



Legislative Council Staff

Nonpartisan Services for Colorado's Legislature

Room 029 State Capitol, Denver, CO 80203-1784

Phone: (303) 866-3521 • Fax: (303) 866-3855

lcs.ga@state.co.us • leg.colorado.gov/lcs

Memorandum

February 12, 2020

TO: Interested Persons

FROM: Greg Sobetski, Principal Economist, 303-866-4105

SUBJECT: 2020 Tobacco MSA Payment Forecast

Summary

Colorado receives annual payments from tobacco manufacturers as part of the Tobacco Master Settlement Agreement (MSA). In April 2019, the state received \$81.1 million, which was used to determine distributions to MSA-funded programs for the current FY 2019-20.

Contents

Tobacco MSA	Page 1
NPM Settlement Agreement	Page 2
Revenue Forecast	Page 4
Distribution of MSA Payments	Page 7

This document presents a forecast for annual receipts from the Tobacco MSA through FY 2021-22. The state is expected to receive \$80.4 million in 2020; the actual amount received in 2020 will determine disbursements to MSA-funded programs in FY 2020-21. Payments for 2021 and 2022 will depend on the outcome of an unresolved legal question. Depending on the outcome, Colorado is expected to receive either \$76.6 million in 2021 and \$76.9 million in 2022, or \$68.5 million in 2021 and \$71.7 million in 2022.

Tobacco Master Settlement Agreement

The Tobacco MSA was reached in 1998 between tobacco manufacturers and the governments of 46 states (including Colorado), the District of Columbia, and five U.S. territories. Under the MSA, the states and other governments consented to release participating manufacturers from health-related claims associated with the use, manufacture, and marketing of tobacco products in return for perpetual annual payments from manufacturers.

Colorado receives a fixed portion of the national MSA payment each year. Following a formula in the MSA, the dollar amount received grows with inflation but falls as fewer cigarettes are consumed. Historically, these adjustments have counteracted one another, keeping nominal MSA revenue to Colorado relatively flat. MSA revenue is exempt from TABOR as a damage award.

Compliance dispute and withholding of payments. The MSA allows a participating manufacturer to reduce its payments if all of the following conditions are met:

- the participating manufacturer is found to have lost market share to manufacturers that do not participate in the MSA;
- the MSA is determined to have been a significant contributing factor in the participating manufacturer's market share loss; and
- a state in which the market share loss occurred has not upheld its legal obligations to participating manufacturers under the MSA.

This is called the nonparticipating manufacturers agreement (NPM agreement). In order for manufacturers to lower their obligation under the NPM agreement, they must dispute the amount owed at the time of payment.

Beginning in 2003, participating manufacturers claimed that they had lost market share resulting from governments' failure to comply with the MSA. These allegations were renewed each year, creating a series of disputes. Under the framework of the MSA, each dispute triggered an arbitration proceeding to determine whether governments had failed to comply. Beginning in 2006, some manufacturers withheld a portion of their annual payments, either by reducing the amount paid or by depositing the disputed amounts in an escrow account ("Disputed Payments Account") pending resolution of the arbitration proceedings. Payments were withheld even though the arbitration process had not run its course. Withholding continued annually, such that the amount withheld from the 2006 payment was associated with the 2003 dispute; the amount withheld in 2007 was associated with the 2004 dispute, and so on.

Arbitration proceedings have taken years to resolve. Arbitration concerning disputed payments for 2003, which were withheld in 2006, was resolved in 2014. Colorado was found to have complied with the NPM agreement and received \$11.4 million in NPM adjustment arbitration money, of which \$2.2 million was paid from the Disputed Payments Account and \$9.2 million was reallocated to Colorado from the annual payments of states that did not comply. Arbitration between states and manufacturers concerning disputed payments for 2004, which were withheld in 2007, remains ongoing.

Nonparticipating Manufacturers Adjustment Settlement Agreement

To expedite resolution of payment disputes, participating manufacturers and states negotiated the NPM Adjustment Settlement Agreement (NPM Settlement), a supplementary legal agreement within the MSA framework. Under the settlement, governments immediately receive a percentage of previously withheld payments, while the remaining share is returned to manufacturers. Additionally, future annual payments to these governments are not subject to withholding, though the additional amount paid to signatory states is about 70 percent of the amount that would otherwise be withheld.

Colorado signed the NPM Settlement in March 2018. This section explains how the settlement addresses the NPM disputes for particular years, including its expected fiscal impact for Colorado.

However, Colorado's continued participation in this settlement is uncertain because of the pending legal question discussed below.

Impacts on future payments. With its April 2018 payment, the state received a lump sum amount reflecting previous NPM withholding and a share of the amounts that would otherwise be withheld in future years. Because payments for 2019 and 2020 are governed by the NPM Settlement, the amount that the state receives differs from what would otherwise be expected under the original MSA. Annual payments to Colorado increase because manufacturers do not withhold from these payments. This effect is offset, however, because portions of the lump sum amount received in 2018 are required to be credited back to manufacturers over several years. On net, the settlement is expected to have modestly increased Colorado's receipts in 2019, and is likewise expected to do so in 2020.

This assessment assumes that the state would not receive released disputed payments in either year. Had the state not signed the NPM Settlement, active arbitration proceedings would continue. If the state was determined to have complied with the NPM agreement in earlier years, it would have received released arbitration moneys in lump sum amounts at irregular intervals.

Settlement for 2004 through 2014. In 2018, Colorado received its full share of the amounts withheld by manufacturers between 2007 and 2017, which reflect NPM disputes for 2004 through 2014. The state is authorized to retain 54 percent of the disputed amounts for 2004 through 2012 and 66 percent of the disputed amounts for 2013 and 2014. The remaining share is required to be credited back to manufacturers as a subtraction from the state's annual payments over five years, in 2018 through 2022. Credits to the manufacturers were frontloaded in 2018 to maintain relatively constant annual payment amounts in future years.

Settlement for 2015 through 2017. Participating manufacturers had disputed governments' compliance with the NPM agreement in 2015 through 2017, with withholding scheduled to occur in 2018 through 2020. In 2018, Colorado received its full share of the amounts scheduled to be withheld for these years. The state will retain 75 percent of these amounts; the remaining share is required to be credited back to manufacturers as a subtraction from the state's annual payments over three years, in 2019 through 2021.

Settlement for 2018 and 2019. The NPM Settlement includes provisions governing the disbursement of future funds that would otherwise be subject to NPM withholding. With its 2019 payment, Colorado received 100 percent of what otherwise would have been withheld for the 2018 dispute, and it will receive 100 percent of what otherwise would have been withheld for the 2019 dispute with its 2020 payment. Approximately 25 percent of these amounts will be credited back to manufacturers via subtractions from the annual payments received in 2022 and 2023, respectively.

Settlement for future years — pending legal question. Colorado's participation in the NPM Settlement for 2021 and future years is conditioned on the manner of resolution of a tax-related legal question submitted by manufacturers to the Internal Revenue Service (IRS). This matter is expected to be resolved on or before December 31, 2020, and will determine the payments received in 2021 and 2022.

Table 1A presents the Tobacco MSA payment forecast if the state continues to participate in the NPM Settlement. Net payments received will be slightly less than if the state had not joined the NPM Settlement for 2021 and 2022 only, because credits back for a portion of the 2018 lump sum payment will slightly exceed the state's receipt of about 70 percent of the amount that would otherwise be withheld. Beginning in 2023, continued participation in the NPM Settlement is expected to increase annual receipts relative to what would be expected if the state had not joined the NPM Settlement. These receipts would determine the distributions to programs presented in Table 2A.

Table 1B presents the Tobacco MSA payment forecast if the state does not participate in the NPM Settlement after 2020. In this circumstance, the payment received will decrease because deductions will continue to be made from the payment to credit back portions of the lump sum amount received in 2018, while disputed payments will once again be withheld via the Disputed Payments Account. These receipts would determine the distributions to programs presented in Table 2B.

The payment received for 2020 will not be affected by the resolution of this pending legal question.

Revenue Forecast

Tables 1A and 1B present actual Tobacco MSA receipts for FY 2018-19 and estimated receipts for FY 2019-20 through FY 2021-22.

Estimates for FY 2020-21 and FY 2021-22 depend on the resolution to the pending legal question that governs Colorado's continued participation in the NPM Settlement. Table 1A presents a payment forecast if the state remains part of the NPM Settlement. Revenue is expected to decrease between the state's 2020 and 2021 payments due to the state's receipt of 70 percent, rather than 100 percent, of what otherwise would be withheld. Additionally, the state's 2021 and 2022 payments are reduced because the state will be obligated to credit back a portion of the lump sum payment it received in 2018 as a subtraction from payments received in these two years. The 2022 payment is expected to modestly exceed the 2021 payment, with more significant increases beyond the current forecast period.

Table 1B presents a payment forecast if the state is no longer part of the NPM Settlement for 2021 and 2022. Even if Colorado leaves the NPM Settlement, the state will continue to be obligated to make credits to the manufacturers for a portion of the lump sum amount received in 2018. Revenue is expected to decrease more significantly between the state's 2020 and 2021 payments as manufacturers will resume their deposits of a portion of the state's annual payment in the Disputed Payments Account. The 2022 payment is expected to modestly exceed the 2021 payment, with more significant increases beyond the current forecast period. However, all future annual payments will fall short of those that would be expected if the state were to remain part of the NPM Settlement, except when previously withheld funds are released from the Disputed Payments Account at irregular intervals.

The forecasts in Tables 1A and 1B drive the distributions to MSA-funded programs in Tables 2A and 2B, respectively. The receipts expected for FY 2019-20 and the distributions expected for FY 2020-21 do not differ across the different versions of the tables.

Risks to the forecast. The Tobacco MSA remains an area of ongoing legal uncertainty. Any changes to the legal landscape resulting from government or manufacturer legal strategy, arbitration proceedings, or court orders will have an effect on the amounts received. Colorado's arbitration proceedings for the 2004 through 2017 NPM disputes have been settled; however, resolution of these disputes will not be concluded entirely until arbitration proceedings for all states have been closed. Annual payments are sensitive to cigarette consumption and U.S. inflation. This forecast assumes declining consumption and low inflation, and deviations from either assumption will affect the amount received. Finally, receipts will fall if participating manufacturers cease operations, file bankruptcy, or otherwise fail to pay what is due each year.

Table 1A
2020 Tobacco MSA Payment Forecast if the State Remains Part of the NPM Settlement
Dollars in Millions

Payment Source	FY 2018-19 Actual	FY 2019-20 Estimate	FY 2020-21 Estimate	FY 2021-22 Estimate
Annual MSA Payment (Gross of Withholding) ¹	\$81.1	\$80.4	\$76.6	\$76.9
Manufacturer Withholding ²	-	-	-	-
Net Funds Received	\$81.1	\$80.4	\$76.6	\$76.9

Allocation of Received Funds	FY 2019-20 Preliminary	FY 2020-21 Estimate	FY 2021-22 Estimate	FY 2022-23 Estimate
MSA-Funded State Programs (see Table 2A)	\$79.9	\$79.2	\$75.4	\$75.8
Unallocated Portion ³	\$1.2	\$1.2	\$1.1	\$1.2

Source: Department of Law, Department of the Treasury, and Legislative Council Staff Forecast.

¹For all years, this amount is presented net of credits and debits associated with the NPM Settlement. It is assumed that, under current law, these funds will be subject to the annual MSA payment distribution in HB 16-1408. Section 24-75-1104.5, C.R.S., requires that received disputed payments be expended differently, and it is assumed that no receipts attributable to the NPM Settlement will constitute disputed payments for this purpose beyond FY 2017-18.

²No manufacturer withholding is expected if the state remains part of the NPM Settlement.

³Unallocated amounts for each fiscal year remain in the Tobacco Litigation Settlement Cash Fund, thereby reducing future accelerated payments from the fund.

Table 1B
2020 Tobacco MSA Payment Forecast if the State Leaves the NPM Settlement
Dollars in Millions

Payment Source	FY 2018-19 Actual	FY 2019-20 Estimate	FY 2020-21 Estimate	FY 2021-22 Estimate
Annual MSA Payment (Gross of Withholding) ¹	\$81.1	\$80.4	\$80.0	\$83.3
Manufacturer Withholding ²	-	-	(\$11.6)	(\$11.6)
Net Funds Received	\$81.1	\$80.4	\$68.5	\$71.7

Allocation of Received Funds	FY 2019-20 Preliminary	FY 2020-21 Estimate	FY 2021-22 Estimate	FY 2022-23 Estimate
MSA-Funded State Programs (see Table 2B)	\$79.9	\$79.2	\$67.5	\$70.6
Unallocated Portion ³	\$1.2	\$1.2	\$1.0	\$1.1

Source: Department of Law, Department of the Treasury, and Legislative Council Staff Forecast.

¹For FY 2018-19 and FY 2019-20, this amount is presented net of credits and debits associated with the NPM Settlement. It is assumed that, under current law, these funds will be subject to the annual MSA payment distribution in HB 16-1408. Section 24-75-1104.5, C.R.S., requires that received disputed payments be expended differently, and it is assumed that no receipts attributable to the NPM Settlement will constitute disputed payments for this purpose beyond FY 2017-18.

²Manufacturers are expected to resume withholding a portion of their annual payments in the Disputed Payments Account beginning in 2021 if the state is no longer part of the NPM Settlement.

³Unallocated amounts for each fiscal year remain in the Tobacco Litigation Settlement Cash Fund, thereby reducing future accelerated payments from the fund.

Distribution of MSA Payments

Payments that the state receives under the Tobacco MSA are allocated in percentage shares to specific programs identified in statute. The statutory allocation formula dictates only the distribution of annual MSA payments. Per statute, revenue from the release of disputed payments is credited to the General Fund.¹ Disputed payments released when Colorado agreed to the NPM Settlement were credited to the General Fund and not disbursed using the statutory distribution formula, though future credits and debits associated with the NPM Settlement are expected to affect the distribution to MSA-funded programs and not the state General Fund balance.

The MSA payment that the state receives each April dictates the allocation of moneys to MSA-funded programs for the fiscal year that begins the following July. The bottom section of Tables 1A and 1B show the amounts of payments received each year that are spent on programs versus the unallocated portion reserved each year to reduce the amount of the annual accelerated payment, described below. Tables 2A and 2B show the amount that each MSA-funded program is projected to receive through FY 2022-23 under the payment forecast scenarios presented in Tables 1A and 1B, respectively.

Table 2A
2020 Tobacco MSA Distribution Forecast if the State Remains Part of the NPM Settlement
Dollars in Millions

Program	FY 2019-20 Preliminary	FY 2020-21 Estimate	FY 2021-22 Estimate	FY 2022-23 Estimate
Department of Law				
Tobacco Settlement Defense Account	\$2.0	\$2.0	\$1.9	\$1.9
Department of Human Services				
Nurse Home Visitors	\$21.7	\$21.5	\$20.4	\$20.5
Tony Grampsas Youth Services	\$6.1	\$6.0	\$5.7	\$5.8
Department of Health Care Policy and Financing				
Children's Basic Health Plan Trust	\$14.6	\$14.5	\$13.8	\$13.8
Children with Autism	\$1.6	\$1.6	\$1.5	\$1.5
Department of Higher Education				
CU Health Sciences Center ¹	\$14.2	\$14.1	\$13.4	\$13.5
Department of Public Health and Environment				
AIDS Drug Assistance	\$4.1	\$4.0	\$3.8	\$3.8
HIV Prevention	\$2.8	\$2.8	\$2.7	\$2.7
Immunizations	\$2.0	\$2.0	\$1.9	\$1.9
Health Services Corps	\$0.8	\$0.8	\$0.8	\$0.8
Dental Loan Repayment	\$0.8	\$0.8	\$0.8	\$0.8
Capital Construction				
Fitzsimons Trust Fund	\$6.5	\$6.4	\$6.1	\$6.2
Department of Personnel and Administration				
Supplement State Employee Insurance Plans	\$1.9	\$1.8	\$1.8	\$1.8
Department of Military and Veterans Affairs				
Veterans Trust Fund	\$0.8	\$0.8	\$0.8	\$0.8
Total Funds Distributed	\$79.9	\$79.2	\$75.4	\$75.8

Source: Department of the Treasury and Legislative Council Staff Forecast.

¹For FY 2016-17 and subsequent years, a share of this amount is required to be spent for tobacco-related in-state cancer research.

¹Section 24-75-1104.5 (5), C.R.S.

Table 2B
2020 Tobacco MSA Distribution Forecast if the State Leaves the NPM Settlement
Dollars in Millions

Program	FY 2019-20 Preliminary	FY 2020-21 Estimate	FY 2021-22 Estimate	FY 2022-23 Estimate
Department of Law				
Tobacco Settlement Defense Account	\$2.0	\$2.0	\$1.7	\$1.8
Department of Human Services				
Nurse Home Visitors	\$21.7	\$21.5	\$18.3	\$19.2
Tony Gramscas Youth Services	\$6.1	\$6.0	\$5.1	\$5.4
Department of Health Care Policy and Financing				
Children's Basic Health Plan Trust	\$14.6	\$14.5	\$12.3	\$12.9
Children with Autism	\$1.6	\$1.6	\$1.4	\$1.4
Department of Higher Education				
CU Health Sciences Center ¹	\$14.2	\$14.1	\$12.0	\$12.6
Department of Public Health and Environment				
AIDS Drug Assistance	\$4.1	\$4.0	\$3.4	\$3.6
HIV Prevention	\$2.8	\$2.8	\$2.4	\$2.5
Immunizations	\$2.0	\$2.0	\$1.7	\$1.8
Health Services Corps	\$0.8	\$0.8	\$0.7	\$0.7
Dental Loan Repayment	\$0.8	\$0.8	\$0.7	\$0.7
Capital Construction				
Fitzsimons Trust Fund	\$6.5	\$6.4	\$5.5	\$5.7
Department of Personnel and Administration				
Supplement State Employee Insurance Plans	\$1.9	\$1.8	\$1.6	\$1.6
Department of Military and Veterans Affairs				
Veterans Trust Fund	\$0.8	\$0.8	\$0.7	\$0.7
Total Funds Distributed	\$79.9	\$79.2	\$67.5	\$70.6

Source: Department of the Treasury and Legislative Council Staff Forecast.

¹For FY 2016-17 and subsequent years, a share of this amount is required to be spent for tobacco-related in-state cancer research.

Accelerated payments. The amount allocated to MSA programs for a fiscal year is determined by the payment that the state receives in the previous April. However, due to a budget-balancing measure enacted in 2009 following the Great Recession, the annual payment received each April funds programs in both the fiscal year in which it is received and the following fiscal year. This creates an annual General Fund obligation for a bridge loan, or “accelerated payment,” made to fund MSA programs between the date when the prior year’s payment is exhausted and the date when the current year’s payment arrives. The General Assembly has taken steps to gradually reduce the size of this obligation on the General Fund.

As a budget-balancing measure in FY 2009-10, \$65.0 million was transferred from the state’s 2010 MSA payment to the General Fund.² Had the transfer not been made, this amount would have been used to fund programs for FY 2010-11; to compensate, \$65.0 million from the state’s 2011 MSA payment was allocated to programs in the then-current FY 2010-11. This measure created an ongoing obligation on the General Fund, and the accelerated payment has occurred in every year since. For programs funded in FY 2019-20, \$38.6 million was paid from the state’s April 2019 payment, and the remaining \$41.3 million is expected to be paid from the April 2020 payment.

²Senate Bill 09-269.

To decrease the amount advanced annually from the General Fund, any unallocated amount remaining in the Tobacco Litigation Settlement Cash Fund after programs are funded is retained in the fund and used to reduce the following year's accelerated payment. This amount is currently set at 1.5 percent of the annual payment received.

Statutory distribution formula. Independent of the NPM Settlement, the state's MSA payment would have fallen in 2018 due to the scheduled termination of a supplementary payment, called the Strategic Contribution Fund payment, which the state received over ten years ending in 2017. In anticipation of this reduction, the General Assembly enacted HB 16-1408 to rewrite the MSA distribution formula in statute. HB 16-1408 directs the distribution of 98.5 percent of the annual MSA payment as shown in Table 3.

Table 3
Distribution of Tobacco MSA Payment under HB 16-1408
Effective beginning in FY 2016-17 under Section 24-75-1104.5 (1.7), C.R.S.

Program	Distribution
Department of Law	
Tobacco Settlement Defense Account	2.5%
Department of Human Services	
Nurse Home Visitors	26.7%
Tony Grampsas Youth Services	7.5%
Department of Health Care Policy and Financing	
Children's Basic Health Plan Trust	18.0%
Children with Autism	2.0%
Department of Higher Education	
CU Health Sciences Center ¹	17.5%
Department of Public Health and Environment	
AIDS Drug Assistance	5.0%
HIV Prevention	3.5%
Immunizations	2.5%
Health Services Corps	1.0%
Dental Loan Repayment	1.0%
Capital Construction	
Fitzsimons Trust Fund	8.0%
Department of Personnel and Administration	
Supplement State Employee Insurance Plans	2.3%
Department of Military and Veterans Affairs	
Veterans Trust Fund	1.0%
Total Funds Distributed	98.5%

¹*Of this share, 2.0 percent must be expended for tobacco-related in-state cancer research.*

The remaining 1.5 percent of each year's MSA payment remains in the Tobacco Litigation Settlement Cash Fund and is used to reduce the following year's accelerated payment.