

CAMPAIGN For TOBACCO-FREE Kids[®]

SUMMARY OF THE MULTISTATE SETTLEMENT AGREEMENT (MSA)

The multistate settlement agreement (MSA) between the states and the major U.S. tobacco companies will direct a lot of money to the states, but it says nothing about how that money should be spent. Accordingly, the agreement will not, by itself, substantially reduce tobacco use unless the state legislatures invest a significant amount of the state settlement proceeds into new and expanded efforts to reduce smoking and other tobacco use.

The Agreement Does Not Address The Following Important Matters

- The need for comprehensive programs to prevent and reduce tobacco use in every state.
- Protecting people from secondhand smoke.
- Making tobacco products less accessible to children by such measures as banning vending machines and self-service displays.
- Establishing more effective and more visible health warnings on tobacco products.
- Establishing strong Food and Drug Administration authority over tobacco products.
- Restricting US tobacco company marketing to youth overseas.
- Helping U.S. tobacco farmers make the transition to other forms of income.

The New Tobacco-Marketing Restrictions Are Helpful But More Needs To Be Done

The agreement establishes the following new restrictions on tobacco company marketing and advertising:

- Eliminates tobacco billboards and transit ads.
- Prohibits the use of cartoon characters to promote tobacco products.
- Prohibits tobacco brand name merchandise (e.g., hats, t-shirts), except at tobacco-sponsored events.
- Prohibits tobacco brand-name sponsorship for concerts, events in which any contestants are under 18, or for football, baseball, soccer or hockey (except for Brown & Williamson's continued sponsorship of either the Kool Jazz Festival or the GPC Country Music Festival).
- Limits other tobacco brand-name sponsorships to one event or series (such as the Winston cup race tour) annually per manufacturer.
- Permits free tobacco-product distributions only at locations where children are not permitted.
- Restricts offers of non-tobacco items or gifts based on proof of purchase to adults.
- Prohibits the use of non-tobacco brand names (such as Harley Davidson Cigarettes) on tobacco products.
- Reaffirms the previously agreed upon prohibition on tobacco product placement in movies and on TV.

The agreement still permits the following tobacco advertising and marketing practices to continue:

- Permits outdoor advertising with signs of fourteen square feet or smaller on the buildings or property of places where tobacco is sold (including stores near schools) and at events sponsored by the tobacco industry.
- Permits the use of human images in tobacco advertising, such as the Marlboro cowboy.
- Places no specific restrictions on tobacco advertisements in newspapers and magazines.
- Places no specific restrictions on advertising in places that sell tobacco products.
- Permits each tobacco company to continue a single tobacco brand-name sponsorship of auto racing, rodeo, or other event not specifically prohibited (see above), with "single" sponsorships including the sponsorship of entire series of auto races, rodeos, or other events (e.g., all Nascar races).
- Places no specific restrictions on the televising of tobacco brand-name sponsored events.
- Allows unlimited tobacco-company sponsorships of events in their corporate (as opposed to brand) names.
- Places no specific restrictions on tobacco Internet advertising.
- Places no specific restrictions on tobacco direct-mail advertising.

The agreement does state, however, that the tobacco companies cannot "take any action, directly or indirectly, to target youth in the advertising, promotion, or marketing of tobacco products." To date, this provision has been used successfully to stop some cigarette company advertising in magazines with large youth readerships. More vigorously enforcing this provision could significantly reduce more of the cigarette companies' marketing efforts that reach and influence kids.

See, also, the following TFK Factsheets:

- *MSA's Shortcomings*, <http://tobaccofreekids.org/research/factsheets/pdf/0058.pdf>.
- *Multistate Settlement Agreement Fails to Reach or Limit Most Cigarette Company Marketing Tactics*, <http://tobaccofreekids.org/research/factsheets/pdf/0085.pdf>.
- *MSA versus FDA Rule*, <http://tobaccofreekids.org/research/factsheets/pdf/0056.pdf>
- *MSA Restrictions on Distribution of Free Packs of Cigarettes*, <http://tobaccofreekids.org/research/factsheets/pdf/0215.pdf>.
- *Increased Cigarette Company Marketing Since the Multistate Settlement Agreement Went Into Effect*, <http://tobaccofreekids.org/research/factsheets/pdf/0128.pdf>.

The Agreement's New Public Education Program To Reduce Youth Tobacco Use

The agreement required the tobacco companies to contribute \$300 million a year for five years (ending in 2003) to a newly created National Foundation (the Legacy Foundation) for a public education program to reduce underage tobacco use and educate consumers about the causes and prevention of diseases associated with the use of tobacco products. The agreement prohibits any use of the National Foundation's public education funds to support ads that vilify

the tobacco industry, any of its member companies, or any of its individual employees – and the cigarette companies have used the restriction to try to stop various Legacy Foundation ads.

While this MSA National Foundation funding for public education has now ended, the Legacy Foundation still has substantial funds (and interest income) remaining from the prior-year payments and will continue in operation. The public education efforts of the Legacy Foundation work best as a national overlay to parallel state-specific public education efforts that can target special state populations, operate free of the restrictions placed on ads funded by the national foundation, and otherwise more effectively address unique state characteristics and challenges.

The MSA calls for the Legacy Foundation to be operated by an eleven-person board, with two members appointed by the National Association of Attorneys General, two by the National Governors Association, two by the National Council on State Legislatures, and the remaining five appointed by the first six.

The New National Foundation's Tobacco-Related Research

The agreement also requires that the tobacco companies provide the national foundation with \$25 million each year through 2008 to support research concerning tobacco use and other substance abuse. These payments are subject to various adjustments which have reduced the payments to roughly \$22 million per year.

Dissolution Of Tobacco Industry Organizations

The agreement dissolves the Tobacco Institute, the Council on Tobacco Research, and the Center for Indoor Air Research, which have all served as propaganda tools of the tobacco industry. The agreement states that the Council on Tobacco Research may not be reconstituted, but the others may be reconstituted under rules set forth in the agreement designed to bring greater oversight to their activities.

The Tobacco Companies' Payments

The agreement requires the tobacco companies to pay approximately \$195.9 billion to the states between now and 2025 (in current dollars). These payments are increased to account for inflation (with a minimum increase of 3% per year), but are reduced when the top four cigarette companies' combined U.S. cigarette sales or their combined percentage share of the total U.S. cigarette market fall below 1997 levels – and those companies' U.S. market share and sales have been declining steadily. So far, this downward volume adjustment has reduced the amounts paid by all the participating manufacturers to the states by more than the upward inflation adjustment has increased them but the inflation adjustment is catching up. See, also, the following TFK factsheets:

- *Adjustments to the State's Tobacco Settlement Receipts*, <http://tobaccofreekids.org/research/factsheets/pdf/0070.pdf>
- *How the MSA Volume Adjustment is Calculated*, <http://tobaccofreekids.org/research/factsheets/pdf/0131.pdf>.
- *Actual Payments Received by the States from the Tobacco Settlements*, <http://tobaccofreekids.org/research/factsheets/pdf/0218.pdf>.
- *Using State Cigarette Tax Increases To Replace Any Reduced or Delayed Settlement Payments*, <http://tobaccofreekids.org/research/factsheets/pdf/0067.pdf>.

State Use of MSA Payments

The agreement places no restrictions on how the states may spend the settlement funds they receive but has strong language that indicates that the states are expected to spend a significant portion to prevent and reduce tobacco use, especially among kids. See, also, the following TFK factsheets:

- *MSA Calls for States to Invest Tobacco Settlement Funds to Prevent and Reduce Tobacco Use*, <http://tobaccofreekids.org/research/factsheets/pdf/0203.pdf>.
- *State Tobacco-Prevention Spending vs. State Tobacco Revenues*, <http://tobaccofreekids.org/research/factsheets/pdf/0219.pdf>.

Optional State Action To Eliminate Payment Reductions From Lost Market Share

The multistate agreement calls for reductions in the settlement payments to the states if the participating manufacturers' combined market share declines. But each state can eliminate the risk of any such payment reductions if it passes a "Qualifying Statute" that neutralizes the cost disadvantage of the participating manufacturers vis-à-vis nonparticipating manufacturers. Passing a Qualifying Statute does not automatically increase or decrease the amounts paid to a state, it just protects against a reduction in payments in the event a nonparticipating manufacturer gains market share. Exhibit F to the agreement sets forth a model statute that automatically qualifies as a Qualifying Statute upon passage if it is neither changed nor added to prior to its implementation. The model statute requires nonparticipating manufacturers to make payments into a special escrow account in amounts equal to what they would pay the states if they signed onto the settlement agreement. The escrow amounts can be used only to satisfy any judgments or settlements the states happen to obtain against the nonparticipating manufacturers, and are otherwise returned to the nonparticipating manufacturers 25 years after going into escrow. All of the states have passed a model statute and many are taking additional legislative action to force non-complying nonparticipating manufacturers to make all required payments. See the TFK factsheet *MSA: The Non-Participating Manufacturers Adjustment And The Model Statute*, <http://tobaccofreekids.org/research/factsheets/pdf/0065.pdf>.

Federal Right To Some Of The Payments Has Been Waived

Given that some portion of the tobacco companies' payments are to reimburse states for their tobacco-caused Medicaid expenditures, the federal government (which pays 50 percent or more of each state's Medicaid expenditures) had a statutory claim on a corresponding portion of the tobacco companies' payments. Congress has formally waived this claim. Although it could, technically, be revived that is highly unlikely.

Possible Payment Reductions Based On New Federal Tobacco Taxes Or Charges

The agreement provided that the tobacco companies' payments to the states will be reduced by the amount of any new federal funds obtained from the tobacco companies through any federal legislation (e.g., a tobacco tax increase or any other charges against the tobacco companies) enacted on or before November 30, 2002, so long as those funds are made available to the states by the federal government, either for unrestricted purposes or for any form of health care or tobacco control. That deadline has now passed and no related reductions to the payments to the state were ever made.

Limits On Tobacco Company Efforts To Influence State Use of Settlement Funds

The agreement prohibits any efforts by the tobacco companies to divert any of the settlement payments to the states to any program or use that is neither tobacco-related nor health-related.

Tobacco Company Lobbying Restrictions

The agreement bars any efforts by the tobacco companies or their lobbyists to oppose eight specified kinds of new state or local tobacco-control legislation or administrative rules, which include measures to: 1) restrict youth access to vending machines; 2) include cigars in the definition of tobacco products; 3) enhance enforcement of laws forbidding sales of tobacco products to youth; 4) support the use of new technology to enforce age-of-purchase laws; 5) limit promotions of non-tobacco products that use tobacco products as prizes or giveaways; 6) enforce access restrictions through penalties on youth possession or use; 7) limit tobacco product advertising or the wearing of tobacco logo merchandise in or on school properties; and 8) limit non-tobacco products designed to look like tobacco products (e.g., candy cigarettes).

The tobacco companies can, however, continue lobbying against any measures within these categories if they had already begun opposing them prior to the settlement agreement's restrictions going into effect. They are also free to lobby against legislation that includes both provisions within these categories and provisions that are not listed. For more information, see the TFK factsheet *Multistate Settlement Agreement Restrictions on Cigarette Company Lobbying* at <http://tobaccofreekids.org/research/factsheets/pdf/0064.pdf>.

New Procedural Requirements Pertaining to Lobbying

The agreement forbids any tobacco company executives, employees, contract lobbyists, or anyone else who lobbies on the companies' behalf to support or oppose any federal, state, or local legislation or governmental action without the express authorization of the tobacco company. The agreement also requires that, in those states that do not already require the tobacco companies to disclose their lobbying expenditures, the tobacco companies must periodically disclose any payment to a lobbyist that the tobacco company knows or has reason to know will be used to influence state or local legislation or governmental action pertaining to tobacco products or their use -- if the state attorney general requests that they do so. For more information, see the TFK factsheet *Multistate Settlement Agreement Restrictions on Cigarette Company Lobbying* at <http://tobaccofreekids.org/research/factsheets/pdf/0064.pdf>.

Required Tobacco Industry Document Disclosure

The agreement requires that the tobacco industry documents, which have been produced in litigation and for which no claim of privilege has been made, be placed on the Internet, requires the tobacco industry to maintain the site for ten years, and requires the industry to produce a detailed index to the documents. The agreement does not provide a process for challenging any industry claim of privilege that has not already been overturned by a court.

Legal Claims Against the Tobacco Companies That The Agreement Settles

The agreement settles all claims the states brought or could have brought against the tobacco companies based on any tobacco company action taken before the settlement. The settled claims not only include any claims for Medicaid reimbursements, but also all other civil claims (e.g., anti-trust, consumer protection, common law negligence) or statutory claims the states could have brought against the tobacco companies. The agreement also settles all potential

claims by the states against the tobacco companies based on the companies' future acts that pertain to the use of or exposure to tobacco products manufactured by the companies, including any claims for related health costs (but does not block traditional consumer protection, fraud, and anti-trust actions by the states). The agreement not only covers all such claims by the state itself, but also covers any such claims by cities and counties or by citizens acting as private attorney generals pursuant to existing state laws.

The agreement does not block any potential claims against the tobacco companies based on future actions not related to the use of or exposure to their tobacco products, nor does it block any possible lawsuits by Indian tribes or private citizens, including class actions. It also does not effect any possible lawsuits that might bring criminal charges against the tobacco companies.

No Direct Help For Tobacco Farmers

The agreement does not provide for any direct assistance or relief for tobacco farmers, but it did require the major tobacco companies to meet with the tobacco states to discuss the problem. These discussions resulted in a Phase II agreement whereby the major companies will pay the tobacco states \$5.15 billion (subject to inflation and volume adjustments) over 12 years to assist tobacco farmers and quota holders.

Sources Of Additional Information

TFK MSA-Related Factsheets, <http://tobaccofreekids.org/research/factsheets/index.php?CategoryID=8>.

TFK Special Reports on State Use of MSA Funds for Investments to Prevent or Reduce Tobacco Use, <http://tobaccofreekids.org/reports/settlements>.

<http://www.naag.org/tob2.htm>. Tobacco settlement page of the website of the National Association of Attorneys General (NAAG), which includes the full text of the multistate settlement agreement and other related information.

<http://www.ncsl.org/statefed/tmsasumm.htm>. National Conference of State Legislators (NCSL) website page on the tobacco settlement, which includes a summary and analysis of the multistate settlement, and a very useful list of related frequently asked questions with answers.

<http://www.nga.org/Health/Tobacco.htm>. National Governors' Association (NGA) tobacco settlement website page that offers a considerable amount of useful information. According to the NGA, they will soon offer evaluations of different anti-tobacco-use strategies.