

2009 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2197

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2197

Senate Industry, Business and Labor

Check here for Conference Committee

Hearing Date: January 28, 2009

Recorder Job Number: 8042

Committee Clerk Signature

Minutes:

**Chairman Klein** opened the IBL hearing, all members presents.

**Senator Wanzek** introduced SB 2197, written testimony provided. (See attachment #1)

**Allen Stenehjem** testified in support of SB 2197. (See attachment #2), also presented a written letter from Mike Cummings, a tobacco wholesaler in Fargo, supporting SB 2197. Also presented a letter from Louella Moseley, president of BCTGM Local 196T, in support of SB 2197.

**Senator Klein:** By changing the weight-based, what numbers are we going to?

**Allen Stenehjem:** I don't want to calculate off the top of my head, the tax on product A would go from 73% to 26.5%, the tax on product B would go from 23% to 26.5%. The important factor is not which company benefits, it's the consumer who is paying the extra tax.

**Senator Andrist:** It is my understanding that Kentucky has a unit-based tax, what's wrong with this concept.

**Allen Stenehjem:** the crux of the whole thing is who is paying the extra cost? The consumer

**Senator Andrist:** From a public policy standpoint, we are looking at the same damage, so why not have the same tax?

**Senator Behm:** It makes sense, what **Senator Andrist** says, why don't we tax it all the same, weight, volume, ect?

**Senator Potter:** Is the national market growing, shrinking, or holding

**Allen Stenehjem:** The business is good and market is growing.

**Senator Potter:** Has the state been losing money due to the weight-based tax? And would we have made the losses if we would have had the price-based tax?

**Allen Stenehjem:** When you look at the tax, this is not revenue neutral. The state of ND lost out on \$1 million dollars of tax income last biennium. This is a business decision. Competition and fairness in the market is where we need to focus. Do we favor one company over the other through our tax policy?

**Senator Horne:** My understanding is each product has a base-price and our current system adds a weight-based tax, and then a sales tax beyond that?

**Senator Klein:** At the end of the day, what does the consumer actually see?

**Stanley Arnold**, representing Conwood Company, testified in favor of SB 2197. (See attachment #3)

**Kent Tupa:** representing American Cancer Society, testified in favor of SB 2197. (See attachment #4)

**Senator Horne:** My concern is the base-price would be lower, which would increase the usage and encourage youth. This then turns to a health issue, I understand fair tax issues, however, we don't need to encourage youth into buying the cheaper brand because kids are not price conscious.

**Senator Klein** Any testimony in opposition to SB 2197?

**John Job:** representing AMCON Distribution Co. testified in opposition to SB 2197. (See attachment #5)

**Robert Shepherd:** representing UST Public Affairs Inc., testified in opposition of SB 2197. (See attachment #12)

**Senator Andrist:** It seems the weight-based system would have a declining tax.

**Robert Shepherd:** If you adopt the old system, you will take a tax hit.

**Senator Andrist:** Then you would concede there should be adjustment for inflation

**Robert Shepherd:** You as the legislature set your tax according to the economy.

**Kerry Paulson:** representing US Tobacco Public Affairs testified in opposition to SB 2197. (See attachment #13)

**Jeb Elke:** representing ND Chamber of Commerce testified in opposition to SB 2197, just reiterated Kerry Paulson's testimony.

**Myles Kolsberg** testifying for the Tax Office, there are charts and files pertaining to increases ounces, amount of increase, and revenue.

**Senator Wanzek:** If you look at taxes as weight based taxes in 2001. What % would that be at looking forward to 2008, with relationship to value?

**Myles Kolsberg:** We do not have that information.

**Allen Stenehjem:** Looking at fiscal notes, they base their assumptions on market shares. It may not be an exact science but you can infer what tier a product sells in or comes from.

**Myles Kolsberg:** Fiscal Notes approach range of 300K-700K, and came up with the ranges of 500K.

**Chairman Klein** closed the meeting with no action being taken.

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2197

Senate Industry, Business, and Labor Committee

Check here for Conference Committee

Hearing Date: February 4, 2009

Recorder Job Number: 8702

Committee Clerk Signature

Minutes:

**Chairman Klein:** reopened the hearing on SB 2197, all members present.

**Chairman Klein:** We have worked this over and there is some concern about an amendment.

**Senator Wanzek:** The amendment changes are lowering the percentage from 28% to 26.5%.

It has the intent to stay revenue neutral, and this is what it takes to do that.

**Chairman Klein:** one of the presenters miscalculated some numbers and wanted to correct it so he is passing that out.

**Senator Wanzek:** It was the intent to change to method of calculation and not the total state dollars.

**Senator Andrist:** To me, the biggest deficiency to weight-based system is that so much per pound has no inflation component as the dollar tax would, as the value of the dollar goes up. I am very sensitive to any measure that makes tobacco more readily accessible to our young people. If we stay with a weight-based system, we should add an inflation escalator.

**Chairman Klein:** I disagree with that because if we are going to do that, we will have to address every other sin product because we are doing it that way for cigarettes, beer, and soon all wines. It doesn't matter if you are down on the low end (tier one) or in the high (tier three), your still only paying \$.44 per pack. It is the way it is.

**Senator Potter:** I resist the amendment because and recognize exactly what it does, it drives up the cost and produces revenue for the state of North Dakota and that's ok by me.

**Senator Behm:** It bothers me these are taxed at different. Why is weight-per-ounce taxed different than the price?

**Chairman Klein:** We are charging tax per ounce.

**Senator Behm:** Thanks for straighten me out.

**Senator Wanzek:** We are putting a tax increase on tobacco.

**Senator Wanzek:** I will make a motion to pass the amendment

**Senator Andrist:** Seconded

**Chairman Klein:** We have a motion for a Do Pass on the SW amendment as it has been handed out. Motion failed 4-3

**Senator Wanzek:** Motion for a Do Pass

**Senator Behm:** Seconded

**Chairman Klein:** Motion fails 4-3

**Senator Nodland:** Made motion to Do Not Pass

**Senator Potter:** Seconded

**Chairman Klein:** Motion for a Do Not Pass passes 5-2, CK will carry.

**FISCAL NOTE**  
**Requested by Legislative Council**  
01/14/2009

Bill/Resolution No.: SB 2197

**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.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>			\$500,000			
<b>Expenditures</b>						
<b>Appropriations</b>						

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

2007-2009 Biennium			2009-2011 Biennium			2011-2013 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).*

SB 2197 changes the method of computing the wholesale tobacco tax on certain types of tobacco products from a 'tax per ounce' to a tax based on the wholesale price of the product.

**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.*

In 2008, there were 4.581 million ounces of "snuff" on which \$2.748 million in wholesale tobacco tax was collected at the current tax rate of \$.60 per ounce. This bill would change the method of taxing this product to 28% of the wholesale price.

The fiscal impact of this switch back to 28% of the wholesale price would depend on the relative market share of each of the various-priced products (there are three basic price tiers of snuff sold in the state).

Industry representatives have provided some information relative to the respective market share of each of these tiers, and based on this information, and the expected rate of growth in the amount of product sold, we estimate the fiscal impact of the switch back to 28% of the wholesale price will increase state general fund revenues by an amount between \$300,000 and \$700,000 for the 2009-11 biennium. The midpoint of this range is shown above.

**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.*

**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.*

**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.*

<b>Name:</b>	Kathryn L. Strombeck	<b>Agency:</b>	Office of Tax Commissioner
<b>Phone Number:</b>	328-3402	<b>Date Prepared:</b>	01/27/2009



2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2197

Senate

Committee

**Industry, Business and Labor**

Check here for Conference Committee

Legislative Council Amendment Number Amendment

Action Taken  Pass  Do Not Pass  Amended

Motion Made By Senator Wanzek Seconded By Senator Andrist

Senator	Yes	No	Senator	Yes	No
Senator Jerry Klein - Chairman	✓		Senator Arthur H. Behm	✓	
Senator Terry Wanzek - V.Chair	✓		Senator Robert M. Horne		✓
Senator John M. Andrist		✓	Senator Tracy Potter		✓
Senator George Nodland		✓			

Total (Yes) 3 No 4

Absent 0

Floor Assignment Senator

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

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Date: 2/4/09  
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2197

Senate

Committee

**Industry, Business and Labor**

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Pass  Do Not Pass  Amended

Motion Made By Senator Nodland Seconded By Senator Potter

Senator	Yes	No	Senator	Yes	No
Senator Jerry Klein - Chairman	✓	<del>✓</del>	Senator Arthur H. Behm	<del>✓</del>	✓
Senator Terry Wanzek - V.Chair		✓	Senator Robert M. Horne	✓	
Senator John M. Andrist	✓	<del>✓</del>	Senator Tracy Potter	✓	
Senator George Nodland	✓	<del>✓</del>			

Total (Yes) 5 No 2

Absent 0

Floor Assignment Senator Klein

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

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Date: 2/4/09  
Roll Call Vote #: 2

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2197

Senate

Committee

**Industry, Business and Labor**

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Pass  Do Not Pass  Amended

Motion Made By Senator Nodland Seconded By Senator Potter

Senator	Yes	No	Senator	Yes	No
Senator Jerry Klein - Chairman		✓	Senator Arthur H. Behm	✓	
Senator Terry Wanzek - V.Chair		✓	Senator Robert M. Horne	✓	
Senator John M. Andrist		✓	Senator Tracy Potter	✓	
Senator George Nodland		✓			

Total (Yes) 4 No 3

Absent 0

Floor Assignment Senator Klein

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

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2197

Senate

Committee

Industry, Business and Labor

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Pass  Do Not Pass  Amended

Motion Made By Senator Wanzek Seconded By Senator Behm

Senator	Yes	No	Senator	Yes	No
Senator Jerry Klein - Chairman		✓	Senator Arthur H. Behm	✓	
Senator Terry Wanzek - V.Chair	✓		Senator Robert M. Horne	✓	
Senator John M. Andrist		✓	Senator Tracy Potter		✓
Senator George Nodland		✓			

Total (Yes) 3 No 4

Absent 0

Floor Assignment Senator

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

**REPORT OF STANDING COMMITTEE (410)**  
February 4, 2009 4:58 p.m.

**Module No: SR-22-1679**  
**Carrier: Klein**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2197: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends DO NOT PASS (4 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). SB 2197 was placed on the Eleventh order on the calendar.**

2009 TESTIMONY

SB 2197

#2

Chairman Klein and fellow IBL Committee Members,

For the record, my name is Terry Wanzek, State Senator from District 29. I am here to introduce SB 2197.

SB 2197 makes one substantive change which is the most controversial part of the bill. It changes the current method of taxation on most tobacco products, mainly snuff or chewing tobacco, from a weight based tax to value tax. In other words the tax will be assessed on a percentage of dollar value versus by weight. It is my understanding that this is how we already tax cigars and pipe tobacco.

As an agricultural businessman, I know how a simple competitive advantage can yield a tremendous increase in market share. In my business, if I want a larger market share, I have to do so by becoming more efficient in production or by increasing my marketing expenses. I do not have the option to raise the tax on my competitor's crops. To me, this seems to be an unfair practice. With free enterprise everyone should compete on a level playing field.

It seems fair to have a discussion about the merits of one manufacturer paying a much higher percentage in taxes as related to the total amount of revenue charged to ND consumers versus another enjoying a much lower percentage of tax. In other words, the company taking a larger share of the ND market share pays a much lower percentage of tax from those ND consumer dollars than another company extracting fewer dollars or market share from ND consumers.

Many of us can argue and would argue on the merits of tobacco use; however it is a legal product. Stating this fact, we need to provide a fair business climate to any producer of this legal product. A basic principle in the business world is to analyze the internal and external strengths, weaknesses, opportunities, and threats. When I see tax structure as an opportunity for one Tobacco Company and a threat to another, this serves as a red flag to unfair business practice. Tax policy should be equitable. Knowing this, I introduced SB 2197 to allow for this discussion. I trust in the wisdom of the Senate IBL committee to give this issue a fair hearing and objective consideration.

Thank you Mr. Chairman & fellow committee members.

Proposed Amendments for SB 2197  
Sen. Terry Wanzek

- Page 1, line 15- after snuff, insert chewing tobacco
- Page 1 line 18- after snuff, insert chewing tobacco
- Page 1, line 23- after snuff, insert chewing tobacco
- Page 2, line 5-after snuff, insert chewing tobacco
- Page 2, line 16-after snuff, insert chewing tobacco
- Page 2, line 19-after snuff, insert chewing tobacco
- Page 2 line 24-after snuff, insert chewing tobacco
- Page 2 line 27-after snuff, insert chewing tobacco
- Page 2, line 28-after snuff, insert chewing tobacco
- Page 3, line 5-after snuff, insert chewing tobacco
- Page 3 line 12-after snuff, insert chewing tobacco
- Page 3, line 28-after snuff, insert chewing tobacco
- Page 4 line 1-after snuff, insert chewing tobacco
- Page 4, line 4-after snuff, insert chewing tobacco
- Page 4, line 6-after snuff, insert chewing tobacco
- Page 5, line 8-after snuff, insert chewing tobacco
- Page 5 line 16-after snuff, insert chewing tobacco
- Page 6, line 21-after snuff, insert chewing tobacco
- Page 6. Line 24- change twenty-eight percent to twenty-six point five percent
- Page 6, line 24-after snuff, insert chewing tobacco
- Page 6, line 28-after snuff, insert chewing tobacco
- Page 7, line 1-after snuff, insert chewing tobacco
- Page 7, line 27-after snuff, insert chewing tobacco
- Page 8, line 5-after snuff, insert chewing tobacco



## Estimated North Dakota Moist Smokeless Tobacco Prices

During the hearing on SB-2197 before the Industry, Business and Labor Committee on January 28, 2009, Senator Robert M. Horne asked to be provided with information relating to the prices of Moist Smokeless Tobacco under the present weight-based system, and the ad valorem method provide for in SB-2197.

Below are the estimated figures, based on the following assumptions:

- Tier wholesale prices are representative prices of brands within that Tier (Premium-Tier 1; Price Value – Tier 2; Sub Price value –Tier 3)<sup>1</sup>.
- Weight-based tax is calculated at 60¢ per ounce on a 1.2 ounce can.
- Ad valorem tax is calculated at 28% of wholesale price, per SB-2197.
- Sales Tax is based on 5% statewide sales tax, and does not include any local sales tax imposed on some cities.
- Calculations do not include any potential wholesale or retail markup.

### Calculations under current Weight-Based Excise Tax

Tier	Wholesale Price	Excise tax at 60¢ per ounce	Estimated price including excise tax	State sales tax at 5%	Estimated final price without wholesale or retail markup
1	\$ 3.01	\$ .72	\$ 3.73	\$ .19	\$ 3.92
2	\$ 1.35	\$ .72	\$ 2.07	\$ .10	\$ 2.17
3	\$ .98	\$ .72	\$ 1.70	\$ .09	\$ 1.79

### Calculations under ad valorem method per SB-2197

Tier	Wholesale Price	Excise tax at 28%	Estimated price including excise tax	State sales tax at 5%	Estimated final price without wholesale or retail markup
1	\$ 3.01	\$ .84	\$ 3.85	\$ .19	\$ 4.04
2	\$ 1.35	\$ .38	\$ 1.73	\$ .09	\$ 1.82
3	\$ .98	\$ .28	\$ 1.26	\$ .06	\$ 1.32

<sup>1</sup> USSTC RAD-SVC database. These are the wholesale prices (nationally and in ND) for representative brands in each of the three tiers. Copenhagen was used for the Tier 1 price, Husky was used for the Tier 2 price and Longhorn was used for the Tier 3 price. As of February 1, 2009, the price of Copenhagen was \$3.01, the price of Husky was \$1.35 and the price of Longhorn was \$0.98.



Senate Industry, Business and Labor Committee  
 Senate Bill 2197

### Summary of Tobacco Tax Reported FY 2002 - 2008

Fiscal Year	Chewing Tobacco		Snuff Tobacco		Other Tobacco Products	
	Ounces	Tax at 16¢	Ounces	Tax at 60¢	Wholesale Value	Tax at 28%
FY2003	191,043	\$30,567	3,096,862	\$1,858,117	\$1,589,208	\$444,978
FY2004	179,166	28,667	3,099,902	1,859,941	1,495,441	418,723
FY2005	186,641	29,863	3,474,236	2,084,542	1,414,963	396,190
FY2006	192,875	30,860	3,777,562	2,266,537	1,521,976	426,153
FY2007	202,532	32,405	3,965,426	2,379,256	1,673,608	468,610
FY2008	218,419	34,947	4,462,570	2,677,542	1,678,076	469,861

Prepared by Office of State Tax Commissioner  
 February 3, 2009

# Ad Valorem is clearly the preferred tax method for moist snuff in the United States - because it works!



Mr Chairman and members of the committee for the record my name is Allan Stenehjem and I represent Conwood Company, a manufacturer of moist snuff.

As you can see from the chart, it is clear that almost all states which tax smokeless tobacco do so based on ad valorem or percentage of price bases. Prior to 2001, North Dakota taxed smokeless tobacco at a percentage of wholesale price.

Over the past few years, bills have been introduced in a number of targeted states that address the taxation of smokeless tobacco. Most bills change the taxation from a percentage of price to a weight-based system. This approach has been pushed aggressively by UST, the largest U.S. smokeless tobacco manufacturer, this was done primarily to reduce the effective tax rates on the higher-priced premium products it sells, while raising the effective tax rates on the lower-priced smokeless products sold by its competition. UST's claim is "to level the playing field

Most businesses follow the "Affected Performance Competition Model. That is, businesses have knowledge of what their competition is doing, thus affecting their own business and marketing strategies. Competition consists of trying to get the customer to buy your product instead of the one offered by the competitor. In

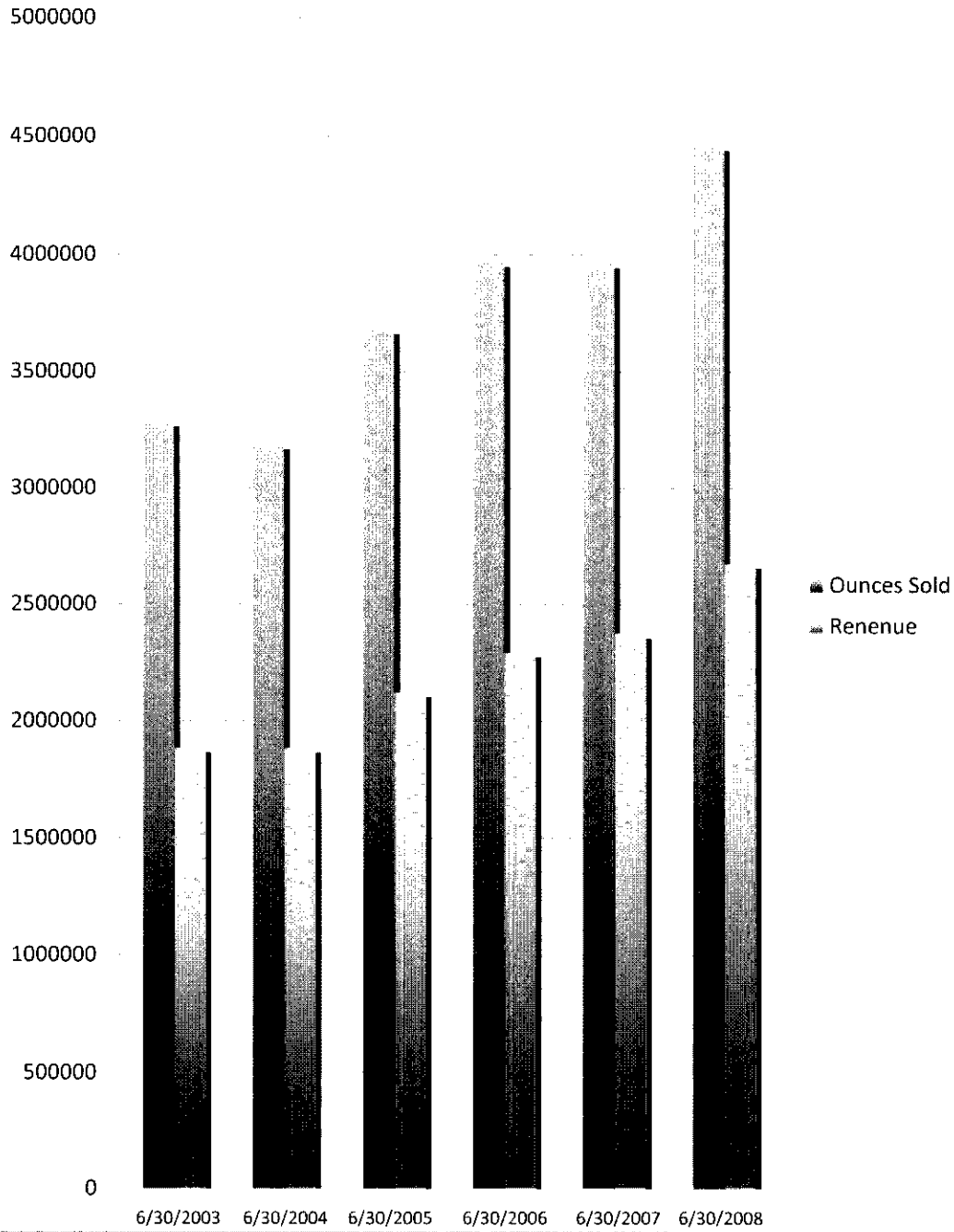
selling the same product, a company's performance determines their success. Can you offer a better product at a competitive price?

When UST discovered they were losing market share of their premium brands of smokeless tobacco to their competitors' value-priced products, UST chose to abandon the performance competition model of making a better product at a lower price. Instead, they turned to the states to make their products more competitive in the market by lobbying for changes in the state tobacco tax from a percentage of price to a weight-based system. North Dakota was one of its first targets.

The weight-based initiative is the result of an unbridled attempt by the leading manufacture, UST, to use tax law as a weapon to improve the competitiveness of its products.

At some point in today's testimony you will hear and see charts showing that from 2001, when the tax was changed from a percentage of price method to a weight based tax method, the tax revenue from the sale of OTP in North Dakota experienced a steady increase. That statement is true. Revenues from Other Tobacco Products (OTP) have increased every year since 2003. In 2003, the state of North Dakota collected nearly \$1.9 million in taxes and in 2008 it collected

# Ounces Sold vs. Revenue



close to \$2.7 million. The opponents may claim that this is due to the weight based taxing method in place today and that is why ND has experienced such increases.

However, compared to SD, MT, and MN, ND is the lowest taxed state on tobacco products. The reason ND has seen an increase in revenue has absolutely nothing to do with the weight based taxing method, but as you look at the chart, it has everything to do with ounces sold. In 2003, 3.3 million ounces of OTP were sold. In the fiscal year 2008 almost 4.5 million ounces were sold. This is where you see the increase in tax revenue. Because of our low tax, ND is experiencing more and more cross border sales of all tobacco products..

Unlike weight-based taxes, percentage-of-price tax rates automatically increase with inflation and price increases. This percentage-of-tax protects the state's tax rate and revenues from being eroded over time. What UST did in North Dakota in 2001 was to package its weight-based proposal so that it would purportedly bring in more revenues in the next couple of years. But the fixed monetary tax rate in a weight-based system will inevitably erode over time as inflation and product prices increase, thus producing substantially less state revenue than would percentage-of-price tax.

North Dakota is in an enviable financial position. We have a budget surplus of over \$1.2 billion. Initiatives brought forward by the Governor and many legislators, talk about property tax relief, income tax reduction, increased funding for schools, and not tax increases as other states are forced to do.

Consider this, in 2001, when ND was coaxed into changing from a percentage-of-price tax rate to a weight based on OTP we had also adopted that same flat tax rate on the Oil Production tax and the Oil Extraction tax. Would we be in the same financial position? The answer of course is NO. When oil hit \$120 a barrel ND was able to realize huge revenues because these two taxes are based on the value of the oil and not on the size of the barrel.

Now that the price of oil has stabilized for the time being and the state has adjusted revenue projection for that, are we still not in a better position with a percentage-of-price on the production and extraction tax? Would we ever consider changing the tax method?

In 2007 a wholesale distributor from Bismarck testified that “the ND Wholesalers do not support the change from Weight based to a percentage of price tax method.



Today I would like to submit to you a letter from a wholesaler in Fargo who disagrees.

While I represent Conwood Company on this issue there are other manufactures of tobacco products that have an interest in this issue.

Swedish Match is a global Group with a broad offer of market-leading brands in smokeless tobacco products, cigars pipe tobacco and cigarettes. I would like to provide a letter of support for SB 2197 on their behalf.

***Fargo Moorhead Jobbing Co.***

***1017 4th Ave N***

***P.O. Box 1469***

***Fargo ND 58107***

To the members of the North Dakota Legislature,

My name is Mike Cummings and I am the owner of FM Jobbing, one of the few North Dakota based Tobacco Wholesalers doing business in the state.

I could not have been happier to hear that SB2197 had been introduced. This bill would change the current weight based system on smokeless tobacco and revert back to the previous ad valorum system.

Since North Dakota went to a weight based taxation system several years ago, it has been more difficult for us to compute our taxes owed to the state. Under the previous ad valorum system, our taxes were a simple percentage of the manufacturer's wholesale price. It was extremely easy for us to compute and easy for the state to audit.

When the state first began taxing cigarettes and beer they did so on a unit price system. They used this system because these products are uniform. When the state began taxing the tobacco category "other tobacco products" they realized the unit or weight system wouldn't work and taxed these products on an ad valorum or "percentage of wholesale price" system. They taxed this category of tobacco products under this system because those products came in dozens of shapes, sizes, weights and forms. In short, the ad valorum system was simple, effective, and fair.

I am asking you to vote in favor of SB2197 for the following reasons:

First, the weight based system, when passed, created a huge tax increase on the working class people in North Dakota.

Second, the weight based system has been a tremendous burden on the wholesale community with no apparent benefit to us or the state.

Third, the weight based system gave one out of state company an unfair competitive advantage, at the expenses of North Dakota taxpayers. I think we would agree this is unfair and that under our free market system, government should not be involved in picking winners and losers.

As one of the few North Dakota based distributors of tobacco products I would just like to say that the ad valorum method of taxations for the category "other tobacco products" has been a very simple and cost effective system for us to work with and for that reason I would like to respectfully ask you to vote in favor of SB 2197.

Thank you taking the time to listen to my concerns,

  
Mike Cummings

☆☆☆  
**SWEDISH MATCH**

TO: ND Legislature  
From: Mrs. Louella Moseley  
Swedish Match  
January 27, 2009

My name is Louella Moseley, and I am President of Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union 196-T at Swedish Match. Our company is a unique tobacco company, using its world leading brands and niche tobacco products to work in growing markets in harmony with current social and consumer trends. Our employee base is also unique. At Swedish Match, our organization is unionized in order to foster a fair business work environment.

Before you is Senate Bill 2197. We strongly encourage you to vote yes on this bill. This bill will create a fair tax structure for all smokeless tobacco manufacturers. In our industry, firms should compete for market shares through means of promotions, advertisements, and reputation, not by influencing tax policy.

Please join us in supporting Senate Bill 2197.

Thank you,

*Louella Moseley*  
*President BTGM Local 196 T*

**North America Division**

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Attachment  
#3

Statement of Stanley R. Arnold on behalf of  
Reynolds American and Conwood Company, LLC  
Senate Bill 2197  
January 28, 2009

Good Morning,

For the record, my name is Stan Arnold and I represent Conwood Company, LLC, a manufacturer of moist snuff and wholly owned subsidiary of Reynolds American, Inc. I encourage you to pass SB 2197 because it represents good tax policy.

Allan has clearly stated why we believe the change is needed. Simply put, it is the fair thing to do! In 2001, North Dakota changed the method of taxing moist snuff. That change shifted the burden of the tax to North Dakotans of modest means. The change has resulted in luxury brands with an effective tax rate of approximately 24% and the modest brands with an effective tax rate range of 33% to 73%. Such a tax rate discrepancy clearly changes behavior, although the precise effects are difficult to measure.

The question has to be asked, what principle of taxation justifies imposing a significantly higher tax rate on a company's product simply because it sells its product for less than its competitor? Just as importantly, we know that companies don't pay this tax, North Dakotans pay this tax. Do you want to say to a North Dakota citizen of modest means that he or she must pay a 73% tax rate while their well-to-do neighbor only pays tax at a 24% rate?

I have over 33 years of experience in the state and local tax field with 20 of those years involved in developing and implementing state tax policy. I managed the department of revenue in New Hampshire for 14 years and worked with five governors and numerous legislative committees in developing sound tax policy decisions to meet the revenue needs of New Hampshire.

I am not a specialist on tobacco issues. I am a specialist in tax policy issues and testify across the country on a broad range of tax policy issues. Since leaving state service, I have continued to work in the tax policy area representing clients in Congress on a bill clarifying the state taxation of pensions and advising on business tax issues before the PA, TN, MA, and RI Tax Study Commissions. I think it is important for you to understand, that while I'm being paid as a lobbyist on this issue, I wouldn't be here if I did not believe that passing SB 2197 was in the best interest of ND citizens.

There are three important points that I wish to make today. First, this issue is all about competition and increasing the cost barrier for any competitor that wishes to challenge UST's dominate position in the market. Second, contrary to what you may already have heard, an excise tax is not a targeted tax and there is no established economic or state tax theory that requires excise taxes to be based on a unit cost. Finally, the current law violates three base principles of sound tax policy.

Prior to 1980, UST was the only domestic manufacturer of moist snuff. The most effective way to compete with a monopoly or near monopoly is on price. Provide the same or similar product at less cost and the upstart competitor has a chance to succeed. This is precisely what occurred. Competitors entering the market with innovative products and lower prices made inroads into the dominant manufacturer's market share. However, UST's investors didn't like to see them losing market share and put pressure on the company to take action.

North Dakota was one of UST's first targets to try a new strategy. It approached your state to help it maintain its market share by increasing the cost of operations on its competitors and decreasing the competitors' margin. I've gone back over the 2001 testimony and see where language such as *this is a simple technical correction to OTP methodology to bring in line with other consumer products sold; or this protects the states from a sudden price decrease; and we are seeing*

*decreasing sales of premium products.* My client, Conwood Company, LLC did not present all of the relevant issues probably because this was one of the first states this tactic was employed.

The one fact that has most bothered me in the testimony by the proponents of weight based is the implication that the size of the market is fixed. The market is expanding and there are a number of reasons for that expansion. One of the reasons for the growth is because there are now more products for sale. If competition had not been introduced in the 70's and 80's we would probably be still looking at two products Skoal and Copenhagen in the same type of cans and flavors. If you didn't like these products for whatever reason, you simply wouldn't use the product.

Competition is the mainstay of the US economy. When proponents of weight based say individuals are "down-trading" and that is bad, they fail to recognize that if there were no product to "down-trade" to, there would be no sale. They want to force out competition, but fail to recognize economic reality that artificially forcing out a competitor doesn't mean they automatically gain that customer.

Business organizations which believe in free market theory should support this bill because it puts competition back into this product. No one requires these companies to charge any specific price. If a company believes it can charge \$3.01 and sell sufficient product to please its shareholders then that is the market. If another company believes it can charge \$1.35 and make up in volume what it loses in margin then that is competition. If customers don't like the product of the company that charges \$1.35 then it will not survive. That is the free market and charging an effective tax rate of between 24% and 73% disrupts that market by favoring one product over the other.

This brings me to my second point. UST is attempting to turn good market theory on its head by claiming that excise taxes are somehow a special type of tax which requires them to be imposed on a unit basis. However, excise taxes are not special and are properly categorized as legacy taxes.<sup>1</sup> Excise taxes were the main source of revenue at the federal level because there was no federal capability in the 1700s and 1800s to raise revenue any other way. The first excise taxes were on monopoly or near monopolistic industries such as tobacco products, big oil, liquor, cotton etc.

At the state level, most funding was provided by broadly applied property tax systems that encompassed real estate as well as farm animals, machinery, etc. In the 1900s, there was a need for additional revenue to support the wars and increased public projects. The federal government developed systems to tax individual and business income. In turn, it repealed the excise taxes. In the mid 1900s, the states built systems to piggyback on the federal systems and replace the excise taxes and reduce the property tax burden. The remaining excise taxes are there because the revenue is needed and it is either too expensive or politically unpopular to change: not because they are desirable or supported by good tax policy.

Arguments can be made as to whether or not any tax should remain on the books, but if a state is going to impose a tax, it should be based on sound tax policy principles. Three principles are (1) revenue should match the growth of the expenses they support; (2) the system should be based on administrative efficiency and (3) be economically neutral.

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<sup>1</sup> There is an interesting discussion of excise taxes on the U.S. Treasury web site about the History of the U.S. Tax System (<http://www.ustreas.gov/education/fact-sheets/>). In discussing the period following the Civil War, it states "The need for Federal revenue declined sharply after the war and most taxes were repealed. By 1868, the main source of Government revenue derived from liquor and tobacco taxes. The income tax was abolished in 1872. From 1868 to 1913, almost 90 percent of all revenue was collected from the remaining excises."

Principle one is that revenue growth should match expenses. This is one of the most difficult tasks of a state legislature. North Dakota is in good shape currently and I salute your good performance. Most of the other states are struggling because revenue is not keeping up with expenses. Since 2001, the only increase in revenue from moist snuff has come from volume. Prior to 2001, there were two drivers of revenue; volume growth and price increases.

Since the change, the tax on moist snuff has been capped at 60 cents per ounce or 72 cents per can for most moist snuff sold in North Dakota. During that same time the manufacturer which encouraged North Dakota to make the change has raised its prices on premium moist snuff six times from \$2.37 per can to \$3.01 per can. In addition the most expensive brand is now \$3.11 per can. These premium priced products make up around 80% of the market in North Dakota. You received no revenue from these increases due to the change in law—if you return to ad valorem taxation the state receives more tax revenue when prices increase, even if volume is stagnant.

Principle two is Administrative Efficiency. The ad valorem method is just easier to administer. It is one tax computed by taking the total value of product times the percentage tax. The weight based system has to compute the total ounces and then multiply by the fixed rate. From an audit standpoint the ad valorem is easier to verify. The manufacturers price is a key value that is used throughout the wholesalers accounting system and can be checked a number of ways. The weight based is based on the total ounces sold, but that is the only time that number is used in the accounting system. It is specifically designed just to administer the tax. However, the wholesaler is not dependent on that number anywhere else in the accounting system.



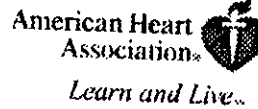
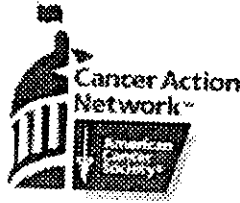
Statement of Stanley R. Arnold on SB 2197  
1/26/2009

The third principle of economic neutrality has been discussed previously, but it is the most important principle, so I'll briefly state it again. We all know the adage that the power to tax is the power to destroy. If we are able to achieve economic neutrality in any tax system, the likelihood of adverse consequences of the tax is minimized. We do not want the tax to interfere with customer choice. A good system will result in decisions being made on the economic merits of the products and not for tax reasons. Competition results in a more efficient market with consumers having more choice and better value.

I encourage you to pass SB 2197 to correct the unfairness of imposing an effective tax rate of only 24% for luxury brands while imposing an effective tax rate of 33% to 73% on consumers of modest means. Passing SB 2197 is also an endorsement of free market principles. UST is a big company that should be able to succeed based on its own efforts without the help of government tax policy.

Thank you for your time and attention. I'm prepared to answer your questions.

Attachment  
# 4



## SB 2197– Tobacco Products Tax

**Please support SB 2197—to switch North Dakota's weight-based tobacco products tax to percentage.**

### Why does UST support weight-based legislation?

- UST's (the United States Smokeless Tobacco Company) *best-selling* premium products (Copenhagen, Skoal) are also smokeless tobacco products *most* popular with youth. Taxing tobacco products by percentage instead of weight would affect their ability to recruit a new generation of users.
- Tobacco Industry documents clearly demonstrate a “graduation strategy”, based on pH levels. UST's most addictive product is Copenhagen.
- Top 3 products that benefit from weight-based legislation: Kodiak, Skoal, Copenhagen.

### Weight-based legislation costs the State of North Dakota...

- The fixed monetary tax rate in a weight-based system inevitably erodes over time as inflation and product prices increase, producing substantially less state revenues than a parallel percentage-of-price tax.
- With the infusion of new products that can weigh only 0.28 ounces, accurately and responsibly weighing each product in order to collect a weight-based tax entails significant new costs. In contrast, the prices used by a percentage-of-price tax are clear, publicly available, and easy to confirm quickly.
- Because “dosing” is not considered, the new generation of smokeless moist snuff tobacco products can weigh as little as one-tenth per dose compared to that in a can. A weight-based system allows these emerging products to pay almost nothing, thereby reducing state revenues.

### UST argues...

That keeping a weight-based system is necessary to raise the effective tax rates on cut-rate smokeless products sold by their competitors. However, because they make so much money on the current tax loophole, they are able to spend more money marketing their products to young persons, including the use of expensive fruit and candy flavorings

### Decreased Youth Use

- As with cigarettes, raising the price of smokeless tobacco products through state tax increases or other means will prompt a reduction in smokeless tobacco use, especially among adolescents and young adults. A 10 percent increase in smokeless tobacco prices reduces adult consumption by 3.7% and reduces male youth consumption by 5.9%, with two-thirds of that reduction coming from kids stopping any use of smokeless products at all. 2

1 Substance Abuse & Mental Health Services Admin., *Results from the 2005 National Survey on Drug use*

and Health, Table 7.67B, <http://oas.samhsa.gov/NSDUH/2k5nsduh/tabs/Sect7peTabs58to67.pdf>.

2 Chaloupka, F, et al., "Public Policy and Youth Smokeless tobacco use," *Southern Economic Journal* 64(2):503-516,

1997, <http://tigger.uic.edu/~fjc/Presentations/Scans/Final PDFs/sej1997.pdf>.



3125 East Thayer Bismarck, ND 58501 (701)258-3618 fax (701)258-0945

Attachment  
#5

Mr. Chairman and members of the Senate Industry, Business and Labor committee, my name is John Job. I am the Division Manager for AMCON Distributing Company located in Bismarck. AMCON is a wholesale distributing company that distributes consumer products to retailers. From the Bismarck distribution center we serve customers in SD, MT, MN, WI, and all over ND. We specialize in distributing to convenience stores.

We are opposed to this bill for the following reasons:

- We would return to the confusion that existed prior to the weight based legislation that passed the ND legislature as SB 2408 in 2001. Prior to 2001 most of the confusion was created by promotional products. Some manufacturers will promote with buy some get some free or dramatically reduced pricing. With the tax assessed on wholesale cost, reduced priced products pay little or no tax as in the case of free goods. At the present time AMCON Distributing Company pays the tax to the state of ND on how many ounces we receive and distribute in ND. That means all price categories of moist tobacco products are taxed at the same level.
- Cigarettes, gasoline, beer, and wine excise taxes are all unit based. All of these consumer products have premium categories and low price categories and yet the tax per unit is calculated at identical amounts by units. This is the same principal that our present weight based moist tobacco is taxed on.
- Enacting SB 2197 will create a larger difference between low priced product and premium priced product just by the differences between the excise taxes assessed. It will also make the excise tax more like a sales tax. Enacting SB 2197 would give some manufacturers a larger pricing competitive advantage over another manufacturer.
- We have a concern that a large amount of business would shift to the low price category. This shift would sharply reduce the amount of taxes collected. We have a major concern that we will be back here in two years discussing a tax increase.
- The ND wholesalers did not ask for the change in moist tobacco excise tax calculation. This change to moist tobacco calculation is manufacturer driven. The ND wholesalers do not support this change and we were not asked about SB 2197 prior to it's introduction to the sixty-first legislative assembly. We only discovered it's existence after it was introduced.

To recap, passing SB 2197 will raise less moist tobacco excise taxes as it shifts business. This bill will create excise tax confusion on promotional products. It will change from level taxing by unit to creating a competitive advantage of certain manufacturers over other manufacturers. This legislation was not asked for or supported by anyone in the ND tobacco wholesale distribution community. We are asking for your vote to defeat SB 2197.



**O.K. Distributing Co., Inc.**

P.O. Box 1252  
522 14<sup>th</sup> Avenue West  
Williston, ND 58802-1252  
Phone: 701-572-9161  
Fax: 701-572-9631  
Email: kellyk@okdist.com

*Attachment  
#6 - #10*

January 27, 2009

To Whom It May Concern:

O.K. Distributing Co. Inc; is a multi-state distributor of tobacco products. We have worked with rate based and weight based tax systems. When North Dakota switched to weight based tax system, I was concerned with the change and how it would affect us and our customers. When Montana implemented a weight based tax it became even simpler to keep track of and set up in our software. Our customers have voiced little or no complaints after we explained the way it is figured and how it is comparable to cigarette taxing. Now after many years, I would never want to return to a rate based system.

Taxing moist snuff at a flat rate amount per ounce is straight forward and a lot easier to implement and report to the state. Audits take less time to do and review. I feel after many years since North Dakota began this weight based system, I can not believe that more states are not doing it. If you have any questions, please contact me at the address and number above.

Sincerely,

A handwritten signature in cursive script that reads 'Kelly Kaiser'.

Kelly Kaiser  
Vice President/ General Manager

**FRANK MCKONE CIGAR CO.  
742 19<sup>TH</sup> STREET NORTH  
FARGO, ND 58102  
1-701-235-4261**

**January 27, 2009**

**To Whom It May Concern:**

**Frank McKone Cigar Co. is a wholesale candy and tobacco distributor based in Fargo, ND. We are presently using the weight based tax system to tax all of our moist products that we are presently selling in North Dakota. The weight based tax system is easy to implement and report to the state. I do not support any legislation that would change the weight based tax system in North Dakota.**

**Sincerely,**



**Henry J Knoll  
Operations Manager  
Frank McKone Cigar Co.**

**HETTINGER-MOBRIDGE CANDY & TOBACCO INC.****Wholesale Distributors**

*Candies • Confections • Cigarettes • Cigars • Tobacco  
Paper Products • Cleaning Supplies*

**MOBRIDGE OFFICE**

Airport Road  
PO Box 533  
Mobridge, SD 57601  
Phone: (605) 845-2006  
FAX: (605) 845-2006  
USA: 1-800-568-5941

January 27, 2009

To Whom It May Concern:

Hettinger-Mobridge Candy and Tobacco Inc; is a multi-state distributor of tobacco products. We have worked with rate based and weight based tax systems. South Dakota is a rate based system It is harder to track and some times causes some confusion. When North Dakota switched to weight based tax system, I was concerned with the change and how it would affect us and our customers. I wish that South Dakota would open there eyes and see what is going on around them it would make our job of reporting that much easier to set up in our software. Our customers have voiced little or no complaints after we explained the way it is figured and how it is comparable to cigarette taxing.

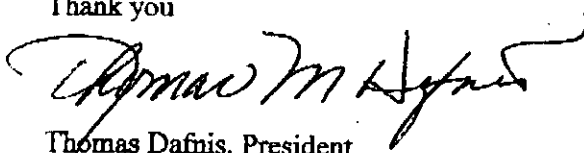
Taxing moist snuff at a flat rate amount per ounce is straight forward and a lot easier to implement and report to the state.

Audits take less time to do and review.

Once a month it takes our staff about 4 days to perform all the reports for the states we cover. It is time we make that process easier not harder. We are not working against the state but for them. If you have any questions or would like to see what hoops we have to jump through to be in business in the state and sell tobacco products, please fell free to contact me at the Hettinger Office 701-567-2440.

Our Company has done business in the state since the 1950's we need your support to continue.

Thank you



Thomas Dafnis. President

**HETTINGER OFFICE**

400 2nd Avenue South  
PO Box 549  
Hettinger, ND 58639  
Phone: (701) 567-2440  
FAX: (701) 567-2116  
USA: 1-800-584-9242

**S-N-GO STORES INC.**

2701 S. UNIVERSITY DRIVE, FARGO, NORTH DAKOTA 58103  
PHONE: (701) 235-7531

January 27<sup>th</sup>, 2009

To Whom It May Concern:

Stop-N-Go Foods Inc. is a retail outlet of tobacco products. When North Dakota changed to a weight based tax, we were concerned as to how it would affect our customer base. I am convinced now, however, that weight based tax is the way to go. It creates consistency in pricing structure, making it not only easier for us, but also for our customers. Also, the state will take in less tax revenues overall by changing to a 28% ad valorem tax. If it has worked for the past four years why change now?

Sincerely,

A handwritten signature in black ink, appearing to read "Brian D. Tjaden".

Brian D. Tjaden  
Supervisor of Stores  
Stop-N-Go Foods Inc.



80 US Highway 2 East  
Wolf Point, MT 59201  
406-653-1313  
Fax 406-653-1321

**Hi-Line Wholesale Co.**

January 26, 2009

To Whom It May Concern:

Hi-Line Wholesale Co. is a Convenience Store Distributor and tobacco distributor in north east Montana. Montana utilizes a weight based system to collect tobacco tax.

I see no advantage for Montana or any other state to go away from a weight based system. The weight based tax is fair, equitable, and easy to administer. The tax is assessed by the weight (amount) of product sold.

Sincerely,



Tom Ault

Owner

Attachment  
# 11

True Wholesale cost as of 1/27/09						
	Wholesale					SB 2197
Brand Family	TRUE	Present	Proposed	Present Cos	Proposed Cos	Increase /
	Per can cost	Weight tax	28%	With Tax	With Tax	Decrease
Copenhagen 1.2OZ	2.898	0.720	0.811	3.618	3.709	0.09
Couger 1.2 OZ	2.090	0.720	0.585	2.810	2.675	(0.13)
Genco 1.2 OZ	1.276	0.720	0.357	1.996	1.633	(0.36)
Grizzly 1.2 OZ	1.300	0.720	0.364	2.020	1.664	(0.36)
Hawken 1.2 OZ	2.994	0.720	0.838	3.714	3.832	0.12
Husky 1.2 OZ	1.300	0.720	0.364	2.020	1.664	(0.36)
Kayak 1.2 OZ	0.978	0.720	0.274	1.698	1.252	(0.45)
Kodiak 1.2 OZ	2.994	0.720	0.838	3.714	3.832	0.12
Longhorn 1.2 OZ	0.944	0.720	0.264	1.664	1.208	(0.46)
Red Man 1.2 OZ	1.300	0.720	0.364	2.020	1.664	(0.36)
Red Seal 1.5OZ	1.946	0.900	0.545	2.846	2.491	(0.36)
Redwood 1.2 OZ	1.308	0.720	0.366	2.028	1.674	(0.35)
Rooster 1.2 OZ	0.820	0.720	0.230	1.540	1.050	(0.49)
Silver Creek 1.2 OZ	1.308	0.720	0.366	2.028	1.674	(0.35)
Skoal 1.2 OZ	2.898	0.720	0.811	3.618	3.709	0.09
Timberwolf 1.2 OZ	1.300	0.720	0.364	2.020	1.664	(0.36)

Attachment  
#12

Legislative Assembly of North Dakota  
Industry, Business and Labor Committee

**Testimony of**  
**Robert L. Shepherd**  
**In Opposition to Senate Bill 2197**  
***An Act Relating To The Tobacco Products Tax***

January 28, 2009

Mr. Chairman and Members of the Committee:

My name is Robert L. Shepherd, and I am offering testimony to the Committee today in opposition to Senate Bill 2197.

My comments and opinions are based on my career of 25 years of government service in New York State, and 10 years subsequent experience in the tobacco industry. In New York, I was a police officer for 7 years, an Assistant District Attorney in the Bronx for 7 years, and I served for 11 years at the New York State Tax Department where I was a Deputy Commissioner. Since leaving government I have concentrated by practice almost exclusively in tobacco. I have represented tobacco manufacturers, distributors, and retailers, and for a time was the Executive Director of the Northeast Association of Wholesale Distributors – cigarette and tobacco distributors in the New England states.

I am appearing here today representing United States Smokeless Tobacco, a subsidiary of Altria Group.

You did the right thing in 2001 when you changed the way Moist Smokeless Tobacco (“MST”) was taxed in North Dakota, from an *ad valorem* method to a weight based method, and history has confirmed that you did the right thing.

Excise taxes are traditionally levied on the individual item, based on a measuring unit of that item. Thus, gasoline excise taxes are measured by the gallon, alcoholic beverage excise taxes are measured by the liter or wine-gallon, and even cigarette excise taxes are measured by the stick. Sales taxes, by contrast, are traditionally levied based upon the price of the product. When you drive into a gas station, you choose whether to use premium or regular gasoline. The excise tax on each gallon is the same. Similarly, a bottle of wine carries the same amount of excise tax, regardless of whether it is inexpensive “jug” wine or a fine merlot. A pack of premium brand cigarettes carries the same amount of excise taxes as a price-value brand. All of these are consistent with excise tax policy and theory.

Today, you are being asked to back away from the visionary step you took in 2001, and go back to an antiquated and broken system of taxation that will put state revenues at risk and make them

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**UST PUBLIC AFFAIRS INC.**

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6 High Ridge Park, Bldg. A, Stamford, CT 06905-1323

unpredictable – all for the benefit of companies that sell lower price brands and are seeking to pay less than their fair share to taxes on their brands.

In 2001 North Dakota became the fourth state to join the federal government in taxing MST by weight rather than price. In doing so, this legislature recognized that just like cigarettes which are taxed by the stick, one ounce of snuff is the same as any other ounce of snuff for tax purposes, and ought to be taxed that way. Today, 14 states and the federal government tax MST by weight or unit.

In 2001 when you were considering SB-2408, I testified that switching to a weight based tax would level the playing field for all smokeless tobacco brands, and that it would be good for North Dakota's OTP revenues, raising them as much as \$240,000 in the 2001-2003 biennium. In fact, according to ND Department of Revenue figures, OTP collections for the 2001-2003 biennium increased \$526,000, and in the succeeding biennium, they went up an additional \$201,000 over the already increased collections.<sup>1</sup>

The truth is that OTP collections have increased each year, every year since you switched to a weight based tax.<sup>2</sup>

North Dakota has continued to see steady growth in MST sales, and since all cans carry the same tax burden, revenues have increased in lock-step. In other states, overall can sales have continued to grow, but down-trading to less expensive brands that carry less tax have meant that revenue collections have not grown they way they could have under a weight based tax system.

When you considered SB-2408 in 2001 you were told by some who opposed the change that prices in this category automatically increase and that therefore the twenty-eight percent tax would automatically bring in increased revenues over time. *The truth is that prices in this category do not automatically increase.* Indeed, at the end of 2006 one company cut the price on their brands by \$1.00 per can.<sup>3</sup> But because you adopted a weight-based – not a percent of price – system, North Dakota revenues were unaffected by these pricing changes. In ad valorem states, revenue collections suffered each time one of those brands was sold. In fact, while North Dakota has been protected, HALF of the companies have cut their prices.<sup>4</sup> Unheard of a decade ago, but commonplace in today's market. In short, we don't think it is good tax policy to assume you will receive more income in the future based on predictions of what pricing dynamics will be in the future.

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<sup>1</sup> N. D. TAX COMM'R, CIGARETTE AND TOBACCO TAX COLLECTIONS, ANNUAL STATEMENT OF TAX COLLECTIONS (2001-2005), <http://www.nd.gov/tax/tobacco/pubs/collect/index.html>

<sup>2</sup> N. D. TAX COMM'R, CIGARETTE AND TOBACCO TAX COLLECTIONS, ANNUAL STATEMENT OF TAX COLLECTIONS (2001-2008), <http://www.nd.gov/tax/tobacco/pubs/collect/index.htm>

<sup>3</sup> Compare Memorandum from Swisher Int'l, Inc. to Customers (Oct. 20, 2005) (identifying the 2005 per unit price of Swisher moist snuff brands at \$2.20) with Memorandum from Swisher Int'l, Inc. to Customers (Nov. 3, 2006) (identifying the 2006 per unit price of Swisher moist snuff brands at \$1.20).

<sup>4</sup> See *Id.*; See also Press Release, Swedish Match, Swedish Match to Reposition Timber Wolf Snuff in the U.S. (Nov. 30, 2004).

Weight-based taxes have also protected North Dakota from the effects of other pricing behavior that can reduce revenues in ad valorem states. Some companies run pricing specials such as “2 cans – Special low price,” offering 2 cans for the price of one. In this state, each can carries the same ultimate tax liability, while in ad valorem states, the state does not receive revenue on both cans. While we agree that price competition is a good thing, we also believe that excise tax policy should be neutral on price, as North Dakota is. A company should not be rewarded for lowering its price on MST by receiving an even lower excise tax obligation on its brand. This is what the proponents of SB-2197 are asking you to do.

Ask yourself, “Why is North Dakota being asked to give up all these benefits and retreat to a system that states around the country are turning away from?” The answer lies in the arguments made by the proponents the last time they tried to convince you to repeal the weight based tax.

In 2007 the same proponents as today, argued that as prices increase so do revenues, that the consumers should benefit when they buy lower priced products, and that weight based taxes were designed to bar the entry of competitive brands and support a monopoly. These arguments were unpersuasive then, and they are unpersuasive today.

As has already been shown, prices do not automatically rise in today’s market. The ad valorem system does not protect state revenues.

When consumers buy less expensive MST, they pay less in *sales* tax. When they purchase less expensive beer, wine, and gasoline, they pay the same amount of *excise* tax as the expensive brands, but less in *sales* tax. The proponents confuse sales taxes with excise taxes.

If weight based taxes were designed to bar the entry of competitive brands, why are there more low-priced brands on the market today than ever before? Kayak and Longhorn were introduced in 2003. Triumph, Klondike, Dukes, Predator, Red Man, Tahoe, and Starr are some of the brands that have all been introduced within the last 2 years. Clearly, the market has not been closed.

Simply put, SB-2197 will undermine the stability of the excise tax on smokeless tobacco products, provide an unjustified tax benefit to some brands over others based on price, and will move the state to an antiquated tax system that is not in the State’s or the consumer’s interest. In sum, the North Dakota Legislative did the right thing for its citizens in 2001 when the tax was changed to a weight based tax, and the Legislative Assembly did the right thing in 2007 when you rejected the effort to retreat to the old system.

I urge you to vote “DO NOT PASS” on SB-2197.

Attachment #13

January 28, 2009

North Dakota Senate  
Industry, Business and Labor Committee  
State Capitol  
Bismarck, North Dakota 58505

Re: SB 2197 (Repeal of weight based tobacco excise tax—approved in 2001)

Dear Chairman Klein and Committee Members:

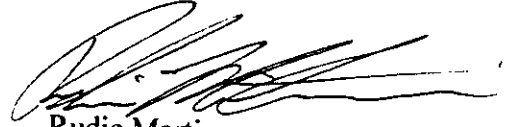
SB 2197 seeks to repeal SB 2408 that was passed in the 2001 Session that began to tax smokeless tobacco by weight putting all smokeless tobacco at par with each other.


Before 2001, discount brands (the proponents of SB2197) enjoyed an unfair tax advantage allowing them to sell at discounts because of their tax status. As a result, of the old tax scheme we saw "2 for 1" and "3 for 1" sales promotions of discount products directed at our youths, based upon tax advantages rather than quality or price.

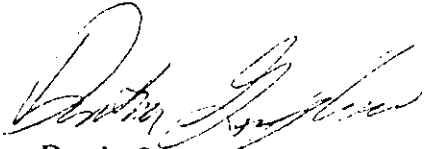
SB 2197 takes us back in time to 2001, and would restore an excise tax structure that was unfair, and created inappropriate tax policy, that favors one product over another. In North Dakota we should assess an excise tax based upon the same measure (in this case weight), and then assess a sales tax, based upon price—which current law provides. We don't tax Coke differently then Pepsi, nor BP gasoline differently than Tesoro. We shouldn't tax brands of smokeless tobacco differently.

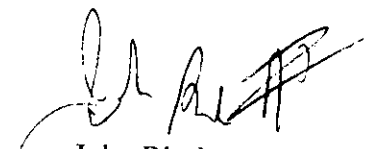
We changed the excise tax structure by passing SB 2408 in 2001. It was a good choice then. It remains a good choice. No sound reason has been offered to reverse that policy direction. We urge a DO NOT PASS recommendation on the bill.

Sincerely,

  
Rudie Martinson,  
ND Hospitality Association

  
Bill Shalhoob  
ND Chamber of Commerce

  
Dustin Gawrylow  
ND Taxpayers Association

  
John Risch  
Bismarck, ND