

HOUSE INDUSTRY, BUSINESS AND LABOR
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SUPPLEMENTAL TESTIMONY OF MATTHEW SAGSVEEN
OFFICE OF ATTORNEY GENERAL
SENATE BILL NO. 2259

Mr. Chairman, members of the Committee, pursuant to the Committee's request, I provide the following supplemental testimony.

HB 1432 was the comprehensive "complementary" legislation tobacco bill introduced during the Fifty-Eighth Legislative Assembly in 2003. SB 2259 is the "complementary" legislation tobacco bill introduced during the Sixty-Seventh Legislative Assembly in 2021. The term "complementary" reflects the intent of the legislation to aid in enforcement of chapter 51-25, which is North Dakota's existing qualified escrow law. The purpose of this Memorandum is to compare HB 1432 and SB 2259 and summarize their similarities and differences.

The title of HB 1432 stated, "A BILL for an Act to impose limitations on the sales of tobacco products of tobacco manufacturers not participating in the tobacco settlement agreement; and to provide a penalty." The sponsors of HB 1432 from the House of Representatives were Rep. Grande, Rep. Grosz, and Rep. Haas. The sponsors of the bill from the Senate were Sen. Freborg, Sen. Robinson, and Sen. Tollefson. According to the House Journal, the bill was introduced and had its first reading on January 20, 2003. The bill was referred to the House Human Services Committee chaired by Rep. Price. On January 27, 2003, the bill received a "do not pass" recommendation by a vote of 13-0. On January 30, 2003, the bill had its second reading and failed to pass in the House by a vote of 84-5. No other action on the bill is noted in the House Journal.

SB 2259, the comprehensive complementary legislation tobacco bill introduced in the Senate on January 18, 2021, which would be codified as chapter 51-25.1, is in

large part materially similar to HB 1432, with some exceptions:

Section 51-25.1-01: SB 2259 would provide definitions of ten terms, including all eight of the terms that were defined in section 2 of HB 1432. The content of the definitions of the eight terms defined in both SB 2259 and HB 1432 is materially the same. The two additional terms defined in section 51-25.1-01 of SB 2259 are “Commissioner”, referencing the Tax Commissioner, and “Master settlement agreement”, which North Dakota and other states and certain tobacco product manufacturers entered into in 1998.

Section 51-25.1-02: SB 2259 would require tobacco product manufacturers to submit an annual “certification” to the Attorney General and would require the Attorney General to develop and maintain a public directory of those tobacco product manufacturers which submit current and accurate certifications. The content of section 51-25.1-02 of SB 2259 and section 3 of HB 1432 is materially the same, with the exception that, under HB 1432, it would have been the Tax Commissioner who received the annual certifications and developed and maintained the directory. (This change in the administration of the proposed complementary law from the Tax Commissioner to the Attorney General also is reflected in other provisions in SB 2259.)

Section 51-25.1-03: SB 2259 would establish requirements pertaining to the appointment of agents for service of process on tobacco product manufacturers related to the enforcement of the proposed chapter 51-25.1 and the existing chapter 51-25, which is North Dakota’s qualified escrow fund law. The content of the proposed section 51-25.1-03 and section 4 of HB 1432 is materially the same.

Section 51-25.1-04: SB 2259 would establish requirements for the reporting of information by distributors and tobacco product manufacturers. The content of these

provisions in section 51-25.1-04(1)-(4) is materially the same as subsections 1-4 of section 5 in HB 1432.

However, the language in section 51-25.1-04(5) is materially different from language in subsection 5 of section 5 of HB 1432. Specifically, section 51-25.1-04(5) would authorize the Attorney General to require nonparticipating manufacturers to make escrow deposits in quarterly installments as opposed to the annual escrow deposits referenced in the existing chapter 51-25. The language that would authorize the Attorney General to require quarterly escrow deposits is modeled after a similar provision in Arkansas' complementary law. Four of the five nonparticipating manufacturers whose cigarettes currently are sold in North Dakota already voluntarily make escrow deposits on a quarterly basis. On the other hand, subsection 5 of section 5 of HB 1432 would have merely authorized the promulgation of administrative rules requiring escrow deposits be made in installments during the year.

Section 51-25.1-05: SB 2259 would authorize the Attorney General to: 1) Revoke the license of a distributor under certain circumstances; 2) Establish a process for the seizure and forfeiture of contraband cigarettes; 3) Authorize the Attorney General to seek injunctive relief to restrain threatened or actual violations of certain provisions in SB 2259; and 4) Make violation of a specifically referenced provision in SB 2259 a class A misdemeanor. The content of section 51-25.1-05 of SB 2259 and section 6 of HB 1432 is materially the same with three exceptions.

First, whereas subsection 2 of section 6 of HB 1432 did not identify a specific process for seizure and forfeiture of contraband cigarettes, section 51-25.1-05(2) of SB 2259 does identify a specific process, which is modeled on the seizure and forfeiture process set forth in section 57-36-14 of the Tobacco Products Tax Law.

Second, whereas subsection 4 of section 6 of HB 1432 would have made violation of a specifically referenced provision a class B misdemeanor, section 51-25.1-05(4) of SB 2259 would make violation of the provision in SB 2259 a class A misdemeanor. The class A misdemeanor designation is based on section 57-36-33 of the Tobacco Products Tax Law, which makes a violation of the chapter a class A misdemeanor. Third, whereas a violation of any provision in HB 1432 would have resulted in an unfair and deceptive trade practice in violation of chapter 51-10, SB 2259 would not make a violation of the complementary law an unfair and deceptive trade practice.

Section 51-25.1-06: Section 51-25.1-06 of SB 2259 contains ten miscellaneous subsections. The content of most of the subsections is materially the same as the content of subsections contained in HB 1432, including: 1) The requirement proposed in section 51-25.1-06(2) that a distributor certify that it will comply with the complementary law as a condition of issuance of a distributor license; 2) The requirement proposed in section 51-25.1-06(3) that a licensed distributor maintain a current email address with the Attorney General; 3) The authority proposed in section 51-25.1-06(5) to adopt administrative rules to effect the purposes of the complementary law; 4) The authority proposed in section 51-25.1-06(6) to seek various costs and fees incurred in connection with any action brought by the State to enforce the complementary law, 5) The requirement proposed in section 51-25.1-06(7) that a court order any ill-gotten gains resulting from a violation of the complementary law disgorged and paid to the general fund; 6) A provision proposed in section 51-25.1-06(8) clarifying that all referenced remedies or penalties are cumulative to each other and to remedies and penalties available under other laws of the State; and 7) A provision proposed in section 51-25.1-06(9) clarifying that the proposed

complementary law would not amend chapter 51-25, which is North Dakota existing qualified escrow fund law.

There are essentially four material differences between section 51-25.1-06 of SB 2259 and HB 1432. First, there is language in both section 51-25.1-06(1) and HB 1432 providing a process for a tobacco product manufacturer to challenge a decision not to include in, or to remove from, the directory a tobacco product manufacturer. Under HB 1432, the process would have been the filing of an administrative action under the Administrative Agencies Practice Act in chapter 28-32. Under section 51-25.1-06(1), the process would be the filing of a civil action in Burleigh County district court.

Second, section 51-25.1-06(4) would identify specific dates by which: 1) Each distributor must submit its initial report to the Attorney General; 2) Each tobacco product manufacturer must submit its initial certification to the Attorney General; and 3) The directory to be maintained by the Attorney General must be developed and made available for public inspection. HB 1432 did not set those timeframes.

Third, in addition to requiring that a court order any ill-gotten gains resulting from a violation of the complementary law disgorged and paid to the general fund, section 51-25.1-06(7) would require the court to order payment of any related taxes due under chapter 57-36.

Finally, for each nonparticipating manufacturer located outside the United States, section 51-25.1-06(10) would make each importer into the United States of the nonparticipating manufacturer's brand families sold in the United States jointly and severally liable with the nonparticipating manufacturer for deposit of all escrow amounts due under chapter 51-25 and payment of all penalties imposed under a provision in the complementary law. HB 1432 did not include a similar provision. Please advise if any further information can be provided.