

2001 DRAFTING REQUEST

Bill

Received: 12/15/2000

Received By: **champra**

Wanted: **Soon**

Identical to LRB:

For: **Administration-Budget**

By/Representing: **Hoadley**

This file may be shown to any legislator: **NO**

Drafter: **champra**

May Contact:

Alt. Drafters:

Subject: **State Finance - miscellaneous**

Extra Copies: **E-mail to Frank Hoadley**

Pre Topic:

DOA:.....Currier -

Topic:

Tobacco securitization

Instructions:

See Attached.

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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+ *dreicher@foleylaw.com*

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 1/31/01 pg

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By/Representing: Hoadley

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Alt. Drafters: kahlepj
rmarchan
nelsorp1
kuesejt

Subject: State Finance - miscellaneous

Extra Copies: E-mail to Frank Hoadley, ^{DRAFT}
dreicher@foleylaw.com

Pre Topic:

DOA:.....Hoadley - *Curier*
Montgomery

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Champagne, Rick

From: Hoadley, Frank
Sent: Friday, December 08, 2000 2:10 PM
To: Champagne, Rick
Subject: Tobacco Securitization Legislation

Please draft legislation pursuant to the attached instructions. We recognize that we will need to provide additional detail in some areas, but this should cover the basic framework.

Frank Hoadley



Drafting Instructions for
Toba...

895.10(1)

Drafting Instructions for Tobacco Settlement Legislation

1. Declaration of Intent. Include a legislative declaration of intent (a nonstatutory provision) that:
 - a. to diminish the State's exposure to an industry-specific risk, all or a part of the State's rights to receive payments after June 30, 2001 from the master settlement agreement shall be sold and the sale proceeds invested in a separate nonlapsing fund (to be known as the Permanent Fund), and
 - b. the separate nonlapsing fund shall be maintained in perpetuity for the benefit of the people of the State of Wisconsin.

2. Permanent Fund.
 - a. *Creation.* Create the Permanent Fund as a separate nonlapsing fund.
 - b. *Sale Proceeds.* Appropriate to the Permanent Fund any proceeds from the sale of all or any part of the State's rights to receive payments from the master settlement agreement and any residual returned to the State pursuant to the terms of the sale. (Any amounts received from the settlement agreement that are not part of what is sold, however, will continue to go into the General Fund.)
 - c. *Investment.* Authorize the State of Wisconsin Investment Board to direct the investment of money in the Permanent Fund, in the same types of investments as are permitted for the Pension Fund.
 - d. *Earnings.* Provide that any interest earnings or investment returns shall remain in the Permanent Fund and that amounts in the Permanent Fund may be applied to expenses of the fund.
 - e. *Transfers from the Permanent Fund.*
 - i. Require the State of Wisconsin Investment Board to determine, from time to time, the percentage of the Permanent Fund that should be transferred to the General Fund so that, over time, the remaining percentage is expected to equal the original value of the Permanent Fund, adjusted for inflation, it being understood that investment gains and losses in any year may cause the actual amount to be greater or less than the expected amount.
 - ii. Establish a standing appropriation to the General Fund, as of July 1 of each year, of the percentage of the Permanent Fund determined by the State of Wisconsin Investment Board.

25.187C

iii. Require the State of Wisconsin Investment Board to report periodically to the Secretary of Administration and the Legislature on the percentage to be transferred and the actual amount of the transfer.

iv. **[If a decision is made that the fund should serve as a “Rainy Day Fund”:** Establish criteria for using and replenishing amounts in the Permanent Fund in time of extraordinary financial difficulty (for example, upon certification by the Secretary of Administration).]

3. Sale of Payments.

- 18.61(2)
- a. *Authorization.* Authorize the Secretary of Administration to sell, for cash or other consideration, all or any part of State’s rights to receive payments after June 30, 2001 from the master settlement agreement to such purchaser or purchasers and at such price or prices as the officer determines.
 - b. *State Will Honor MSA.* Make a pledge, for the benefit of such purchaser or purchasers, that the State will honor the terms and provisions of the master settlement agreement and provide for actions to be brought against the State if it does not (*see, e.g.,* section 18.61) and that the State will not limit or alter the rights of the purchaser under the purchase contract (*see, e.g.,* section 231.11).
 - c. *Bankruptcy-Remote Entity.* Authorize the Secretary of Administration to be an incorporator of a not-for-profit corporation or member of a LLC established for any purpose related to any sale of all or any part of the State’s rights to payments under the master settlement agreement, as the officer determines. Such entity shall not be treated as a State agency.
 - d. *“Winding Up”.* Authorize Secretary of Administration to take any actions reasonably related to “winding up” any transaction incidental to any sale of all or any part of the State’s rights to payments under the master settlement agreement, as the officer determines

4. Bankruptcy Protection.

- a. *Absolute Sale.* Specify that any transfer of all or any part of the State’s rights to receive payments under the master settlement agreement (whether by the State or any transferee), unless expressly assigned solely as security, will constitute an absolute sale, even if the terms of the transfer provide for a possible or eventual return of a residual to the transferor.
- b. *Security Interest.* Establish a method of perfecting a security interest in the rights to receive payments under master settlement agreement. For example, provide that rights to receive payments under the master settlement agreement constitute a “general intangible” for purposes of the UCC.

5. WHEFA.

- a. *Purchase of Payments.* Authorize the Wisconsin Health and Educational Facilities Authority ("Authority") to purchase, for cash or other consideration, all or any part of the State's rights to receive payments under the master settlement agreement, including the payment of any agreed-upon residual.
 - b. *Sale of Obligations.* Authorize the Authority to sell obligations representing interests in, payable from, or secured by interests in all or any part of the State's rights to receive payments under the master settlement agreement. Such obligations will not be subject to the existing 30-year maturity limit for other Authority obligations.
 - c. *Bankruptcy-Remote Entity.* Authorize the Authority, or its executive director, to be an incorporator of a not-for-profit corporation or member of a LLC established for any purpose related to any sale of all or any part of the State's rights to payments under the master settlement agreement, as the executive director determines. Such entity shall not be treated as a State agency.
 - d. *Corporate Trustee.* Modify section 231.09 so the Authority may contract with a corporate trustee without regard to whether it is "in this state".
6. Appropriation. Appropriate \$_____ from the General Fund to pay such costs incidental to any sale of all or any part of the State's rights to payments under the master settlement agreement, as the Secretary of Administration determines.

SUPPLEMENTAL DRAFTING INSTRUCTIONS FOR TOBACCO SETTLEMENT
LEGISLATION
1/19/01

These instructions respond to the January 4, 2001 Drafter's Note from the Legislative Reference Bureau to Frank Hoadley and the Preliminary Draft of the legislation attached thereto.

1. Tobacco Control Fund, Tobacco Control Board, Permanent Fund and Releasing Amounts from the Permanent Fund

D-Note this issue
✓ a. Do not eliminate the tobacco control fund and at this point do not change s. 25.66 (1).

b. Delete the current language in proposed s. 25.17 (16) (a) [page 3, lines 20-23 and page 4, lines 1-7], and insert the following in lieu thereof:

D-Note
✓ "Annually, calculate the amount of transferable moneys that are available in the permanent fund for transfer to the general fund under s. 16.519. For the purpose of this calculation, transferable moneys shall equal the sum of the following:

✓ 1. 8.5% of the market value of the investments in the permanent fund as of the ___ day of _____ of each year.

✓ 2. All proceeds of, and investment earnings on, investments of the permanent fund made at the direction of the secretary of administration under s. [AA.AAA] [see items 1.f. below] that are received during such fiscal year.

✓ 3. All other amounts identified by the secretary of administration as payments of residual interests to the state from the sale of the state's right to receive payments under the Attorneys General Master Tobacco Settlement Agreement of November 23, 1998 that are received during such fiscal year.

✓ c. In proposed s. 25.17 (16) (b) [page 4 lines 8-11], delete all the language following the words "specifying the" in line 10, and insert the following in lieu thereof:

"amounts of transferable moneys that are available in the permanent fund for transfer to the general fund under s. 16.519."

D-Note
d. Expand the permitted investment language for the permanent fund in proposed s. 25.17 (5m) [page 3, lines 16-18]. In addition to sub. (4) and sub. (5), we assume that the inclusion of the permanent fund in 25.17 (1) would qualify the Permanent Fund for investment in the general categories of s. 25.17, such as 25.17(3)(b). Because the sale transaction may involve the permanent fund taking a subordinated note or certificate of ownership interest in the tobacco settlement revenues as part of the purchase price, we suggest inclusion of a provision similar to s. 25.17 (2) (c), such as:

✓ "([AA.AAA]) Invest the assets of the permanent fund as directed by the secretary of administration in:

✓ 1. Evidences of indebtedness, including subordinated obligations, issued by the any entity established pursuant to s. 16.63 (3) or s. 231.215 or by the Wisconsin health and educational facilities authority which are secured by tobacco settlement revenues (as defined in s.16.63 (1) (c)).

✓ 2. Certificates or other evidences of ownership interest in all or any portion of tobacco settlement revenues (as defined in s.16.63 (1) (c)).

D-Note
In making such investment, the board shall accept such terms and conditions as the secretary of administration specifies and is relieved of any obligations relative to prudent investment of the fund, including those set forth under ch. 881."

✓ 2. **Statement of Intent**

D-Note
a. Leave out the statement of intent, however, insert the following in proposed s. 25.69 of the statutes on page 4, line 18, immediately before the period: "and otherwise shall be preserved in perpetuity as a permanent fund for the benefit of the people of the state".

✓ 3. **Investment Board Expenses**

a. It is understood that the investment board will assess the fund for its expenses under s. 25.187.

✓ 4. **Rainy Day Fund Issues**

a. The rainy day function is not currently contemplated, and therefore, no further drafting on that issue is required.

5. **Sale and Perfection Issues**

✓ a. Add the following definition to proposed s. 16.63 (1):

"(c) "Tobacco settlement revenues" means all general intangibles consisting of the right to receive settlement payments arising from or pursuant to the tobacco settlement agreement and all proceeds thereof (whether direct or indirect)."

b. Replace the proposed s. 16.63 (4) [page 2, lines 14-16] with the following provision:

RJM
"(4) (a) Notwithstanding any other provision of law to the contrary, including the uniform commercial code and the common law, the sale, transfer and assignment and the granting, perfection and enforcement of ownership interests and security interests in tobacco settlement revenues are governed by this section rather than by article 9 of the uniform commercial code or common law, as the case may be. Further, in no event shall the tobacco settlement revenues be deemed proceeds of any property which is not tobacco settlement revenues.

(b) A valid and enforceable security interest in tobacco settlement revenues shall be created and perfected only by the means set forth in this subsection (b) of s. 16.63 (4)

1. A security interest in tobacco settlement revenues shall attach, be perfected and be assigned priority in the manner provided by the uniform commercial code for perfection of security interests in general intangibles, as such law may be revised or amended from time to time (including applicable transition provisions); provided that if the state or the Wisconsin health and educational facilities authority is the debtor, the proper place to file a financing statement to perfect a security interest in tobacco settlement revenues is the Wisconsin department of financial institutions.

2. In addition to any other method for describing collateral in a legally sufficient manner permitted under the laws of the state, the description of collateral in any financing statement filed pursuant to this subdivision shall be deemed legally sufficient if it describes the collateral as general intangibles consisting of the right to receive settlement payments arising from or pursuant to the tobacco settlement agreement and all proceeds thereof.

3. The security interests under subdivision 1 are enforceable against the debtor, any assignee, grantee and all third parties, including judicial lien creditors, subject only to the rights of any third parties holding security interests in the tobacco settlement revenues previously perfected in the manner described in this subsection (b). Except as otherwise provided by its terms, a perfected security interest in the tobacco settlement revenues is a continuously perfected security interest in all then existing or thereafter arising tobacco settlement revenues. A security interest perfected under this subsection ranks prior to any other lien, including any judicial lien, which subsequently attaches to the tobacco settlement revenues.

3. The relative priority of a security interest created under this subsection is not defeated or adversely affected by the commingling of funds arising from the tobacco settlement revenues with other funds.

4. If an event of default occurs under obligations secured by tobacco settlement revenues, the holders thereof or their authorized representatives, as secured parties, may foreclose or otherwise enforce the lien in the tobacco settlement revenues in accordance with article 9 of the uniform commercial code (as such law may be revised or amended from time to time and including applicable transition provisions), subject to the rights of any third parties holding a prior security interest in the tobacco settlement revenues previously perfected in the manner provided in this subsection.

(c) A sale, assignment or other transfer of any tobacco settlement revenues which is expressly stated in the documents governing such transaction to be a sale or other absolute transfer shall be treated as an absolute transfer of the seller's

right, title and interest in, to and under the tobacco settlement revenues, which transfer places such tobacco settlement revenues beyond the reach of the seller or its creditors, as in a true sale, and not as a pledge or other financing, of such tobacco settlement revenues; provided, however, that whether such transfer is deemed to be a sale for tax purposes shall be governed by applicable law without regard to this s. 16.63 (4). The characterization of any such transfer as an absolute transfer and the corresponding characterization of the purchaser's property interest shall not be defeated or adversely affected by, among other things: the commingling of funds arising with respect to the tobacco settlement revenues with other funds; the retention by the seller of a partial or residual interest (including an equity interest) in the tobacco settlement revenues, whether direct or indirect, or whether subordinate or otherwise; the sale of only a portion of the tobacco settlement revenues or an undivided interest therein; any recourse that the purchaser (or its assignees) may have against the seller; whether the seller is responsible for collecting payments due under the tobacco settlement revenues or otherwise enforcing any of the tobacco settlement revenues; any retention by the seller of bare legal title for the purpose of such collection activities; and the treatment of the transfer for tax purposes; provided, however, that nothing in this s. 16.63 (4) is intended to preclude consideration of such provisions in determining whether such transfer is deemed to be a sale for tax purposes under other applicable law. A sale, assignment or other transfer of tobacco settlement revenues shall be deemed perfected automatically as against third parties, including any judicial lien creditors, upon attachment as defined in article 9 of the uniform commercial code."

6. **Right to Sell the State's Right to Receive the Tobacco Settlement Payments**

a. The initial sale of the state's right to receive any payments under the tobacco settlement payment will be done at the direction of the secretary pursuant to s. 16.63 (2). Depending on the structure of the sale transaction, an entity created pursuant to s. 16.63 (3) may be the purchaser from the state of the state's rights to receive the payments. Once purchased by the s. 16.63 (3) entity, that entity (as will any other purchaser) will own the state's right to receive the payments which were sold and should have the general powers under ch. 181 or ch. 183 to sell or pledge those rights as it determines in its discretion. It does not appear, therefore, that any further authorization is required.

D-Note
b. Please confirm that LRB believes that s. 16.63 (2) would authorize the Secretary to sell the state's right to receive tobacco settlement payments for cash or other consideration and at such price as the secretary shall determine. The sale, for example, may involve receiving part of the purchase price in the form of a subordinated note or a certificate of ownership interest in tobacco settlement revenues. We want to be sure that the Secretary has wide discretion to approve the form of transaction.

✓ c. In proposed s. 16.63 (3) [page 2, lines 10-13], delete the language in the beginning of the sentence through the words "ch. 183" and insert the following in lieu thereof:

"The secretary may organize one or more nonstock corporations under ch. 181 or limited liability companies under ch. 183"

7. **Handling DOA Costs of Sale**

a. Provide a new sum sufficient appropriation to DOA to fund the secretary's costs in connection with selling the state's right to the payments, including any costs incurred prior to the sale by the secretary and any seed money required in establishing the s. 16.63 (3) entity and in its purchase of the state's rights to payments.

8. **Additional Comments Relating to proposed s. 16.63 of the Statutes**

a. In proposed s. 16.63 (5) [page 2, lines 17-24]:

i. insert the following words in line 18 after the words "state pledges" and in line 21 after the words "state also pledges":

"to and agrees with any purchaser or subsequent transferee of the state's right to receive any of the payments under the tobacco settlement agreement"

ii. insert the following words after the word "purchaser" in line 23:

"or any subsequent transferee"

iii. insert the following sentence in line 24 as a new final sentence of (5):

"The secretary may include this pledge and agreement of the state in any contract that is entered by the secretary under this section."

b. In proposed s. 16.63 (6) [page 3, lines 1-6]:

i. insert the following words in line 2 after the words "state pledges":

"to and agrees with any purchaser or subsequent transferee of the state's right to receive any of the payments under the tobacco settlement agreement"

ii. insert the following words after the word "purchaser" in line 5:

"or any subsequent transferee"

iii. insert the following sentence in line 5 as a new final sentence of (6):

"The secretary may include this pledge and agreement of the state in any contract that is entered by the secretary under this section."

D-Note may be included cost

D-Note plus

D-Note plus

D-Vale
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c. Either add a general provision that any entity established pursuant to s. 16.63 (3) or s. 231.215 will not be deemed an agency of the state with respect to statutory provisions applying to state agencies and the officers and employees of those agencies, or specifically exclude the entity, its officers and employees from each of those statutory provisions.

d. Add a provision similar to s. 18.10 (12) of the statutes, such as:

JTK →

“Procurement of Services. The secretary may enter into a contract with any firm or individual engaged in financial services for the performance of any of his duties under this section, using selection and procurement procedures established by the secretary. That contract is not subject to s. 16.705 or 16.75.”

e. Add a provision similar to s. 18.13 of the statutes, such as:

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“ **Suits against the state. (1) In General.** This section shall govern all civil claims, suits, proceedings and actions against the state relating to the sale of the state’s rights to receive payments under the tobacco settlement agreement notwithstanding any contrary provision of the statutes. If the state fails to comply with the provisions of s. 16.63 or the terms of any agreement relating to the sale of the state’s rights to receive payments under the tobacco settlement agreement, an action to compel such compliance may be commenced against the state in accordance with s. 801.02 without any prerequisite act. The plaintiff shall serve an authenticated copy of the summons and complaint on the attorney general by leaving the copies at the attorney general’s office in the capitol with an assistant or clerk. The place of trial of such an action shall be as provided in s. 801.50.

(3) *Judgment.* Sections 16.53 and 775.01 shall not apply to such claims against the state under s. (1). If there is a final judgment against the state in such action, it shall be paid as provided in s. 775.04 together with interest thereon at the rate of 10% per year from the date such payment was judged to have been due until the date of payment of such judgment.”

9. **Additional Comments Relating to WHEFA**

a. Create a s. 231.01 (12) of the statutes to read:

“Tobacco settlement revenues” has the meaning given in s. 16.63 (1) (c).

PJK

b. In proposed s. 231.03 (6) (g) [page 4, line 23]: insert the words “or make a loan” in the first sentence after the word “purchase” and before the words “under sub. (20)” and insert the following in lieu of the second sentence:

“Bonds issued for this purpose shall be payable from, or secured by interests in, tobacco settlement revenues and such other property pledged under the bond resolution and, notwithstanding s. 231.08 (3), are not required to mature in 30 years or less from the date of issue.”

c. In proposed s. 231.03 (20) [page 5, lines 4-5], delete the remainder of the sentence after “agreement,” in line 5 and insert the following in lieu thereof:

“or make a loan to be secured by the state’s right to receive any of the payments under the tobacco settlement agreement, in either case upon such terms and at such prices as it considers reasonable and can be agreed upon between it and the owner thereof. Without limiting the foregoing, the authority may issue certificates or other evidences of ownership interest in all or any portion of the tobacco settlement revenues upon such terms and conditions as specified by the authority in the resolution under which such certificates or evidences are issued, or in a related trust agreement or trust indenture.”

d. Amend the definition of “revenues” in s. 231.01 (9) by inserting the following at the end thereof:

“, and with respect to any bonds issued for the purpose described in s. 231.03 (6) (g), tobacco settlement revenues identified in the bond resolution.”

e. Amend the last sentence in s. 231.16 (1) by inserting the following at the beginning thereof in lieu of the word “No”:

“Except for bonds issued to refund bonds issued for the purpose described in s. 231.03 (6) (g), no”.

f. In proposed s. 231.215 [page 5, lines 23-24 and page 6, lines 1-3], delete the language in the beginning of the sentence through the words “ch. 183” and insert the following in lieu thereof:

“The authority, or its executive director, may organize one or more nonstock corporations under ch. 181 or limited liability companies under ch. 183”

g. **[DOA and WHEFA will consider further whether to expand the types of investments permitted pursuant to s. 231.17 and 66.0603 (1m) to determine if a broader range of investments would be useful in a securitization; e.g., guaranteed investment contracts with maturities beyond 7 years]**

Champagne, Rick

From: Hoadley, Frank
Sent: Tuesday, January 23, 2001 6:55 PM
To: Champagne, Rick
Subject: Tobacco Securitization



Statutory
Language.doc



i Redline of
Supplemental Instru...



k Supplemental Drafting
Instruct...

Two additions to drafting instructions:

A revision to the last set of instructions. Two versions are included; one is a "redline" to show changes from the revised instructions I last sent you and one is a "clean" version. The redline version should make it plain what the changes are. Included in this draft is an attempt to address the "timing" and "hold harmless" concepts we last communicated about.

A problem areas we have been thinking about is the current litigation the counties have undertaken against the State and the tobacco companies. The problem is two-fold: First, the presence of unresolved litigation stops the securitization transaction in its tracks. Second, the terms of the Master Settlement provide that even if the State manages to extract itself from the litigation, under the agreement any amounts to be received by the State are reduced by any amounts tobacco companies are required to pay to our cities/counties. An additional drafting instruction is provided to address this problem directly.

Frank Hoadley 6-2305

TOBACCO SETTLEMENT LEGISLATION: SAMPLE LANGUAGE

AFFIRMING MSA AND LIMITING CHALLENGES

1/23/01

- (x) The participation of the state in the Attorneys General Master Tobacco Settlement Agreement of November 23, 1998 is affirmed.
- (y) Payments received and to be received by the state under the Attorneys General Master Tobacco Settlement Agreement of November 23, 1998 are declared to be property of the state, to be dealt with in a manner approved by the legislature, including a sale under s. 16.63. No subdivision of the state, including any county, and no officer or agent of any such subdivision, shall have or seek to maintain (i) any claim against any party that was released by the state under the provisions of the Attorneys General Master Tobacco Settlement Agreement of November 23, 1998, or (ii) any claim against the state or any officer or agent of the state that seeks in any way to avoid or limit that settlement agreement.

SUPPLEMENTAL DRAFTING INSTRUCTIONS FOR TOBACCO SETTLEMENT
{LEGISLATION 1/19/01} {LEGISLATION
1/23/01}

These instructions respond to the January 4, 2001 Drafter's Note from the Legislative Reference Bureau to Frank Hoadley and the Preliminary Draft of the legislation attached thereto.

1. Tobacco Control Fund, Tobacco Control Board, Permanent Fund and Releasing Amounts from the Permanent Fund

a. Do not eliminate the tobacco control fund ~~{and at this point do not change s. 25.66 (1).}~~ **Amend s. 25.66 (1) to read as follows:**

“(1) There is created a separate nonlapsible trust fund, known as the tobacco control fund, to consist of, in each of fiscal years 2001-2002 and 2002-2003, the first \$23,500,000 of the moneys received by the general fund in each fiscal year from the following:

(a) Payments received under the Attorneys General Master Tobacco Settlement Agreement of November 23 1998, to the extent the right to receive such payments has not been sold pursuant to s. 16.63.

(b) If the right to receive such payments has been sold pursuant to s. 16.63, the moneys transferred to the general fund from the permanent fund under s.16.519.”}

b. Delete the current language in proposed s. 25.17 (16) (a) [page 3, lines 20-23 and page 4, lines 1-7], and insert the following in lieu thereof:

“Annually, calculate the amount of transferable moneys that are available in the permanent fund for transfer to the general fund under s. 16.519. For the purpose of this calculation, transferable moneys shall equal the ~~{sum of the following:}~~ **{following:}**

{1} {1. In fiscal year 2001-2002, an amount equal to \$ _____, less all payments under the Attorneys General Master Tobacco Settlement Agreement of November 23, 1998 that are not sold pursuant to s. 16.63 which are received during such fiscal year by the state.

2. In fiscal year 2002-2003, an amount equal to \$ _____, less all payments under the Attorneys General Master Tobacco Settlement Agreement of November 23, 1998 that are not sold pursuant to s. 16.63 which are received during such fiscal year by the state.

3. In each fiscal year following fiscal year 2002-2003, the sum of the following:

A. 8.5% of the market value of the investments in the permanent fund as of the ___ day of _____ of each year.

~~{2}~~ B. All proceeds of, and investment earnings on, investments of the permanent fund made at the direction of the secretary of administration under s. [AA.AAA] [see items 1.f. below] that are received during such fiscal year.

~~{3}~~ C. All other amounts identified by the secretary of administration as payments of residual interests to the state from the sale of the state's right to receive payments under the Attorneys General Master Tobacco Settlement Agreement of November 23, 1998 that are received during such fiscal year.

c. In proposed s. 25.17 (16) (b) [page 4 lines 8-11], delete all the language following the words "specifying the" in line 10, and insert the following in lieu thereof:

"amounts of transferable moneys that are available in the permanent fund for transfer to the general fund under s. 16.519."

d. Expand the permitted investment language for the permanent fund in proposed s. 25.17 (5m) [page 3, lines 16-18]. In addition to sub. (4) and sub. (5), we assume that the inclusion of the permanent fund in 25.17 (1) would qualify the Permanent Fund for investment in the general categories of s. 25.17, such as 25.17(3)(b). Because the sale transaction may involve the permanent fund taking a subordinated note or certificate of ownership interest in the tobacco settlement revenues as part of the purchase price, we suggest inclusion of a provision similar to s. 25.17 (2) (c), such as:

"([AA.AAA]) Invest the assets of the permanent fund as directed by the secretary of administration in:

1. Evidences of indebtedness, including subordinated obligations, issued by the any entity established pursuant to s. 16.63 (3) or s. 231.215 or by the Wisconsin health and educational facilities authority which are secured by tobacco settlement revenues (as defined in s.16.63 (1) (c)).

2. Certificates or other evidences of ownership interest in all or any portion of tobacco settlement revenues (as defined in s.16.63 (1) (c)).

In making such investment, the board shall accept such terms and conditions as the secretary of administration specifies and is relieved of any obligations relative to prudent investment of the fund, including those set forth under ch. 881."

2. Statement of Intent

a. Leave out the statement of intent, however, insert the following in proposed s. 25.69 of the statutes on page 4, line 18, immediately before the period: "and otherwise shall be preserved in perpetuity as a permanent fund for the benefit of the people of the state".

3. Investment Board Expenses

a. It is understood that the investment board will assess the fund for its expenses under s. 25.187.

4. Rainy Day Fund Issues

a. The rainy day function is not currently contemplated, and therefore, no further drafting on that issue is required.

5. Sale and Perfection Issues

a. Add the following definition to proposed s. 16.63 (1):

"(c) "Tobacco settlement revenues" means all general intangibles consisting of the right to receive settlement payments arising from or pursuant to the tobacco settlement agreement and all proceeds thereof (whether direct or indirect)."

b. Replace the proposed s. 16.63 (4) [page 2, lines 14-16] with the following provision:

"(4) (a) Notwithstanding any other provision of law to the contrary, including the uniform commercial code and the common law, the sale, transfer and assignment and the granting, perfection and enforcement of ownership interests and security interests in tobacco settlement revenues are governed by this section rather than by article 9 of the uniform commercial code or common law, as the case may be. Further, in no event shall the tobacco settlement revenues be deemed proceeds of any property which is not tobacco settlement revenues.

(b) A valid and enforceable security interest in tobacco settlement revenues shall be created and perfected only by the means set forth in this subsection (b) of s. 16.63 (4)

1. A security interest in tobacco settlement revenues shall attach, be perfected and be assigned priority in the manner provided by the uniform commercial code for perfection of security interests in general intangibles, as such law may be revised or amended from time to time (including applicable transition provisions); provided that if the state or the Wisconsin health and educational facilities authority is the debtor, the proper place to file a financing statement to perfect a security interest in tobacco settlement revenues is the Wisconsin department of financial institutions.

2. In addition to any other method for describing collateral in a legally sufficient manner permitted under the laws of the state, the description of collateral in any financing statement filed pursuant to this subdivision shall be deemed legally sufficient if it describes the collateral as general intangibles consisting of the right to receive settlement payments arising from or pursuant to the tobacco settlement agreement and all proceeds thereof.

3. The security interests under subdivision 1 are enforceable against the debtor, any assignee, grantee and all third parties, including judicial lien creditors, subject only to the rights of any third parties holding security interests in the tobacco settlement revenues previously perfected in the manner described in this subsection (b). Except as otherwise provided by its terms, a perfected security interest in the tobacco settlement revenues is a continuously perfected security interest in all then existing or thereafter arising tobacco settlement revenues. A security interest perfected under this subsection ranks prior to any other lien, including any judicial lien, which subsequently attaches to the tobacco settlement revenues.

3. The relative priority of a security interest created under this subsection is not defeated or adversely affected by the commingling of funds arising from the tobacco settlement revenues with other funds.

4. If an event of default occurs under obligations secured by tobacco settlement revenues, the holders thereof or their authorized representatives, as secured parties, may foreclose or otherwise enforce the lien in the tobacco settlement revenues in accordance with article 9 of the uniform commercial code (as such law may be revised or amended from time to time and including applicable transition provisions), subject to the rights of any third parties holding a prior security interest in the tobacco settlement revenues previously perfected in the manner provided in this subsection.

(c) A sale, assignment or other transfer of any tobacco settlement revenues which is expressly stated in the documents governing such transaction to be a sale or other absolute transfer shall be treated as an absolute transfer of the seller's right, title and interest in, to and under the tobacco settlement revenues, ~~which transfer places such tobacco settlement revenues beyond the reach of the seller or its creditors,~~ as in a true sale, and not as a pledge or other financing~~;~~ of such tobacco settlement revenues **and after such transfer such tobacco settlement revenues shall not be subject to any claims of the seller or its creditors**; provided, however, that whether such transfer is deemed to be a sale for tax purposes shall be governed by applicable law without regard to this s. 16.63 (4). The characterization of any such transfer as an absolute transfer and the corresponding characterization of the purchaser's property interest shall not be defeated or adversely affected by, among other things: the commingling of funds arising with respect to the tobacco settlement revenues with other funds; the retention by the seller of a partial or residual interest (including an equity interest) in the tobacco settlement revenues, whether direct or indirect, or whether

subordinate or otherwise; the sale of only a portion of the tobacco settlement revenues or an undivided interest therein; any recourse that the purchaser (or its assignees) may have against the seller; whether the seller is responsible for collecting payments due under the tobacco settlement revenues or otherwise enforcing any of the tobacco settlement revenues; any retention by the seller of bare legal title for the purpose of such collection activities; and the treatment of the transfer for tax purposes; provided, however, that nothing in this s. 16.63 (4) is intended to preclude consideration of such provisions in determining whether such transfer is deemed to be a sale for tax purposes under other applicable law. A sale, assignment or other transfer ~~{or}~~ {of} tobacco settlement revenues shall be deemed perfected automatically as against third parties, including any judicial lien creditors, upon attachment as defined in article 9 of the uniform commercial code.”

6. Right to Sell the State’s Right to Receive the Tobacco Settlement Payments

a. The initial sale of the state’s right to receive any payments under the tobacco settlement payment will be done at the direction of the secretary pursuant to s. 16.63 (2). Depending on the structure of the sale transaction, an entity created pursuant to s. 16.63 (3) may be the purchaser from the state of the state’s rights to receive the payments. Once purchased by the s. 16.63 (3) entity, that entity (as will any other purchaser) will own the state’s right to receive the payments which were sold and should have the general powers under ch. 181 or ch. 183 to sell or pledge those rights as it determines in its discretion. It does not appear, therefore, that any further authorization is required.

b. Please confirm that LRB believes that s. 16.63 (2) would authorize the Secretary to sell the state’s right to receive tobacco settlement payments for cash or other consideration and at such price as the secretary shall determine. The sale, for example, may involve receiving part of the purchase price in the form of a subordinated note or a certificate of ownership interest in tobacco settlement revenues. We want to be sure that the Secretary has wide discretion to approve the form of transaction.

c. In proposed s. 16.63 (3) [page 2, lines 10-13], delete the language in the beginning of the sentence through the words “ch. 183” and insert the following in lieu thereof:

“The secretary may organize one or more nonstock corporations under ch. 181 or limited liability companies under ch. 183”

7. Handling DOA Costs of Sale

a. Provide a new sum sufficient appropriation to DOA to fund the secretary’s costs in connection with selling the state’s right to the payments, including any costs incurred prior to the sale by the secretary and any seed money required in establishing the s. 16.63 (3) entity and in its purchase of the state’s rights to payments.

8. Additional Comments Relating to proposed s. 16.63 of the Statutes

a. In proposed s. 16.63 (5) [page 2, lines 17-24]:

i. insert the following words in line 18 after the words “state pledges” and in line 21 after the words “state also pledges”:

“to and agrees with any purchaser or subsequent transferee of the state’s right to receive any of the payments under the tobacco settlement agreement”

ii. insert the following words after the word “purchaser” in line 23:

“or any subsequent transferee”

iii. insert the following sentence in line 24 as a new final sentence of (5):

“The secretary may include this pledge and agreement of the state in any contract that is entered by the secretary under this section.”

b. In proposed s. 16.63 (6) [page 3, lines 1-6]:

i. insert the following words in line 2 after the words “state pledges”:

“to and agrees with any purchaser or subsequent transferee of the state’s right to receive any of the payments under the tobacco settlement agreement”

ii. insert the following words after the word “purchaser” in line 5:

“or any subsequent transferee”

iii. insert the following sentence in line 5 as a new final sentence of (6):

“The secretary may include this pledge and agreement of the state in any contract that is entered by the secretary under this section.”

c. Either add a general provision that any entity established pursuant to s. 16.63 (3) or s. 231.215 will not be deemed an agency of the state with respect to statutory provisions applying to state agencies and the officers and employees of those agencies, or specifically exclude the entity, its officers and employees from each of those statutory provisions.

d. Add a provision similar to s. 18.10 (12) of the statutes, such as:

“*Procurement of Services.* The secretary may enter into a contract with any firm or individual engaged in financial services for the performance of any of his

duties under this section, using selection and procurement procedures established by the secretary. That contract is not subject to s. 16.705 or 16.75.”

e. Add a provision similar to s. 18.13 of the statutes, such as:

“ **Suits against the state. (1) *In General.*** This section shall govern all civil claims, suits, proceedings and actions against the state relating to the sale of the state’s rights to receive payments under the tobacco settlement agreement notwithstanding any contrary provision of the statutes. If the state fails to comply with the provisions of s. 16.63 or the terms of any agreement relating to the sale of the state’s rights to receive payments under the tobacco settlement agreement, an action to compel such compliance may be commenced against the state in accordance with s. 801.02 without any prerequisite act. The plaintiff shall serve an authenticated copy of the summons and complaint on the attorney general by leaving the copies at the attorney general’s office in the capitol with an assistant or clerk. The place of trial of such an action shall be as provided in s. 801.50.

{(2) *Recovery of Money Judgment.* If the recovery of a money judgment against the state is necessary to give the plaintiff in an action authorized by (1) a complete remedy, such a claim may be joined with the claim to compel compliance.}

(3) *Judgment.* Sections 16.53 and 775.01 shall not apply to such claims against the state under s. ~~{(1)}~~**{(2)}**. If there if a final judgment against the state in such action, it shall be paid as provided in s. 775.04 together with interest thereon at the rate of 10% per year from the date such payment was judged to have been due until the date of payment of such judgment.”

9. Additional Comments Relating to WHEFA

a. Create a s. 231.01 (12) of the statutes to read:

“Tobacco settlement revenues” has the meaning given in s. 16.63 (1) (c).

b. In proposed s. 231.03 (6) (g) [page 4, line 23]: insert the words “or make a loan” in the first sentence after the word “purchase” and before the words “under sub. (20)” and insert the following in lieu of the second sentence:

“Bonds issued for this purpose shall be payable from, or secured by interests in, tobacco settlement revenues and such other property pledged under the bond resolution and, notwithstanding s. 231.08 (3), are not required to mature in 30 years or less from the date of issue.”

c. In proposed s. 231.03 (20) [page 5, lines 4-5], delete the remainder of the sentence after “agreement,” in line 5 and insert the following in lieu thereof:

“or make a loan to be secured by the state’s right to receive any of the payments under the tobacco settlement agreement, in either case upon such terms and at

such prices as it considers reasonable and can be agreed upon between it and the owner thereof. Without limiting the foregoing, the authority may issue certificates or other evidences of ownership interest in all or any portion of the tobacco settlement revenues upon such terms and conditions as specified by the authority in the resolution under which such certificates or evidences are issued, or in a related trust agreement or trust indenture.”

d. Amend the definition of “revenues” in s. 231.01 (9) by inserting the following at the end thereof:

“, and with respect to any bonds issued for the purpose described in s. 231.03 (6) (g), tobacco settlement revenues identified in the bond resolution.”

e. Amend the last sentence in s. 231.16 (1) by inserting the following at the beginning thereof in lieu of the word “No”:

“Except for bonds issued to refund bonds issued for the purpose described in s. 231.03 (6) (g), no”.

f. In proposed s. 231.215 [page 5, lines 23-24 and page6, lines1-3], delete the language in the beginning of the sentence through the words “ch. 183” and insert the following in lieu thereof:

“The authority, or its executive director, may organize one or more nonstock corporations under ch. 181 or limited liability companies under ch. 183”

g. **[DOA and WHEFA will consider further whether to expand the types of investments permitted pursuant to s. 231.17 and 66.0603 (1m) to determine if a broader range of investments would be useful in a securitization; e.g., guaranteed investment contracts with maturities beyond 7 years]**

MARK-UP OF PROPOSED LANGUAGE

~~INSERT ANALYSIS RM~~

INSERT

a. Add the following definition to proposed s. 16.63 (1):

(c) "Tobacco settlement revenues" means all general intangibles consisting of the right to receive settlement payments arising from or pursuant to the tobacco settlement agreement and all proceeds thereof ~~of these payments~~, whether direct or indirect.

Tobacco settlement

INSERT

b. Replace the proposed s. 16.63 (4) [page 2, lines 14-16] with the following provision:

~~(4) (a) Notwithstanding any other provision of law to the contrary, including the uniform commercial code and the common law, the sale, transfer, and assignment and the granting, perfection and enforcement of ownership interests and security interests in tobacco settlement revenues are governed by this section rather than by article 9 of the uniform commercial code or common law, as the case may be. Further,~~

~~(a) in no event shall the tobacco Tobacco settlement revenues may not be deemed proceeds of any property which is not tobacco settlement revenues.~~

~~(b) Except as otherwise provided in this subsection, the sale, transfer, and assignment of tobacco settlement revenues and the granting, perfection and enforcement of ownership interests and security interests in tobacco settlement revenues are governed by ch. 409. Notwithstanding ch. 409, with regard to creating, perfecting, and enforcing a valid and enforceable security interest in tobacco settlement revenues may be created and perfected only by the following means:~~

1. ~~A security interest in tobacco settlement revenues shall attach, be perfected and be assigned priority in the manner provided by the uniform commercial code for perfection of security interests in general intangibles, as such law may be revised or amended from time to time (including applicable transition provisions); provided that if~~ If this state or the Wisconsin health and educational facilities authority is the debtor in the transaction, the proper place to file the required financing statement to perfect the security interest in ~~tobacco settlement revenues~~ is the department of financial institutions.

2. ~~In addition to any other method for describing collateral in a legally sufficient manner permitted under the laws of the state, the~~ The description of collateral in any the required financing statement filed pursuant to this subdivision shall be deemed legally is sufficient if it describes the collateral as general intangibles consisting of the right to receive settlement payments arising from or pursuant to the tobacco settlement agreement and all proceeds thereof of those payments.

That agreement

3. ~~The security interests under subdivision 1 are~~ A security interest perfected under this paragraph is enforceable against the debtor, any assignee, grantee and all third parties, including judicial lien creditors under any lien obtained by judicial proceedings, subject only to the rights of any third parties holding security interests in the tobacco settlement revenues previously perfected in the manner described in under this paragraph. Except as otherwise provided by its terms Unless the applicable security agreement provides otherwise, a perfected security interest in the tobacco settlement revenues is a continuously perfected security interest in all then existing or thereafter arising tobacco settlement revenues existing on the date of the agreement or arising after the date of the agreement. A security interest

perfected under this paragraph ~~ranks prior to~~ has priority over any other lien, including any ~~judicial lien obtained by judicial proceedings~~, which subsequently attaches to the tobacco settlement revenues.

4. The relative priority of a security interest created under this paragraph is not ~~defeated or adversely affected by the commingling of funds proceeds~~ arising from the tobacco settlement revenues with other ~~funds~~ amounts.

~~4. If an event of default occurs under obligations secured by tobacco settlement revenues, the holders thereof or their authorized representatives, as secured parties, may foreclose or otherwise enforce the lien in the tobacco settlement revenues in accordance with article 9 of the uniform commercial code (as such law may be revised or amended from time to time and including applicable transition provisions), subject to the rights of any third parties holding a prior security interest in the tobacco settlement revenues previously perfected in the manner provided in this subsection.~~

(c) 1. A sale, assignment or other transfer of any tobacco settlement revenues ~~which is expressly stated in the documents governing such transaction to be a sale or other absolute transfer shall be treated as~~ is an absolute transfer of the seller's right, title and interest in, to and under the tobacco settlement revenues, if the documents governing the transaction expressly state that the transaction is a sale or other absolute transfer, which transfer Such a transaction places such the tobacco settlement revenues beyond the reach of the seller or its creditors, as in a true sale, and not as a pledge or other financing, of such tobacco settlement revenues.

2. ~~;~~ provided, however, that The characterization of any transfer as an absolute transfer under subd. 1. may be considered in determining whether such the transfer

is deemed to be a sale for tax purposes ~~shall be governed by applicable law without regard to this s. 16.63 (4).~~

3. The characterization of any ~~such~~ transfer as an absolute transfer under subd. 1 and the corresponding characterization of the purchaser's property interest ~~shall not be defeated or adversely~~ is not affected by, ~~among other things:~~ the commingling of funds proceeds arising with respect to the tobacco settlement revenues with other funds amounts; the retention by the seller of a partial or residual interest, including an equity interest, in the tobacco settlement revenues, whether direct or indirect, or whether subordinate or otherwise; the sale of only a portion of the tobacco settlement revenues or an undivided interest ~~therein~~ in the tobacco settlement revenues; any recourse that the purchaser or its assignees may have against the seller; whether the seller is responsible for collecting payments due under the tobacco settlement revenues or for otherwise enforcing any of the tobacco settlement revenues; ~~any retention by the seller of bare~~ or retains legal title to the tobacco settlement revenues for the purpose of ~~such~~ these collection activities; and the treatment of the transfer for tax purposes. ; ~~provided, however, that nothing in this s. 16.63 (4) is intended to preclude consideration of such provisions in determining whether such transfer is deemed to be a sale for tax purposes under other applicable law.~~ [A sale, assignment or other transfer or of tobacco settlement revenues shall be deemed perfected automatically as against third parties, including any judicial lien creditors, upon attachment as defined in article 9 of the uniform commercial code.]

Move to (b) 4.?

SECTION 1. 409.102 (1) (intro.) of the statutes is amended to read:

409.102 (1) (intro.) Except as otherwise provided in s. 409.104 on excluded transactions and s. XXX.XX (4) (b) and (c) on transactions involving tobacco settlement revenues, this chapter applies:

History: 1973 c. 215.

Marchant, Robert

From: Reicher, David M. [dreicher@foleylaw.com]
Sent: Tuesday, January 23, 2001 4:09 PM
To: 'robert.marchant@legis.state.wi.us'
Subject: FW: Tobacco legislation; redelivery

David M. Reicher

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777 E. Wisconsin Avenue
Milwaukee, WI 53202
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> -----Original Message-----

> From: Reicher, David M.
> Sent: Tuesday, January 23, 2001 4:07 PM
> To: 'robert.marchant@legis.state.wi.us'
> Cc: Groethe, Reed; Lane, Patricia J.
> Subject: Tobacco legislation

>
> Mr.Marchant:
>
> Pursuant to your conversation with Reed Groethe, we suggest the following
> changes to the proposed language regarding the true sale of the tobacco
> settlement revenues. In our item 5.b., proposed section 16.63 (4) (c),
> strike the phrase "which transfer places such tobacco settlement revenues
> beyond the reach of the seller or its creditors" in the first sentence,
> and insert the following in the first sentence after the word "revenues"
> and before ";provided, however,": "and after such transfer such tobacco
> settlement revenues shall not be subject to any claims of the seller or
> its creditors". Also, please correct our typo in the last sentence of (c)
> which says "other transfer or tobacco settlement revenues" by changing the
> "or" to "of".

> Please call me with any questions.

> David M. Reicher

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>
>
>

Champagne, Rick

From: Hoadley, Frank
Sent: Wednesday, January 24, 2001 5:25 PM
To: Champagne, Rick
Subject: FW: Redraft from LRB

Rick -

I have no problem if you forward drafts directly to Dave Reicher and/or Reed Groethe, so long as I am copied and receive the same material.

Thanks,

Frank Hoadley 6-2305

-----Original Message-----

From: Reicher, David M. [mailto:dreicher@foleylaw.com]
Sent: Wednesday, January 24, 2001 3:42 PM
To: 'frank.hoadley@doa.state.wi.us'
Cc: Groethe, Reed
Subject: Redraft from LRB

Frank:

I spoke to Rick after our call. He indicated that the draft is in typing so the changes Reed and I discussed with you will be made after the next draft, which should be sent out tomorrow morning. Rick is willing to send a draft to Reed and I directly if you send him an e-mail approving his directly sending it to us. I only suggest this so that we will get it as soon as it is ready in case you are tied up in meetings or a call when LRB sends it out.

David M. Reicher

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