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ROLL NUMBER

DESCRIPTION

1251

2007 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1251

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1251

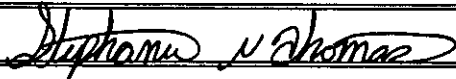
House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: January 24, 2007

Recorder Job Number: 1859

Committee Clerk Signature



Minutes:

Chair Keiser opened the hearing on HB 1251.

John Olson, Phillip Morris, USA: Support HB 1251.

Eric Shapland, Phillip Morris, USA: See written testimony #1.

Rep. Ruby: With the settlements there is an agreement between the states and the companies that were involved. Would the companies not be sued further?

Eric: Yes, that is one of the benefits to join the MSA as a participating manufacturer; in a grain to make these annual multibillion dollar payments in gratuity as a foreign looking release.

Rep. Ruby: So, those companies that are nonparticipating carry a risk of being sued by the states, as well?

Eric: That is correct, and the escrow statutes are the source of revenue for these states.

Rep. Ruby: So, if I heard you right, we had to pay into the escrow accounts, because they're not participating numbers, and they do have that period of time to pay in, until the next year.

You mentioned for obvious reason for a state to enact propalinity legislation, that made the rest ignore state law. When they're paying into the escrow accounts, want state law are they ignoring?

Eric: If they are, there is no state law that they are ignoring, and we don't have a problem.

The whole point of this complimentary legislation is to prevent NPM's from being able to receive the incentive and the opportunity to not comply with the escrow statutes, and take a tremendous cost advantage to the market, and take market share away from those who owned up to those obligations to either comply with the escrow statutes, or actually join the MSA and make payments under the MSA, and agree to the advertising restrictions of the MSA.

Rep. Ruby: If that is such an advantage, then why did certain companies go in and join?

Eric: Not ignoring an escrow statute and violating state law is the agreement. Many companies make the determination that they don't want to ignore state law. They know that they want to compete in a market that is consistent with both obligations that legislature has imposed on them, and therefore they don't have the illicit competitive advantage.

Rep. Kasper: It appears what you're trying to do here is we have these NPM's that either are not complying with current ND law by escrowing, or ND does not have an escrow requirement, and therefore, you're not wanting to implement an escrow requirement in advance. If they don't comply, that would give the Attorney General additional powers to do the things that he should do to make them comply. Is that what this bill would do?

Eric: With one major clarification, in 1999 the state of ND did enact an escrow statute, and so NMP's in the state are currently required to make escrow contributions. The second point of clarification that I would like to make is that it's not necessarily that in the past we're talking about noncompliant in the state of ND, we're talking about noncompliance nationwide.

Rep. Kasper: So, our current escrow requirement is not strong enough so, we're going to strengthen it and make it pay in advance, or we put penalties in this if they don't comply.

Eric: That's correct. The escrow statute as currently written didn't have a lot of teeth to them, and it created a lot of opportunity for widespread noncompliance.

Rep. Kasper: So, you're not afraid to compete, you just want to be able to compete fairly.

Eric: That's correct. The MSA's forward looking terms do create a competitive disadvantage by accepting advertising restrictions and ongoing multibillion dollar payment obligations. The escrow statutes level that competitive playing field, and also generate money for the escrow accounts to the states.

Rep. Dosch: Could you give me some ideas of the NPM's that are currently operating in ND?

Eric: I am not in the best position to testify to that. Whatever the current state is, the landscape has changed significantly.

Rep. Johnson: What happens to ND if we don't do this?

Eric: The idea is to the extent that NPM's make a decision if they're going to try the business model in ND. That would undermine the shells by the folks who have decided to join the MSA, and as their sells decline, our payments decline.

Doug Bahr, Office of the Attorney General: Opposed to HB 1251. See written testimony #2.

Rep. Kasper: The 43 of the 46 states that have already signed off and are part of the National Settlement Agreement, I would assume that there really isn't that much of a problem with the implement of this statute, because there is a mechanism that the other 43 states have found to be able to sign off.

Doug: There is not a problem in implementing the statute. The point is that we have a statute that is working, and that is a lot less expensive, and just as affective.

Rep. Kasper: I'm browsing at what the noncompliant companies have to do to file their states. It appears that you wouldn't comply, because this is an onerous costly thing for them. It appears to me that anybody with any type of background, and is already in the 43 states, these companies have the power to complete this in a day or two, and it would not be onerous.

Doug: It's not just the nonparticipating manufacturers, it's every tobacco company that wants to sell product in ND that has to do this.

Rep. Kasper: Are you familiar with the streamline sales tax legislation that was passed here in ND that requires internet sales to be taxed. Wouldn't that sort of catch up to these tobacco companies selling on the internet?

Doug: That has only helped those who are going to voluntarily comply with the law. If they don't want to comply, we don't know who's selling, unless we catch them somehow.

Rep. Dosch: What is the balance of the escrow account now in the state from the NPM's?

Doug: I cannot tell you, each one has their own escrow account, and none of the escrow funds comes to the state. This money stays there for 20 years on a go in come out basis.

After 20 years the money comes out and goes to them, it is there money.

Rep. Dosch: Is the state pursuing that?

Doug: The lawsuits against the major manufacturers were based on years of their conduct. It was based on specific alleged inappropriate conduct by those companies, and that's why they were sued.

Rep. Dosch: Would that be really to their advantage not to have originally participated in them settlements, because now they can operate, and have the ability to perhaps market more intensively now, because even though they're escrowing, they know in 25 years they're getting all of that back anyway.

Doug: This is a business decision that each tobacco manufacturer has to make. There are benefits when you pay under the settlement, because you get tax brakes. When you put it in escrow, you don't get a tax break.

Rep. Thorpe: Is there a perceived competition they're looking at between ND and Minnesota?

Doug: I'm not aware of that argument, and Minnesota is not a member of the MSA.

Rep. Amerman: In the four points of the testimony, how much conversation did you have beforehand with the parties that wanted to do this?

Doug: We have been aware of this bill for years, when the National Association of Attorney Generals in other states started drafting this. Where are the provisions, and how effective it's working in other states and such, and for the most part the quarterly payments would be one benefit. The service issue which this bill provides, if anybody gets certified, they have to agree to have an agent that we refer locally, or the Secretary of the State, rather than us trying to serve them in the Philippines, or Brazil, or wherever. As far as all the enforcement stuff, I believe what we have is effectively working.

Rep. Kasper: If we amended the bill to take out all these enforcement problems that you are having, and if we simply required a registration of the product, and require them to make their escrow payments into the Bank of ND so, that if a bankruptcy occurs you got the money in hand, and assign the states so they can't pull it out, would you have any objection to a bill that does that?

Doug: The extra enforcement powers, if the bill is going to pass, leave them in, it can't hurt to have an extra claw. Secondly, they already do record. It's required under current law, and we get bank statements documenting that they actually made the deposits. It is the certification process that is the additional burden, that the Attorney General feels does not provide a meaningful additional benefit.

Rep. Kasper: What would be that certification process? What does that require?

Doug: That requires that they submit all the information, and any other additional information.

Rep. Kasper: How many companies are we talking about that are out there?

Doug: In ND, 25-30 NPM's.

Hearing closed.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1251

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: 01-29-2007

Recorder Job Number: 2124

Committee Clerk Signature

Lisa M Thomas

Minutes:

Chairman Keiser allowed committee discussion on HB 1251. HB 1251 relates to the sale of noncompliant tobacco products; to provide a penalty; and to provide for application.

Rep. Ruby: I guess after hearing the testimony I just agreed with the Attorney General's office and I think they have all of authority that they need and there isn't a real problem. The companies they were talking about are just a small fraction of the companies that are there and they believe they have all of the authority and don't need more teeth on it, so I just thought it was unnecessary.

Rep. Ruby moved a DO NOT PASS. Rep. Vigesaa seconded.

Rep. Clark: I just think there would be a black market for cigarettes is this would pass and we would lose money.

Rep. Zaiser: Is this Rick LaFleur's bill?

Rep. Johnson: The only people that addressed this bill in the hearing were John Olson, Eric Shapland and Doug Bar from the AG's office.

Roll Call Vote: 10 yes. 3 no. 1 absent.

Carrier: Rep. Ruby

FISCAL NOTE
Requested by Legislative Council
01/10/2007

Bill/Resolution No.: HB 1251

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$443,214		\$431,136	
Appropriations			\$443,214		\$431,136	

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. Bill and fiscal impact summary: *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The bill requires cigarette manufactures to be registered/certified by the state prior to selling their product in the state. The bill requires the AG's office do the certification review, maintain a certification list on the web, etc.

B. Fiscal impact sections: *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

The AG's office is responsible to administer the certification process, including performing the certification review, maintaining the certification list on the AG website, etc. This bill will have a fiscal impact on Attorney General expenditures and appropriations.

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

N/A

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The impact of this bill is anticipated to include 2.5 FTE's - 1 attorney, 1 paralegal, and .5 administrative assistant, along with associated operating expenses, to be paid from the general fund. An office system will need to be rewritten to accomodate this legislation.

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The Attorney General's appropriation will require a general fund increase of \$443,214 to implement this legislation.

Name:	Kathy Roll	Agency:	Office of Attorney General
Phone Number:	328-3622	Date Prepared:	01/19/2007

Date: 1-29-07
Roll Call Vote #: _____

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1251

House Industry Business & Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Rep. Ruby Seconded By Rep. Vigasaa

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	☒	☐	Rep. Amerman	☒	☐
Vice Chairman Johnson	☒	☐	Rep. Boe	☒	☒
Rep. Clark	☒	☐	Rep. Gruchalla	☒	☐
Rep. Dietrich	☒	☐	Rep. Thorpe	☒	☒
Rep. Dosch	☒	☐	Rep. Zaiser	☒	☐
Rep. Kasper	☒	☒			
Rep. Nottestad	☒	☐			
Rep. Ruby	☒	☐			
Rep. Vigasaa	☒	☐			

Total Yes 10 No 3

Absent 1

Floor Assignment Rep. Ruby

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
January 29, 2007 1:12 p.m.

Module No: HR-19-1440
Carrier: Ruby
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1251: Industry, Business and Labor Committee (Rep. Keiser, Chairman)
recommends **DO NOT PASS** (10 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING).
HB 1251 was placed on the Eleventh order on the calendar.

2007 TESTIMONY

HB 1251

H.B. 1251 (Belter & Carlson)
Testimony of Eric Shapland Before the
House Committee on Industry, Business and Labor
- January 24, 2007 -

Thank you for the opportunity to speak with you today. I am Eric Shapland, an attorney at the law firm of Heller Ehrman LLP and outside counsel for Philip Morris USA Inc. I am here to testify about H.B. 1251, a bill that is intended to complement the landmark 1998 Tobacco Master Settlement Agreement ("MSA") and related legislation. "Complementary Legislation" will help protect North Dakota's interests as a party to the MSA. It was drafted and endorsed by the National Association of Attorneys General and has been enacted by 43 of the 46 Settling States, and it will be an important tool for North Dakota for many years to come.

The MSA and Escrow Statutes. Let me start with a brief overview of what the MSA is, and how Complementary Legislation fits in. As you will recall, in the 1990s many states sued the major cigarette manufacturers seeking, among other things, reimbursement for the health care expenses that the states incurred as a result of their citizens' smoking. Those lawsuits were resolved in late 1998 when North Dakota and 45 other "Settling States" on the one hand, and four of the large cigarette companies on the other, entered into a settlement agreement known as the MSA. PM USA and the three other companies agreed to pay a projected \$12 billion to the Settling States by 2003 as well as \$1.6 billion for nationwide youth smoking prevention programs.

But the MSA is more than just a resolution of past claims against a handful of companies; it implements historic public health reforms for the entire industry going forward. The Settling States have invited all cigarette manufacturers to accept those reforms. PM USA and over 40 other tobacco manufacturers (the "Participating Manufacturers") have done so. Together, they now make multi-billion dollar annual payments to the Settling States, *forever*, and comply with strict advertising and marketing restrictions designed to curb youth smoking. The Settling States could not have obtained those restrictions any other way because of limitations imposed by the First Amendment.

Under the MSA, North Dakota has already received approximately \$160 million dollars from the Participating Manufacturers. Last year alone, it received approximately \$24 million, which is equivalent to roughly one quarter of its general fund expenditures for the same time period. Moreover, North Dakota was awarded an additional \$14 million per year to be paid from 2008 to 2017 based on its leadership and contributions in the effort to obtain the MSA.

When entering into the MSA, the Settling States and the Participating Manufacturers recognized that the forward-looking terms would not be effective if certain manufacturers decided not to accept the MSA's obligations, including the advertising and marketing restrictions, and used their resulting competitive advantages to

gain market share from the companies who did the right thing and signed the MSA. The MSA is a settlement agreement. Although the Settling States have invited all manufacturers to join, many have chosen not to. These Non-Participating Manufacturers ("NPMs") refuse to be bound by the advertising and marketing restrictions of the MSA and refuse to make the payments required for MSA participants.

In recognition of this, and of the fact that these NPMs could sell cigarettes in a State and thereby cause the State to incur un-reimbursed health care expenses, the MSA contemplated that each Settling State would enact something called an Escrow Statute. Indeed, North Dakota enacted its Escrow Statute in 1999. (S.L. 1999, Ch. 430, § 2; N.D. Century Code 51-25-02.) The Escrow Statute requires NPMs to make a fixed contribution to an escrow account for every cigarette that they sell in the state. The escrow contributions stay in the account for 25 years and are available to satisfy any judgment resulting from the State's claims for health care reimbursement in the future. The statute thereby is intended to prevent NPMs from using their competitive advantages to derive short-term, windfall profits and gain significant market share only to avoid responsibility for the costs that their products impose on the state.

Complementary Legislation. The MSA's payment obligations had a significant effect on the tobacco industry. Today's NPMs were a virtually non-existent segment of the market in 1998, but they quickly emerged to take nearly 8 percent of the national market by 2003. One of the reasons for this trend was that many NPMs were simply not complying with the Escrow Statutes around the country. NPMs took advantage of the incentive and opportunity to avoid compliance. NPMs found that they could ignore their escrow requirements and hide from the State's enforcement agencies, frequently by locating themselves out of state or out of the Country. The Complementary Legislation is an effort to make enforcement by the Settling States much easier.

Complementary Legislation does four things to create an improved system of Escrow Statute enforcement. *First*, it closes a state's cigarette distribution system to non-compliant NPMs. It does so by prohibiting distributors and dealers from possessing cigarettes of a non-compliant NPM and punishing violators by revoking or suspending their licenses. To enable dealers and distributors to determine whether an NPM has complied with the Escrow Statute, the Complementary Legislation requires the Attorney General to publish a directory of compliant NPMs and the brands that they sell.

Second, although North Dakota already has portions of this first mechanism in place, Complementary Legislation goes further to provide the Attorney General with new tools to make it much simpler and quicker for the State to determine the extent of non-compliance with the Escrow Statute. It requires each NPM whose cigarettes are sold in the state to affirmatively certify its compliance with the Escrow Statute and to disclose the information to prove it: the brands and units sold in the state during the previous year, the financial institution maintaining its escrow account, the escrow account number, and the amount contributed to the account for sales in the state. It requires NPMs, dealers

and distributors to maintain records necessary to establish how many packs of an NPM's cigarettes have been distributed in the state, and it makes those records readily accessible to the Attorney General.

Third, Complementary Legislation provides the Attorney General with more -- and more streamlined -- power to enforce the NPMs' escrow obligations. It requires NPMs to maintain a registered agent for service of process, which prevents them from evading enforcement proceedings. It imposes civil penalties on NPMs, dealers and distributors for violations of the legislation's record keeping and certification requirements. It allows the Attorney General to recover "any profits" from non-compliance. And it declares cigarettes of non-compliant NPMs to be contraband and provides for their seizure and destruction.

Finally, Complementary Legislation enables the Attorney General to stop the distribution of a non-compliant NPM's cigarettes much more quickly than it is able to do presently. As written, Escrow Statutes permit payments in arrears. That is, NPMs are not required to escrow funds for sales made in one year until April of the following year. Therefore, as many as sixteen months can pass after a sale before an NPM fails to comply with its resulting escrow obligation. That delay can allow an NPM that plans not to comply with its escrow obligations to derive significant profits even before missing a contribution, let alone being discovered and listed as a non-compliant NPM. The Complementary Legislation allows the Attorney General to require quarterly escrow contributions and thereby significantly shortens this delay.

Why North Dakota Should Enact Complementary Legislation. The obvious reason for any state to enact Complementary Legislation is to make it less likely that NPMs will ignore state law. This not only protects the Settling States' public health objectives, but it protects North Dakota's present interest in the annual revenue stream under the MSA -- approximately \$24 million last year. If NPMs are able to avoid their escrow obligations, they will have a significant cost advantage in the market and can use that advantage to take market share away from Participating Manufacturers -- the very manufacturers who make MSA payments to the States and comply with the advertising and marketing restrictions. This can lead to a reduction in the payments that North Dakota can expect to receive under the MSA in several ways. For example, the Participating Manufacturers' annual payment obligations are equivalent to a fixed per unit amount; so as their volume declines, the overall amount of their payment obligation does too, resulting in lower payments to the State.

Now, I understand that the fiscal note estimates that Complementary Legislation will cost about \$220,000 a year to implement. I would like to raise a few points to put this cost into context.

First, 43 of the 46 other Settling States have enacted Complementary Legislation. North Dakota is now like the only house on the block without a sign in the yard warning

that it has an alarm system. Just as a burglar may target the house with the weakest burglar protection, NPMs may seek out those few remaining States without Complementary Legislation, so that they can attempt to avoid escrow obligations and thereby generate short-term profits.

Second, the streamlined enforcement facilitated by Complementary Legislation will mean more escrowed money sooner for North Dakota, thereby further protecting the State's financial interests.

Third, enforcement activities under the Complementary Legislation may well replace some more cumbersome and costly investigative procedures that the Attorney General currently undertakes. Moreover, the Complementary Legislation can also offset some of its costs by allowing the Attorney General to seek disgorgement of non-compliant NPMs' profits in addition to civil penalties.

Conclusion. In short, Complementary Legislation is in North Dakota's interests. It will protect the state's MSA revenues and the public health objectives for the MSA. As the National Association of Attorneys General said when endorsing this legislation:

"[We] believe that enactment of such legislation by all Settling States will promote the purposes the [Escrow] Statutes were designed to serve and safeguard payments to the Settling States that might otherwise be imperiled. . . . Complementary Legislation . . . will help prevent significant periods of non-compliance and will reduce the expense and difficulty of enforcement actions against NPMs. . . . The enactment of Complementary Legislation will streamline enforcement of the NPM Model Escrow Statutes, safeguard annual MSA payments and help combat the proliferation of youth smoking. The Attorneys General regard this legislation as extremely important and recommend that the proposed model Complementary Legislation be given legislative priority."

Thank you very much for allowing me to address the Committee and for your consideration of this important bill. I would be happy to answer any questions the Committee may have.

TESTIMONY BEFORE THE
INDUSTRY, BUSINESS AND LABOR COMMITTEE
IN OPPOSITION TO HOUSE BILL NO. 1251

Douglas A. Bahr
Director, Civil Litigation Division
Office of Attorney General

January 24, 2007

BACKGROUND

In the 1990s, the State of North Dakota and 45 other states filed suit against Defendants R.J. Reynolds Tobacco Co., Inc. ("RJR"), Lorillard Tobacco Co., Inc. ("Lorillard") and Philip Morris, Inc. ("Philip Morris"). North Dakota's lawsuit alleged the defendant tobacco companies conspired for decades to conceal from the American public the health risks related to smoking and intentionally targeted minors through marketing and promotional efforts. North Dakota sought, among other things, money damages for the enormous cost to the public of treating smoking-related illnesses.

In November 1998, North Dakota and the other Settling States settled their lawsuits against RJR, Lorillard and Philip Morris. This settlement was memorialized in the Master Settlement Agreement (MSA). Since 1998 several other tobacco companies have joined the MSA. Tobacco companies that have joined the MSA are referred to collectively as the Participating Manufacturers (PMs).

The MSA requires the PMs to make annual settlement payments into escrow each April 15, in perpetuity. North Dakota receives 0.3660138 percent of each payment, approximately \$28 million each year, and has received over \$174,450,000 since the MSA was signed.

The annual base payment amount is subject to several adjustments, including the Non-Participating Manufacturer Adjustment. Non-Participating Manufacturers ("NPMs") are tobacco companies that have not joined the MSA. The MSA requires each Settling State to pass a "Qualifying Statute" allowing the Settling State to collect escrow payments from the NPMs. In 1999, North Dakota passed its "Qualifying Statute," the Tobacco Sales Act, codified at N.D.C.C. ch. 51-25. Chapter 51-25 requires NPMs deposit into an escrow account a statutorily calculated amount, which is based upon the NPM's sales in North Dakota. The escrow deposit must be made by April 15 of the year following the sales.

In an effort to improve compliance with N.D.C.C. ch. 51-25, in 2003 the Office of Attorney General proposed amendments to HB 1269. The engrossed bill prohibited tobacco distributors from knowingly selling tobacco product manufactured by tobacco product manufacturers who are not in compliance with North Dakota and federal law. HB 1269 was adopted and became effective April 18, 2003. It is codified at N.D.C.C. § 57-36-05.2.

HB 1432, which is substantially the same as 2007 HB 1251, was introduced during the 2003 session. Philip Morris asked that the bill be defeated because HB 1269 was a better fit for North Dakota.

It is this Office's position that N.D.C.C. § 57-36-05.2 continues to be a better fit for North Dakota than HB 1251. It is also our position that N.D.C.C. § 57-36-05.2 has been very effective in reducing the sale of noncompliant NPM tobacco product in North Dakota.

2007 HB 1251 IS NOT A GOOD FIT FOR NORTH DAKOTA

HB 1251 establishes a burdensome, time consuming and expensive review and certification process, a process that applies to "every" tobacco product manufacturer that may sell tobacco product in North Dakota, MSA participants and non-participants alike. Significant time would be spent certifying MSA participants and compliant NPMs. Rather than implement this burdensome process, it is better to only prohibit tobacco sales from the few tobacco product manufacturers who are not in compliance with the law. That is what N.D.C.C. § 57-36-05.2 does.

N.D.C.C. § 57-36-05.2 IS EFFECTIVE

Escrow is not due for 2006 sales until April 15, 2007. Thus, the most recent data I have is for the escrow deposits due April 15, 2006, for 2005 sales. For 2005 sales, 101% of the escrow due was deposited. That is not to say each NPM deposited the required escrow, but that more than the total escrow required was deposited.

Some NPMs with limited sales did not make the required escrow deposit for 2005 sales. Five of those NPMs sold their product over the Internet, not through licensed distributors. Neither N.D.C.C. § 57-36-05.2 nor HB 1251 will prevent noncompliant Internet sales because such sales do not go through licensed distributors. Thus, these few sales would have occurred even if HB 1251 was law at the time.

Another NPM did not have previous sales in North Dakota. There is no reason to believe that NPM would not have been certified under HB 1251. If it was certified, it could have sold its product in North Dakota and still not made the escrow deposit. If HB 1251 had been law, certification would have been revoked after the NPM became noncompliant. The NPM would then no longer be certified to sell its product in North Dakota. But that is basically what happened under N.D.C.C. § 57-36-05.2. When the NPM did not make the required deposit, it was placed on the noncompliant NPM list, meaning its product may no longer be sold in North Dakota. N.D.C.C. § 57-36-05.2 reached the same basic result through a much more efficient and less costly process.

Another NPM was certified in Washington, but improperly sold 100 units (5 packs) in North Dakota. That NPM did not make its \$2.08 deposit, because it lost its distributor and no longer sells in the United States. Passage and implementation of HB 1251 likely would have prevented the sale of those 5 packs. It is unlikely passage and

implementation of HB 1251 would have prevented any other noncompliant NPM sales in 2005.

Admittedly, North Dakota has had some years where the percentage of required escrow deposits made was very low. That was not because North Dakota did not diligently enforce its law, and the existence of a law like HB 1251 would not have made a difference.

N.D.C.C. § 57-36-05.2 did not become effective until April 18, 2003. Because due process requires a company receive notice and the opportunity to request a hearing prior to being listed as noncompliant, the list of noncompliant manufacturers was not immediately issued. Thus, N.D.C.C. § 57-36-05.2 did not assist in preventing the sale of noncompliant NPM product in much of 2003. Interestingly, however, HB 1251 would not have prevented the sale of most of the noncompliant product that year. During 2003, one NPM had almost 58% of North Dakota's NPM sales. That NPM had been escrow compliant the three previous years. When escrow became due in 2004, however, the NPM closed its doors. HB 1251 would not have prevented the compliant NPM from closing its doors and not making the escrow deposit. Despite N.D.C.C. § 57-36-05.2 not being effective most of that year, over 95% of the required escrow amount was deposited, not taking into account that NPM's sales.

Similarly, HB 1251 would not have prevented the sale of most of the noncompliant product in 2004. That is because two previously compliant NPMs, which together had over 72% of North Dakota's 2004 NPM sales, became noncompliant. One is the previously mentioned NPM. Because that NPM did not close its doors until April 15, 2004, when the escrow deposit was due, and the noncompliant manufacturer list could not immediately be issued, that NPM had 2004 sales. The other NPM had been compliant for years, but then filed bankruptcy. Significantly, a law like HB 1251 would not have prevented either of those NPMs from becoming noncompliant.

CONCLUSION

Adoption of HB 1251 will not significantly reduce noncompliant NPM sales in North Dakota. It does not address Internet sales or compliant NPMs that later become noncompliant. It does impose a costly and burdensome regulatory scheme on the State, while providing no significant benefit. Philip Morris' statement in 2003 continues to be true -- N.D.C.C. § 57-36-05.2 is a better fit for North Dakota than HB 1251.