the tobacco product manufacturer twenty-five
3 years after the date on which it was placed into the qualified escrow fund.

4 (c) 1. Each tobacco product manufacturer that elects to place money into a
5 qualified escrow fund under par. (a) 2. shall annually certify to the attorney general
6 that the tobacco product manufacturer has placed the money into the qualified
7 escrow fund in compliance with par. (a) 2. The attorney general may bring a civil
8 action on behalf of the state against any tobacco product manufacturer that fails to
9 place into the qualified escrow fund the money required under par. (a) 2.

****NOTE: The first sentence in the model merely requires an annual certification
of compliance with the subsection, but I think the intent is to be in compliance with the
requirement to place the money into the escrow fund. I rewrote the language accordingly.
In addition, the language does not say when the annual certification should begin.
Perhaps "on the first day of June and annually thereafter" or something similar would
be more concise.

10 2. Any tobacco product manufacturer that fails in any year to place into a
11 qualified escrow fund the money required under par. (a) 2. shall, within 15 days,
12 place sufficient money into a qualified escrow fund to bring the tobacco product
13 manufacturer into compliance with par. (a) 2. The court, upon a finding of a violation
14 of this subdivision, may impose a civil penalty in an amount not to exceed 5% of the
15 amount improperly withheld from escrow per day of the violation and in a total
16 amount not to exceed 100% of the original amount improperly withheld from a
17 qualified escrow fund.

****NOTE: The model act requires placing sufficient money into escrow "within 15
days". Within 15 days of what? Fifteen days after the AG brings a lawsuit? Fifteen days
after the court finds a failure to place the money into escrow?

18 3. Any tobacco product manufacturer that knowingly fails in any year to place
19 into a qualified escrow fund the money required under par. (a) 2. shall, within 15
20 days, place sufficient money into a qualified escrow fund to bring the tobacco product

INSERT
B

(c) 1. Each tobacco product manufacturer that elects to place money into a qualified escrow fund under par. (a) 2. shall do so annually and shall certify to the attorney general by April 15 that the tobacco product manufacturer has placed the money into the qualified escrow fund in compliance with par. (a) 2.

2. Any tobacco product manufacturer that fails in any year to place into a qualified escrow fund the money required under par. (a) 2. shall, within 15 days after being notified of the deficiency, place sufficient money into a qualified escrow fund to bring the tobacco product manufacturer into compliance with par. (a) 2.

3. The attorney general may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into the qualified escrow fund the money required under this subdivision. The court, upon a finding of violation of this subdivision, may impose a civil penalty 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 a qualified escrow fund. If a violation of this subdivision is knowing, the court may impose a civil penalty 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 a qualified escrow fund.

Passive V. because unknown who will notify the tobacco company - private accounting firm?

1 ~~manufacturer into compliance with par. (a) 2. The court, upon a finding of a knowing~~
 2 ~~violation of this subdivision, may impose a civil penalty in an amount not to exceed~~
 3 ~~15% of the amount improperly withheld from escrow per day of the violation and in~~
 4 ~~a total amount not to exceed 300% of the original amount improperly withheld from~~
 5 ~~a qualified escrow fund.~~

6 4. Any tobacco product manufacturer that knowingly fails in any year to place
 7 into a qualified escrow fund the money required under par. (a) 2. for the second ^{or subsequent} time
 8 shall be prohibited from selling cigarettes to consumers within this state directly or
 9 through a distributor, retailer or similar intermediary for a period not to exceed 2
 10 years.

****NOTE: Although this language is difficult to understand, I think the intent of this paragraph is to allow the AG to bring an action against a tobacco manufacturer for failure to put the proper money into escrow. If the court finds that the AG is right, the court can order the manufacturer to: 1. If not knowingly failing to pay, to place the money into escrow within 15 days of the court order and pay a penalty of 5-100%. 2. If knowingly failing to pay, to place the money into escrow within 15 days of the court order and pay a penalty of 15-300%. 3. If knowingly failing to pay for a second (or subsequent?) time, stop selling cigarettes for up to 2 years. What about paying the money owed into escrow after a second violation? I would prefer to rewrite this paragraph so it says what I think it means to say.

11 5. Each failure to make the annual deposit required under par. (a) 2. shall
 12 constitute a separate violation.

13 **SECTION 2. Nonstatutory provisions.**

14 (1) COPIES OF THE MASTER SETTLEMENT AGREEMENT. The department of ^{administration} justice
 15 shall provide ~~at least one~~ ^a copy of the master settlement agreement to ~~the largest~~
 16 ^{each} public library ~~in each county in the state that is not a law library and to each law~~
 17 ~~library in this state,~~ if that public ~~library or law~~ library does not have a copy of the
 18 master settlement agreement. "Master settlement agreement" means the
 19 settlement agreement and related documents entered into on November 23, 1998, by
 20 this state and the leading U.S. tobacco product manufacturers.

municipal system, as defined in section 43.01(5) of the statutes, public library under section 43.52 of the statutes and consolidated county library under section 43.57 of the statutes



State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-1661/P2
RPN:cmh:jf

~~PRELIMINARY DRAFT NOT READY FOR INTRODUCTION~~

*revis
cont*

1 AN ACT to create 895.10 of the statutes; relating to: an agreement between the
2 state and tobacco product manufacturers.

*insert
AnL*

Analysis by the Legislative Reference Bureau

~~This is a preliminary draft. An analysis will be provided in a later version.~~

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 895.10 of the statutes is created to read:
4 **895.10 Tobacco product agreement.** (1) DEFINITIONS. In this section:
5 (a) "Adjusted for inflation" means increased in accordance with the formula for
6 an inflation adjustment in exhibit C of the master settlement agreement.
7 (b) "Affiliate" means a person who directly or indirectly owns or controls, is
8 owned or controlled by or is under common ownership or control with, another
9 person. In this paragraph, "owns", "owned" and "ownership" means ownership of an
10 equity interest, or the equivalent of an equity interest, of 10% or more.

1 (c) "Allocable share" means the percentage set forth for Wisconsin, as listed in
2 Exhibit A of the master settlement agreement, without regard to any subsequent
3 alteration or modification of Wisconsin's percentage share agreed to by or among any
4 states or, solely for the purpose of calculating payments under subsection IX (c) (2)
5 of the master settlement agreement and corresponding payments under subsection
6 IX (i) of the master settlement agreement, the percentage disclosed for Wisconsin
7 under subsection IX (c) (2) (A) of the master settlement agreement prior to June 30,
8 1999, without regard to any subsequent alteration or modification of Wisconsin's
9 percentage share agreed to by or among any states.

****NOTE: I recreated the definitions given in the master settlement, because that document is not easily available to the public. However, some of these definitions are extremely long, complicated and difficult to understand.

10

(c) ~~1~~ 1. "Cigarette" means any product that contains nicotine, is intended to be
11 burned or heated under ordinary conditions of use, and consists of or contains any
12 of the following:

13 a. Any roll of tobacco wrapped in paper or in any substance not containing
14 tobacco.

15 b. Tobacco, in any form, that is functional in the product, which, because of its
16 appearance, the type of tobacco used in the filler, or its packaging and labeling, is
17 likely to be offered to, or purchased by, consumers as a cigarette.

18 c. Any roll of tobacco wrapped in any substance containing tobacco which,
19 because of its appearance, the type of tobacco used in the filler, or its packaging and
20 labeling, is likely to be offered to, or purchased by, consumers as a cigarette described
21 in this subdivision.

22 2. The term "cigarette" includes "roll-your-own" tobacco which, because of its
23 appearance, type, packaging or labeling is suitable for use and likely to be offered to,

1 or purchased by, consumers as tobacco for making cigarettes. For purposes of this
2 paragraph, 0.09 ounces of "roll-your-own" tobacco shall constitute one individual
3 cigarette.

4 (d) ~~(e)~~ "Consent decree" means the decree signed by this state in the case, State
5 of Wisconsin v. Phillip Morris, Inc., et al., Case No. 97-CV-328 Dane County Circuit
6 Court, dated December 4, 1998.

7 (e) ~~(f)~~ "Master settlement agreement" means the settlement agreement and
8 related documents entered into on November 23, 1998, by this state and the leading
9 U.S. tobacco product manufacturers.

***NOTE: Because many references in this bill are to the master settlement agreement, which is not readily available, perhaps additional language should be added in the statutes requiring the department of justice or some other agency to place a copy of the agreement in at least one public place in every area of the state, such as a public library, the clerk of circuit court or the county clerk or the county law library. In addition, the revisor of statutes should be required to publish the agreement in the administrative register, to give official notice to the public of its contents. See SECTION 2 of this draft.

10 (g) "Original participating manufacturers" means Brown & Williamson
11 Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated and R.
12 J. Reynolds Tobacco Company, and the respective successors of each of these
13 companies. Except as expressly provided in the master settlement agreement, once
14 a company becomes an original participating manufacturer, that company shall
15 permanently retain the status of original participating manufacturer.

***NOTE: Although this definition is not included in list of definitions in the model statute, it is referred to in the definition of "tobacco product manufacturer", so I added this definition from the master settlement agreement to the draft.

16 (f) (h) 1. "Participating manufacturer" means a tobacco product manufacturer
17 ~~and that is bound by the master settlement agreement.~~
that is or becomes a signatory to the master settlement agreement provided that:

18 a. In the case of a tobacco product manufacturer that is not an original
19 participating manufacturer, the tobacco product manufacturer is bound by the
20 master settlement agreement and the consent decree or, in any settling state that

1 does not permit amendment of the original consent decree, a consent decree
2 containing terms identical to those set forth in the consent decree in all settling
3 states in which the master settlement agreement and the consent decree binds
4 original participating manufacturers, provided, however, that the tobacco product
5 manufacturer need only become bound by the consent decree in those settling states
6 in which the settling state has filed a released claim against the tobacco product
7 manufacturer.

8 b. In the case of a tobacco product manufacturer that signs the master
9 settlement agreement after November 23, 1998, the tobacco product manufacturer,
10 within a reasonable period of time after signing the master settlement agreement,
11 makes any payments, including interest at the prime rate, that it would have been
12 obligated to make in the intervening period had it been a signatory as of November
13 23, 1998.

14 2. "Participating manufacturer" also includes the successor of a participating
15 manufacturer. Except as expressly provided in the master settlement agreement,
16 once a company becomes a participating manufacturer, that company shall
17 permanently retain the status of participating manufacturer. Each participating
18 manufacturer shall regularly report its shipments of cigarettes in or to the fifty
19 United States, the District of Columbia and Puerto Rico to Management Science
20 Associates, Inc. or a successor entity. Solely for the purpose of calculations under
21 subsection IX (d) of the master settlement agreement, a tobacco product
22 manufacturer that is not a signatory to the master settlement agreement shall be
23 deemed to be a participating manufacturer if the original participating
24 manufacturers unanimously consent in writing.

① (g) (i) "Qualified escrow fund" means an escrow arrangement with a federally or
2 state chartered financial institution having no affiliation with any tobacco product
3 manufacturer and having assets of at least \$1,000,000,000 where the escrow
4 arrangement requires the financial institution to hold the escrowed funds' principal
5 *as defined in the master settlement agreement* and prohibits the tobacco product manufacturer
6 placing the funds into escrow from using, accessing or directing the use of the funds'
7 principal except as is consistent with sub. (2) (b) 2. and 3.

8 (j) "Released claims" means:

9 1. For past conduct, acts or omissions, including any damages incurred in the
10 future arising from the past conduct, acts or omissions, those claims directly or
11 indirectly based on, arising out of or in any way related to the use, sale, distribution,
12 manufacture, development, advertising, marketing or health effects of, the exposure
13 to, or research, statements, or warnings regarding, tobacco products, including the
14 claims asserted in the actions identified in Exhibit D of the master settlement
15 agreement, or any comparable claims that were, could be or could have been asserted
16 now or in the future in those actions or in any comparable action in federal or state
17 court brought by a settling state or a releasing party, whether or not the settling state
18 or releasing party has brought an action, except for claims not asserted in the actions
19 identified in Exhibit D of the master settlement agreement for outstanding liability
20 under existing licensing or similar fee laws or existing tax laws, but not excepting
21 claims for any tax liability of the tobacco-related organizations or of any released
22 party with respect to the tobacco-related organizations, which claims are covered by
23 the release and covenants set forth in the master settlement agreement.

24 2. For future conduct, acts or omissions, only those monetary claims directly
25 or indirectly based on, arising out of or in any way related to the use of or exposure,

1 to tobacco products manufactured in the ordinary course of business, including
2 without limitation any future claims for reimbursement of health care costs
3 allegedly associated with the use of or exposure to tobacco products.

4 (k) "Releasing parties" means each settling state and any of a settling state's
5 past, present and future agents, officials acting in their official capacities, legal
6 representatives, agencies, departments, commissions and divisions, and also means,
7 to the full extent of the power of the signatories of the master settlement agreement
8 to release past, present and future claims, all of the following:

9 1. Any settling state's subdivisions including municipalities, counties, villages,
10 unincorporated districts and hospital districts, public instrumentalities and public
11 educational institutions.

12 2. Persons acting in a sovereign, quasi-sovereign, private attorney general,
13 taxpayer, or any other capacity, whether or not any of them participate in this
14 settlement, to the extent that the person is seeking relief on behalf of or generally
15 applicable to the general public in the settling state or the people of the state, as
16 opposed solely to private or individual relief for separate and distinct injuries, or is
17 seeking recovery of health care expenses, other than premium or capitation
18 payments for the benefit of present or retired state employees, paid or reimbursed,
19 directly or indirectly, by a settling state.

20 (L) "Settling state" means any state that signs the master settlement
21 agreement on or before November 23, 1998. The term "settling state" does not
22 include the states of Mississippi, Florida, Texas and Minnesota and any state as to
23 which the master settlement agreement has been terminated.

24 (m) "Tobacco products" means cigarettes and smokeless tobacco products.

1 (h) (n) 1. "Tobacco product manufacturer" means an entity that after the effective
2 date of this paragraph [revisor inserts date], directly, and not exclusively through
3 any affiliate, meets any of the following criteria:

4 a. Manufactures cigarettes anywhere that the manufacturer intends to be sold
5 in the United States, including cigarettes intended to be sold in the United States
6 through an importer, ^{Insert 7-6} ~~except where~~ the importer is an original participating
7 manufacturer that will be responsible for the payments under the master settlement
8 agreement with respect to those cigarettes as a result of the provisions of subsection
9 II (mm) of the master settlement agreement and that pays taxes specified in
10 subsection II (z) of the master settlement agreement, and provided that the
11 manufacturer of the cigarettes does not market or advertise those cigarettes in the
12 United States.

***NOTE: I do not understand what this long, convoluted sentence means. I also do not understand how the references to subsections II (mm) and (z) can confer duties on the manufacturers, because those subsections are definitions, which should do nothing more than define terms.

13 b. Is the first purchaser anywhere, for resale in the United States, of cigarettes
14 manufactured anywhere that the manufacturer did not intend to be sold in the
15 United States.

16 c. Becomes a successor of an entity described in subd. 1. a. or b.

17 2. "Tobacco product manufacturer" does not include an affiliate of a tobacco
18 product manufacturer unless the affiliate meets one of the criteria in subd. 1.

19 (o) "Tobacco-related organizations" means the Council for Tobacco
20 Research-U.S.A., Inc., The Tobacco Institute, Inc., the Center for Indoor Air
21 Research, Inc. and the successors, if any, of The Tobacco Institute, Inc. or the Center
22 for Indoor Air Research, Inc.

1 (1) (c) (p) "Units sold" means the number of individual cigarettes sold in this state by
 2 the applicable tobacco product manufacturer, whether directly or through a
 3 distributor, retailer or similar intermediary, during the year in question, as
 4 measured by the excises taxes collected by this state on packs or "roll-your-own"
 5 tobacco containers bearing the excise tax stamp of this state. The department of
 6 revenue shall promulgate the regulations necessary to ascertain the amount of
 7 Wisconsin excise tax paid on the cigarettes of each tobacco product manufacturer for
 8 each year.

9 (2) REQUIREMENTS. (a) Any tobacco product manufacturer selling cigarettes to
 10 consumers within this state, whether directly or through a distributor, retailer or
 11 similar intermediary, after the effective date of this subsection [revisor inserts
 12 date], shall do one of the following:

13 1. Become a participating manufacturer of the master settlement agreement
 14 and generally perform its financial obligations under the master settlement
 15 agreement.

16 2. Place into a qualified escrow fund by April 15 of the year following the listed
 17 year the following amounts, as those amounts are adjusted for inflation:

18 a. For 1999: \$.0094241 per unit sold after the effective date of this subdivision
 19 [revisor inserts date].

20 b. For 2000: \$.0104712 per unit sold ~~after the effective date of this subdivision~~
 21 ~~.... [revisor inserts date]~~

22 c. For each of 2001 and 2002: \$.0136125 per unit sold ~~after the effective date~~
 23 ~~of this subdivision [revisor inserts date]~~

24 d. For each of 2003 to 2006: \$.0167539 per unit sold ~~after the effective date of~~
 25 ~~this subdivision [revisor inserts date]~~

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e. For 2007 and each year thereafter: \$.0188482 per unit sold ~~after~~ the effective date of this subdivision ... [revisor inserts date].

****NOTE: The introduction says the manufacturer must do either 1. or 2. Is that correct in the model legislation?

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(b) A tobacco product manufacturer that places money into a qualified escrow fund under par. (a) 2. shall receive the interest or other appreciation on that money as earned. The money shall be released from the qualified escrow fund only under one of the following circumstances:

****NOTE: The term "funds" was used in this paragraph to refer both to the escrow and the money put into escrow, so I used the word "money" instead of "funds" to distinguish between the two.

, as defined in the master settlement agreement,

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1. To pay a judgment or settlement on any released claim brought against the tobacco product manufacturer by this state or any releasing party located or residing in this state. Moneys shall be released from escrow under this subdivision in the order in which they were placed into escrow and only to the extent and at the time necessary to make payments required under the judgment or settlement.

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2. To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow in a particular year was greater than ~~the~~ ^{2.072039%} ~~state's allocable share~~ of the total payments that the manufacturer would have been required to make in that year under the master settlement agreement, as determined under subsection IX (i) (2) of the master settlement agreement, and before any of the adjustments or offsets described in subsection IX (i) (3) of that agreement other than the inflation adjustment had it been a participating manufacturer, the excess shall be released from escrow and revert to the tobacco product manufacturer.

1 3. To the extent not released from escrow under subd. 1. or 2., money shall be
 2 released from escrow and revert to the tobacco product manufacturer twenty-five
 3 years after the date on which it was placed into the qualified escrow fund.

4 (c) 1. Each tobacco product manufacturer that elects to place money into a
 5 qualified escrow fund under par. (a) 2. shall annually ^{by May 1,} certify to the attorney general
 6 that the tobacco product manufacturer has placed the money into the qualified
 7 escrow fund in compliance with par. (a) 2. The attorney general may bring a civil
 8 action on behalf of the state against any tobacco product manufacturer that fails to
 9 place into the qualified escrow fund the money required under par. (a) 2.

✓ ****NOTE: The first sentence in the model merely requires an annual certification
 of compliance with the subsection, but I think the intent is to be in compliance with the
 requirement to place the money into the escrow fund. I rewrote the language accordingly.
 In addition, the language does not say when the annual certification should begin.
 Perhaps "on the first day of ~~June~~ and annually thereafter" or something similar would
 be more concise. ^{May}

10 2. Any tobacco product manufacturer that fails in any year to place into a
 11 qualified escrow fund the money required under par. (a) 2. shall, within 15 days,
 12 place sufficient money into a qualified escrow fund to bring the tobacco product
 13 manufacturer into compliance with par. (a) 2. The court, upon a finding of a violation
 14 of this subdivision, may impose a civil penalty in an amount not to exceed 5% of the
 15 amount improperly withheld from escrow per day of the violation and in a total
 16 amount not to exceed 100% of the original amount improperly withheld from a
 17 qualified escrow fund.

✓ ****NOTE: The model act requires placing sufficient money into escrow "within 15
 days". Within 15 days of what? Fifteen days after the AG brings a lawsuit? Fifteen days
 after the court finds a failure to place the money into escrow?

18 3. Any tobacco product manufacturer that knowingly fails in any year to place
 19 into a qualified escrow fund the money required under par. (a) 2. shall, within 15
 20 days, place sufficient money into a qualified escrow fund to bring the tobacco product

1 manufacturer into compliance with par. (a) 2. The court, upon a finding of a knowing
 2 violation of this subdivision, may impose a civil penalty in an amount not to exceed
 3 15% of the amount improperly withheld from escrow per day of the violation and in
 4 a total amount not to exceed 300% of the original amount improperly withheld from
 5 a qualified escrow fund.

Insert
11-5

6 → 4. ~~Any~~ tobacco product manufacturer ~~that~~ knowingly ~~fails~~ ^{failed} in any year to place
 7 into a qualified escrow fund the money required under par. (a) 2. ~~for the second time,~~
 8 ^{the court} shall be prohibited ^{the tobacco product manufacturer} from selling cigarettes to consumers within this state directly or
 9 through a distributor, retailer or similar intermediary for a period not to exceed 2
 10 years.

***NOTE: Although this language is difficult to understand, I think the intent of this paragraph is to allow the AG to bring an action against a tobacco manufacturer for failure to put the proper money into escrow. If the court finds that the AG is right, the court can order the manufacturer to: 1. If not knowingly failing to pay, to place the money into escrow within 15 days of the court order and pay a penalty of 5-100%. 2. If knowingly failing to pay, to place the money into escrow within 15 days of the court order and pay a penalty of 15-300%. 3. If knowingly failing to pay for a second (or subsequent?) time, stop selling cigarettes for up to 2 years. What about paying the money owed into escrow after a second violation? I would prefer to rewrite this paragraph so it says what I think it means to say.

11 5. Each failure to make the annual deposit required under par. (a) 2. shall
 12 constitute a separate violation.

13 **SECTION 2. Nonstatutory provisions.**

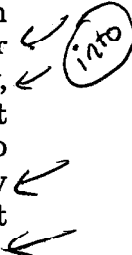
14 (1) COPIES OF THE MASTER SETTLEMENT AGREEMENT. The department of ^{administration} ~~justice~~
 15 shall provide ~~a~~ ^a copy of the master settlement agreement to ~~the largest~~
 16 ^{each} public library ~~in each county in the state that is not a law library~~ and to each law
 17 ^{library in this state if that public library or law library does not have a copy of the}
 18 ^{system as defined in section 4301(5) of the statutes} master settlement agreement. "Master settlement agreement" means the
 19 settlement agreement and related documents entered into on November 23, 1998, by
 20 this state and the leading U.S. tobacco product manufacturers.

1999-2000 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1661/lins
RPN:cmh:jf

insert Anl:

On November 23, 1998, Wisconsin and other states agreed to a settlement of lawsuits brought against the major U.S. tobacco product manufacturers, the "master settlement agreement". As part of that agreement, each state agreed to enact model legislation that would affect tobacco product manufacturers that did not originally join in the master settlement agreement. This bill is intended to fulfill Wisconsin's agreement to enact that required legislation. Under this bill, a tobacco product manufacturer that sells cigarettes in this state is given the choice of joining in the master settlement agreement and performing the obligations under that agreement or placing money into an escrow fund, based on the number of cigarettes sold each year. The amount of money to be placed in escrow per cigarette increases each year until the year 2007, when the amount is \$.0188482. The amount placed in escrow, under the bill, is used to pay part of the claims under the master settlement agreement. Under the bill, any interest in money in the escrow account accrues to the tobacco product manufacturer that put the money in escrow and any money remaining in the escrow account after 25 years is returned to the tobacco product manufacturer that put the money in escrow.



The bill permits the attorney general to bring a civil action against a tobacco product manufacturer that fails to put money in escrow as required. If a court finds that a tobacco product manufacturer failed to place the money in escrow, the bill permits the court to impose a penalty of up to 5% of the amount improperly withheld from escrow for each day of the violation, up to 100% of the amount improperly withheld. If the court finds that a tobacco product manufacturer knowingly failed to place the money in escrow, the bill permits the court to impose a penalty of up to 15% of the amount improperly withheld from escrow for each day of the violation, up to 300% of the amount improperly withheld. The bill also provides that if a tobacco product manufacturer failed to place the money in escrow on two or more occasions, the court is required to prohibit the manufacturer from selling cigarettes in this state for up to two years.

The bill requires the department of administration to provide a copy of the master settlement agreement to each public library system in the state and requires the revisor of statutes to publish the master settlement agreement in the Wisconsin Administrative Register.

(A)

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Insert 7-6

(no 11)
This subdivision paragraph does

a. Manufactures cigarettes anywhere that the manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer. The foregoing sentence shall not apply if the manufacturer of the cigarettes does not market or advertise those cigarettes in the United States, and the importer of those cigarettes is an original participating manufacturer, as defined in the master settlement agreement, that will be responsible for the payments under the master settlement agreement with respect to those cigarettes and will pay excise taxes collected by the federal government with respect to those cigarettes.

(END OF INSERT)

Insert 11-5

(c)

1. Each tobacco product manufacturer that elects to place money into a qualified escrow fund under par. (a) 2. shall do so annually and shall certify to the attorney general by April 15 that the tobacco product manufacturer has placed the money into the qualified escrow fund in compliance with par. (a) 2.

2. Any tobacco product manufacturer that fails in any year to place into a qualified escrow fund the money required under par. (a) 2. shall, within 15 days after being notified of the deficiency, place sufficient money into a qualified escrow fund to bring the tobacco product manufacturer into compliance with par. (a) 2.

~~Review because entire law who will notify the tobacco company - private accounting firm?~~

3. The attorney general may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into the qualified escrow fund the money required under this subdivision. The court, upon a finding of violation of this subdivision, may impose a civil penalty 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 a qualified escrow fund. If a violation of this subdivision is knowing, the court may impose a civil penalty 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 a qualified escrow fund.

paragraph

paragraph

Nelson, Robert

From: Hughes, Ed J. [hughesej@DOJ.STATE.WI.US]
Sent: Thursday, March 25, 1999 10:33 AM
To: 'gene.schaefferjr@legis.state.wi.us'
Cc: Nelson, Robert; Sweet, Richard
Subject: Tobacco legislation

I had a chance to look at the revised draft of the tobacco legislation. The legislation itself looks fine to me. I have no suggestions on it.

I have two comments on LRB analysis. First, those who negotiated the settlement agreement consider it important that states are not absolutely required to enact the model legislation; they simply incur dramatically adverse financial consequences if they do not. The decision is up to the states. The second and third sentences of the analysis are a bit inconsistent with this. I would suggest replacing "As part of that agreement, each state agreed Wisconsin's agreement to enact that required legislation" with: "Under that agreement, the states have a strong financial incentive to enact legislation intended to limit the competitive advantage available to tobacco product manufacturers who decline to participate in the master settlement agreement. This bill is based on the model legislation set forth in the master settlement agreement and is intended to promote public health and protect the level of payments due to the state under that agreement."

Second, I am not sure that the sentence beginning on the 11th line of the analysis ("The amount placed into escrow, under the bill, is used to pay part of the claims under the master settlement agreement.") is accurate. Those who make payments into escrow have chosen not to participate in the master settlement agreement and so are not liable for paying any part of the claims that were settled as part of that agreement. While it is longer-winded, I think it is more accurate to state the following: "The amount paid in escrow, under the bill, is intended to ensure that tobacco product manufacturers that do not participate in the master settlement agreement have funds available to satisfy judgments on the types of claims that were asserted in the state's tobacco lawsuit."

I hope this is helpful. Let me know if you have any questions.

Nelson, Robert

From: Schaeffer, Gene
Sent: Thursday, March 25, 1999 10:54 AM
To: Nelson, Robert
Subject: Model Legislation

Bob,

I received a comment to the draft from Ed Hughes. He had a couple of concerns about the LRB analysis. I would like to speak with you about those when you get the chance. Thanks,

Gene



1999 BILL

repeal

enacts the
model legislation
in

1 AN ACT to create 895.10 of the statutes; relating to: an agreement between the
2 state and tobacco product manufacturers.

may

Analysis by the Legislative Reference Bureau

On November 23, 1998, Wisconsin and other states agreed to a settlement of lawsuits brought against the major U.S. tobacco product manufacturers, the "master settlement agreement". As part of that agreement, each state ~~agreed to~~ enact model legislation that would affect tobacco product manufacturers that did not originally join in the master settlement agreement. This bill is intended to fulfill Wisconsin's ~~agreement to enact that required legislation.~~ Under this bill, a tobacco product manufacturer that sells cigarettes in this state is given the choice of joining in the master settlement agreement and performing the obligations under that agreement or placing money into an escrow fund, based on the number of cigarettes sold each year. The amount of money to be placed into escrow per cigarette increases each year until the year 2007, when the amount is \$.0188482. ~~The amount placed into escrow, under the bill, is used to pay part of the claims under the master settlement agreement.~~ Under the bill, any interest in money in the escrow account accrues to the tobacco product manufacturer that put the money into escrow and any money remaining in the escrow account after 25 years is returned to the tobacco product manufacturer that put the money into escrow.

The bill permits the attorney general to bring a civil action against a tobacco product manufacturer that fails to put money into escrow as required. If a court finds that a tobacco product manufacturer failed to place the money into escrow, the bill permits the court to impose a penalty of up to 5% of the amount improperly withheld

insert
A

BILL

from escrow for each day of the violation, up to 100% of the amount improperly withheld. If the court finds that a tobacco product manufacturer knowingly failed to place the money into escrow, the bill permits the court to impose a penalty of up to 15% of the amount improperly withheld from escrow for each day of the violation, up to 300% of the amount improperly withheld. The bill also provides that if a tobacco product manufacturer failed to place the money into escrow on two or more occasions, the court is required to prohibit the manufacturer from selling cigarettes in this state for up to two years.

The bill requires the department of administration to provide a copy of the master settlement agreement to each public library system in the state and requires the revisor of statutes to publish the master settlement agreement in the Wisconsin Administrative Register.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 895.10 of the statutes is created to read:

2 **895.10 Tobacco product agreement.** (1) **DEFINITIONS.** In this section:

3 (a) “Adjusted for inflation” means increased in accordance with the formula for
4 an inflation adjustment in exhibit C of the master settlement agreement.

5 (b) “Affiliate” means a person who directly or indirectly owns or controls, is
6 owned or controlled by or is under common ownership or control with, another
7 person. In this paragraph, “owns”, “owned” and “ownership” means ownership of an
8 equity interest, or the equivalent of an equity interest, of 10% or more.

9 (c) 1. “Cigarette” means any product that contains nicotine, is intended to be
10 burned or heated under ordinary conditions of use, and consists of or contains any
11 of the following:

12 a. Any roll of tobacco wrapped in paper or in any substance not containing
13 tobacco.

BILL

1 b. Tobacco, in any form, that is functional in the product, which, because of its
2 appearance, the type of tobacco used in the filler, or its packaging and labeling, is
3 likely to be offered to, or purchased by, consumers as a cigarette.

4 c. Any roll of tobacco wrapped in any substance containing tobacco which,
5 because of its appearance, the type of tobacco used in the filler, or its packaging and
6 labeling, is likely to be offered to, or purchased by, consumers as a cigarette described
7 in this subdivision.

8 2. The term “cigarette” includes “roll-your-own” tobacco which, because of its
9 appearance, type, packaging or labeling is suitable for use and likely to be offered to,
10 or purchased by, consumers as tobacco for making cigarettes. For purposes of this
11 paragraph, 0.09 ounces of “roll-your-own” tobacco shall constitute one individual
12 cigarette.

13 (d) “Consent decree” means the decree signed by this state in the case, State
14 of Wisconsin v. Phillip Morris, Inc., et al., Case No. 97-CV-328 Dane County Circuit
15 Court, dated December 4, 1998.

16 (e) “Master settlement agreement” means the settlement agreement and
17 related documents entered into on November 23, 1998, by this state and the leading
18 U.S. tobacco product manufacturers.

19 (f) 1. “Participating manufacturer” means a tobacco product manufacturer that
20 is or becomes a signatory to the master settlement agreement and that is bound by
21 the master settlement agreement.

22 (g) “Qualified escrow fund” means an escrow arrangement with a federally or
23 state chartered financial institution having no affiliation with any tobacco product
24 manufacturer and having assets of at least \$1,000,000,000 where the escrow
25 arrangement requires the financial institution to hold the escrowed funds’ principal

BILL

1 for the benefit of releasing parties, as defined in the master settlement agreement,
2 and prohibits the tobacco product manufacturer placing the funds into escrow from
3 using, accessing or directing the use of the funds' principal except as is consistent
4 with sub. (2) (b) 2. and 3.

5 (h) 1. "Tobacco product manufacturer" means an entity that after the effective
6 date of this paragraph [revisor inserts date], directly, and not exclusively through
7 any affiliate, meets any of the following criteria:

8 a. Manufactures cigarettes anywhere that the manufacturer intends to be sold
9 in the United States, including cigarettes intended to be sold in the United States
10 through an importer. This subdivision paragraph does not apply if the manufacturer
11 of the cigarettes does not market or advertise those cigarettes in the United States,
12 and the importer of those cigarettes is an original participating manufacturer, as
13 defined in the master settlement agreement, that will be responsible for the
14 payments under the master settlement agreement with respect to those cigarettes
15 and will pay excise taxes collected by the federal government with respect to those
16 cigarettes.

17 b. Is the first purchaser anywhere, for resale in the United States, of cigarettes
18 manufactured anywhere that the manufacturer did not intend to be sold in the
19 United States.

20 c. Becomes a successor of an entity described in subd. 1. a. or b.

21 2. "Tobacco product manufacturer" does not include an affiliate of a tobacco
22 product manufacturer unless the affiliate meets one of the criteria in subd. 1.

23 (i) "Units sold" means the number of individual cigarettes sold in this state by
24 the applicable tobacco product manufacturer, whether directly or through a
25 distributor, retailer or similar intermediary, during the year in question, as

BILL

1 measured by the excises taxes collected by this state on packs or “roll-your-own”
2 tobacco containers bearing the excise tax stamp of this state. The department of
3 revenue shall promulgate the regulations necessary to ascertain the amount of
4 Wisconsin excise tax paid on the cigarettes of each tobacco product manufacturer for
5 each year.

6 (2) REQUIREMENTS. (a) Any tobacco product manufacturer selling cigarettes to
7 consumers within this state, whether directly or through a distributor, retailer or
8 similar intermediary, after the effective date of this subsection [revisor inserts
9 date], shall do one of the following:

10 1. Become a participating manufacturer of the master settlement agreement
11 and generally perform its financial obligations under the master settlement
12 agreement.

13 2. Place into a qualified escrow fund by April 15 of the year following the listed
14 year the following amounts, as those amounts are adjusted for inflation:

15 a. For 1999: \$.0094241 per unit sold after the effective date of this subdivision
16 [revisor inserts date].

17 b. For 2000: \$.0104712 per unit sold.

18 c. For each of 2001 and 2002: \$.0136125 per unit sold.

19 d. For each of 2003 to 2006: \$.0167539 per unit sold.

20 e. For 2007 and each year thereafter: \$.0188482 per unit sold.

21 (b) A tobacco product manufacturer that places money into a qualified escrow
22 fund under par. (a) 2. shall receive the interest or other appreciation on that money
23 as earned. The money shall be released from the qualified escrow fund only under
24 one of the following circumstances:

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1 1. To pay a judgment or settlement on any released claim, as defined in the
2 master settlement agreement, brought against the tobacco product manufacturer by
3 this state or any releasing party, as defined in the master settlement agreement,
4 located or residing in this state. Moneys shall be released from escrow under this
5 subdivision in the order in which they were placed into escrow and only to the extent
6 and at the time necessary to make payments required under the judgment or
7 settlement.

8 2. To the extent that a tobacco product manufacturer establishes that the
9 amount it was required to place into escrow in a particular year was greater than
10 2.072039% of the total payments that the manufacturer would have been required
11 to make in that year under the master settlement agreement, as determined under
12 subsection IX (i) (2) of the master settlement agreement; and before any of the
13 adjustments or offsets described in subsection IX (i) (3) of that agreement other than
14 the inflation adjustment had it been a participating manufacturer, the excess shall
15 be released from escrow and revert to the tobacco product manufacturer.

16 3. To the extent not released from escrow under subd. 1. or 2., money shall be
17 released from escrow and revert to the tobacco product manufacturer twenty-five
18 years after the date on which it was placed into the qualified escrow fund.

19 (c) 1. Each tobacco product manufacturer that elects to place money into a
20 qualified escrow fund under par. (a) 2. shall do so annually and shall certify to the
21 attorney general by April 15 that the tobacco product manufacturer has placed the
22 money into the qualified escrow fund in compliance with par. (a) 2.

23 2. Any tobacco product manufacturer that fails in any year to place into a
24 qualified escrow fund the money required under par. (a) 2. shall, within 15 days after

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1 being notified of the deficiency, place sufficient money into a qualified escrow fund
2 to bring the tobacco product manufacturer into compliance with par. (a) 2.

3 3. The attorney general may bring a civil action on behalf of the state against
4 any tobacco product manufacturer that fails to place into the qualified escrow fund
5 the money required under this paragraph. The court, upon a finding of violation of
6 this paragraph, may impose a civil penalty in an amount not to exceed 5% of the
7 amount improperly withheld from escrow per day of the violation and in a total
8 amount not to exceed 100% of the original amount improperly withheld from a
9 qualified escrow fund. If a violation of this paragraph is knowing, the court may
10 impose a civil penalty in an amount not to exceed 15% of the amount improperly
11 withheld from escrow per day of the violation and in a total amount not to exceed
12 300% of the original amount improperly withheld from a qualified escrow fund.

13 4. If the court finds that a tobacco product manufacturer knowingly failed, for
14 the second or subsequent time, to place into a qualified escrow fund the money
15 required under par. (a) 2. the court shall prohibit the tobacco product manufacturer
16 from selling cigarettes to consumers within this state directly or through a
17 distributor, retailer or similar intermediary for a period not to exceed 2 years.

18 5. Each failure to make the annual deposit required under par. (a) 2. shall
19 constitute a separate violation.

SECTION 2. Nonstatutory provisions.

20
21 (1) COPIES OF THE MASTER SETTLEMENT AGREEMENT. The department of
22 administration shall provide a copy of the master settlement agreement to each
23 public library system, as defined in section 43.01 (5) of the statutes. "Master
24 settlement agreement" means the settlement agreement and related documents

Nelson, Robert

Insert
A

From: Hughes, Ed J. [hughesej@DOJ.STATE.WI.US]
Sent: Thursday, March 25, 1999 10:33 AM
To: 'gene.schaefferjr@legis.state.wi.us'
Cc: Nelson, Robert; Sweet, Richard
Subject: Tobacco legislation

I had a chance to look at the revised draft of the tobacco legislation. The legislation itself looks fine to me. I have no suggestions on it.

I have two comments on LRB analysis. First, those who negotiated the settlement agreement consider it important that states are not absolutely required to enact the model legislation; they simply incur dramatically adverse financial consequences if they do not. The decision is up to the states. The second and third sentences of the analysis are a bit inconsistent with this. I would suggest replacing "As part of that agreement, each state agreed . . . Wisconsin's agreement to enact that required legislation" with: "Under that agreement, the states have a strong financial incentive to enact legislation intended to limit the competitive advantage available to tobacco product manufacturers who decline to participate in the master settlement agreement. This bill is based on the model legislation set forth in the master settlement agreement and is intended to promote public health and protect the level of payments due to the state under that agreement."

Second, I am not sure that the sentence beginning on the 11th line of the analysis ("The amount placed into escrow, under the bill, is used to pay part of the claims under the master settlement agreement.") is accurate. Those who make payments into escrow have chosen not to participate in the master settlement agreement and so are not liable for paying any part of the claims that were settled as part of that agreement. While it is longer-winded, I think it is more accurate to state the following: "The amount paid in escrow, under the bill, is intended to ensure that tobacco product manufacturers that do not participate in the master settlement agreement have funds available to satisfy judgments on the types of claims that were asserted in the state's tobacco lawsuit."

I hope this is helpful. Let me know if you have any questions.

(END OF INSERT)

**SUBMITTAL
FORM**

**LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and sign on the appropriate line(s) below.

Date: 3/26/99

To: Senator Rosenzweig

Relating to LRB drafting number: LRB-1661

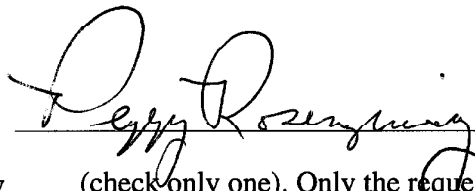
Topic

Model legislation under tobacco settlement

Subject(s)

Courts - miscellaneous

1. **JACKET** the draft for introduction



in the Senate or the Assembly (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached _____.

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction _____.

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Robert P. Nelson, Senior Legislative Attorney
Telephone: (608) 267-7511