

HOUSE INDUSTRY, BUSINESS AND LABOR
MARCH 10, 2021

TESTIMONY OF MATTHEW SAGSVEEN
OFFICE OF ATTORNEY GENERAL
SENATE BILL NO. 2259

Mr. Chairman, members of the Committee.

I am Matthew Sagsveen, Solicitor General, and I appear on behalf of the Attorney General in connection with SB 2259, which is a bill to create and enact chapter 51-25.1 of the North Dakota Century Code, which would create complementary procedural enhancements to aid in enforcement of the existing chapter 51-25, which is North Dakota's qualified escrow fund law that applies to certain tobacco product manufacturers.

North Dakota and tobacco product manufacturers, known as the "participating manufacturers", entered into an agreement commonly referred to as the Master Settlement Agreement ("MSA"), in 1998. The MSA contemplated legislative enactment of a "qualifying statute" requiring tobacco product manufacturers that did not sign onto the MSA, known as "nonparticipating manufacturers", to make annual escrow deposits to accounts in qualified financial institutions. (The escrow deposits may be released to the beneficiary state under circumstances that include either to pay a judgment or settlement on any "Released Claim" brought against the nonparticipating manufacturer by the state, or otherwise released back to the nonparticipating manufacturer after the escrow deposit installment was made.)

North Dakota’s “qualifying statute” was enacted during the 56th Legislative Assembly in 1999 and codified in chapter 51-25 of the North Dakota Century Code. During the 58th Legislative Assembly in 2003, complementary legislation to aid enforcement of chapter 51-25 was proposed in HB 1432, but failed to pass after being introduced.

In March of 2018, North Dakota became a signatory to the Non-Participating Manufacturer Adjustment Settlement Agreement (“NPM Adjustment Settlement Agreement”). The terms of the NPM Adjustment Settlement Agreement require the state to “continuously have . . . Complementary Legislation . . . in full force and effect” to aid enforcement of the qualifying statute in chapter 51-25. Since North Dakota had not enacted such legislation, the Attorney General entered into a side-letter agreement with the participating manufacturers reflecting that the Legislature could enact complementary legislation. The Attorney General delayed introduction of a new complementary legislation bill until participating manufacturers received a determination from the Internal Revenue Service regarding the deductibility of MSA payments for federal income tax purposes. In March of 2020, the participating manufacturers notified the state that the deductibility condition had been satisfied to their satisfaction, which triggered the language in the NPM Adjustment Settlement Agreement regarding the introduction of complementary legislation. SB 2259 is the bill introduced in accordance with the NPM Adjustment Settlement Agreement which North Dakota entered into in 2018.

Section 1 of the bill contains six proposed sections to the North Dakota Century Code. The first proposed section, 51-25.1-01, would define certain terms that would appear in the new chapter. Most of the definitions simply incorporate definitions that appear elsewhere in the Century Code or Master Settlement Agreement.

Section 51-25.1-02 would establish a process for those tobacco product manufacturers seeking to sell cigarettes in North Dakota, both participating and nonparticipating manufacturers, to submit annual certifications to the Attorney General certifying that they are in compliance with the requirements of both chapter 51-25 and the new proposed chapter, ch. 51-25.1. Additionally, section 51-25.1-02 would require the Attorney General to develop and publish on his website an annual directory listing all tobacco product manufacturers that have submitted certifications that conform with the requirements of section 51-25.1-02. Under section 51-25.1-02 a tobacco product manufacturer cannot be removed from the state's directory until the tobacco product manufacturer is provided with at least 15 days' notice of the intended action. Further, section 51-25.1-02 would make it unlawful for a person to sell, offer, or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family that are not included in the directory maintained by the Attorney General.

Section 51-25.1-03 would require any nonresident or foreign nonparticipating manufacturer that is not registered to do business in the state as a foreign corporation or business entity to appoint an agent for service of process as a

condition to having the nonparticipating manufacturer's brand families included or retained on the state's directory. Section 51-25.1-03 also would establish a process for termination of the nonparticipating manufacturer's agent and the appointment of a new agent. In the event a nonparticipating manufacturer were to fail to appoint an agent, the Secretary of State would be deemed to have been appointed as agent for the nonparticipating manufacturer.

Section 51-25.1-04 would require tobacco product manufacturers and distributors to provide the Attorney General with information required to facilitate compliance with this proposed chapter, ch. 51-25.1. Section 51-25.1-04 also would authorize the Tax Commissioner to disclose to the Attorney General any information requested by the Attorney General for purposes of enforcing ch. 51-25.1. Additionally, section 51-25.1-04 would authorize the Attorney General to require nonparticipating manufacturers to make the escrow deposits required by chapter 51-25, North Dakota's qualified escrow fund law, in quarterly deposits. Under chapter 51-25, nonparticipating manufacturers are currently required to make annual escrow deposits.

Section 51-25-05 would make it a Class A misdemeanor for any person to sell, offer, or possess cigarettes for sale in North Dakota, or engage in other conduct as further set forth in Section 51-25-05, if the cigarettes are the cigarettes of a tobacco product manufacturer or brand family intended for distribution or sale in North Dakota that the person knows or should know are not included in the directory maintained by the Attorney General. Additionally, section 51-25-05 would

authorize the Attorney General to revoke the license of a distributor that sells, offers, or possesses for sale in North Dakota cigarettes of a tobacco product manufacturer or brand family not included in the directory. Further, section 51-25-05 would authorize the Attorney General to impose a civil monetary penalty within identified limits for the sale, offer, or possession for sale in North Dakota of cigarettes of a tobacco product manufacturer or brand family not included in the directory. Section 51-25-05 also would establish a procedure for the seizure and forfeiture of cigarettes sold, offered for sale, or possessed for sale in North Dakota, which are not included in the directory. In addition, Section 51-25-05 would authorize the Attorney General to seek an injunction to restrain a threatened or actual violation of identified provisions in the proposed chapter.

Finally, section 51-25-06 would result in a number of miscellaneous provisions, including establishing a process to dispute any determination by the Attorney General not to include in or to remove from the directory a tobacco product manufacturer. Additionally, under section 51-25.1-06, a license or renewal of a license to act as a distributor may not be issued by the Attorney General unless it is certified in writing that the person will comply with ch. 51-25.1. Section 51-25.1-06 would include identification of the timeframe in which distributor and tobacco product manufacturers must submit their initial required reports or certifications, along with the timeframe in which the Attorney General must develop and make available for public inspection the directory listing properly certified tobacco product manufacturers.

Under the proposed section 51-25.1-06, the state would be entitled to recover the costs of its investigation and other related costs in any action brought to enforce ch. 51.25.1. Section 51.25.1 would also provide that, if a court were to determine that a person had violated ch. 51-25.1, the court shall order any profits, gain, gross receipts, or other benefit from the violation disgorged and paid to the general fund, and that the court shall order payment of any taxes due under the Tobacco Products Tax Law in ch. 57-36. Additionally, under section 51-25.1-06, the importer of brand families sold in North Dakota of a nonparticipating manufacturer located outside the United States would have joint and several liability with the nonparticipating manufacturer for the deposit of all escrow amounts due under the proposed ch. 51-25.1 and North Dakota's qualified escrow fund law at ch. 51-25.