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April 24, 2003

VIA FACSIMILE (775) 684-1280

The Honorable Brian Sandoval
Attorney General
Office of the Attorney General
Old Supreme Court Building
100 N. Carson Street
Carson City, NV 89701

Re: Assembly Bill 460

Dear General Sandoval:

Per our discussion, I write in regard to Assembly Bill 460 ("AB 460") on behalf of the Council of Independent Tobacco Manufacturers of America ("CITMA"). The membership of CITMA consists of independent tobacco companies all located within the United States who have chosen to compete in the cigarette tobacco manufacturing business and are doing so fully compliant with the "rules of the game." Such rules were established in 1999 when the various states, and major tobacco companies entered into the Master Settlement Agreement ("MSA") which required settling states to enact the model or qualifying statute – NRS 37A150 ("Model Statute"). The Model Statute requires those tobacco manufacturers that have not signed the MSA to make certain escrow payments and such tobacco manufacturers that do so are considered to be "fully escrow compliant." In other words, the membership of CITMA consists of fully escrow compliant companies seeking only to compete as the free enterprise system of our country allows.

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Specifically, we object to the following amendments in AB 460:

Current Law - (Language we would like to see remain in place)

2. To the extent that the manufacturer establishes that the amount it was required to deposit into escrow on account of units sold in the State in a particular year was greater than the Master Settlement Agreement payments, as determined pursuant to section IX(i) of that Agreement including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold if the manufacturer had been a participating manufacturer, the excess must be released from escrow and revert to the manufacturer.

Proposed Amendment to Current Language - (Language that we oppose)

Amend sec. ~~25~~ 80, page ~~29~~ 30, be deleting lines 22 through 29 and inserting:

"amount it was required to deposit into escrow ***on account of units sold in the State*** in a particular year was greater than ~~[this state's allocable share of the total payments that the manufacturer would have been required to make in that year under]~~ the Master Settlement Agreement ***payments, as determined pursuant to section IX(i) of that Agreement including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold*** if the manufacturer had been a".

Let me emphasize that the membership of CITMA does not consist of any "cheaters," foreign or otherwise, who are not making the proper escrow payments. Moreover, the aspects of AB 460 noted above do not have anything to do with providing the proper tools to the office of Attorney General to ensure that that office can enforce escrow obligations upon companies who are not participating in the MSA but are doing business in Nevada. Our membership understands that escrow payments are an obligation of doing business in Nevada and other states.

Currently, the MSA and the Model Statute Nevada enacted (NRS 370A150) operates in a fair and balanced manner. Original Participating Manufacturers (OPMs which include Philip Morris and RJR, Brown & Williamson and Lorillard) make certain nationwide payments, a portion of which goes to Nevada (as well as 46 other states and Puerto Rico, Guam, American Samoa, the Northern Mariana Islands and the U.S. Virgin Island – 4 states, Minnesota, Mississippi, Texas and Florida, do not participate in the MSA since in their respective states cases were litigated and settled independently). Subsequent Participating Manufacturers (SPMs) in large part do not pay any monies but nonetheless have received waivers of liability from Nevada and will pay monies only if their market share exceeds that which existed in 1998 or 125% of their 1997 market share whichever is greater. Non Participating Manufacturers (NPMs)

must make escrow payments. Currently, those escrow payments are based on the formula in the Model Statute or what the NPM would have paid the state had it been a signatory to the MSA, whichever is less. In short, the current economic conditions require that NPMs pay into Nevada the same amount of money that OPMs pay into Nevada, but NPMs unlike the OPMs are not able to deduct such payments as ordinary business expenses.

AB 460 would drastically change the "rules of the game" and require that any NPM in Nevada must pay into escrow the equivalent amount of money that it would pay if it was operating on a national basis including not only the 46 states but Guam, American Samoa, Puerto Rico, etc. It would in essence significantly increase the cost of doing business and in large part destroy the ability of small independent tobacco manufacturers to compete, and the end result would be an enhanced market share for OPMs. That is the intended purpose and the result of the bill.

There are many reasons why this legislation is unfair, unlawful, and even perhaps unconstitutional. You may, however, have been told of justifications for the statute including perhaps a document issued on the letterhead of the National Association of Attorneys General entitled "Changes To The Applicable Share Provision of The Model Escrow Statute." First, though on the letterhead of the National Association of Attorneys General ("NAAG"), this is not a position paper that has been endorsed by the National Association of Attorneys General through NAAG's recognized approval process. There has been no public discussion of these important issues. Instead, these talking points emanate, we are advised, from the NAAG Tobacco Task Force and its staff. Secondly, the document itself is fatally flawed in many ways. For example, this document indicates that AB 460 is needed to help discourage minors from buying cigarettes and goes on to assert without any citation of authority that "studies have ... demonstrated that cheap cigarettes are favored by kids ...." NAAG staff, however, knows that a survey by SAMHSA, a sub agency of HHS (Health and Human Services) demonstrates that the most popular brands among teens are the most advertised brands of Marlboro, Campbell and Newports and that these three brands together, based on the survey of smokers between the ages of 12 and 17 years of age, accounted for over 90% of their purchases; however, it is RJR who has been recently charged or assessed with monetary sanctions for breaching the advertising to youth restrictions in the MSA, not any NPMs.

More important, the document suggests that passage of AB 460 would not in any manner put the state's MSA payments at risk. This suggestion is not only erroneous, but it ignores findings and conclusions which certain courts have already made. The predicate asserted is that the only parties who could make a challenge would be individuals who are signatories to the MSA and that they (the OPMs and SPMs) and the respective states are in agreement to the passage of this bill. What NAAG neglects to even mention, however, is that the Fourth Circuit, in the *Star Scientific* case (278 F.3d 339 2002), held that Star (an NPM whose claimed injuries were traceable to the requirements of the MSA including the Model Statute enacted as a result of what the Court described as "coercion" to enact a qualifying statute), did have standing to

challenge not only the statute but the MSA itself. Couple that decision with the general reluctance of courts to sanction monopolies, Nevada's assent along with other states in signing the MSA, that the MSA was fair and allocable and that the Consent Decree entered in Nevada settling the litigation between the State and the OPMs explicitly provides that the Consent Decree and final judgment (which as indicated includes and incorporates the MSA and thus also the Model Statute) "shall not be modified ... unless the party seeking modification demonstrates by clear and convincing evidence that it will suffer irreparable harm from new and unforeseen conditions" and goes on to state that "changes in the economic conditions of the parties shall not be grounds for modification," suggest that there are numerous legal theories that the Model Statute cannot and should not be changed.

Lastly, this view point was also taken by at least one state's office of legislative services. By memorandum dated August 28, 2001, the North Carolina General Assembly Legislative Services office stated, in response to an offer from a North Carolina independent tobacco producer to make direct payments to the State which would become state money as opposed to making escrow payments, that the state could not accept such offer since it chose "... to join in the MSA and is bound by its terms." The memorandum went on to state that North Carolina as part of the agreement enacted SL 99-211, which is now identical to NRS 370A150 and under the terms of the MSA the state agreed to and had to enforce that model act and keep it in full force and effect. Obviously, this is consistent with the MSA where Nevada and other states agreed not only to enact "the Model Statute" but to do so "without modification or addition."

This legislation will unbalance the playing field that was carefully crafted in 1999 and do nothing other than to protect and further enhance OPMs' market share by burdening substantially the cost of doing business for NPMs, all while clearly putting at potential risk the Master Settlement monies that Nevada receives. For these reasons, CITMA asks that you reject the specific provisions in AB 460 set forth above and allow the free market place to work.

With kindest regards, I am

Very truly yours,

Ashley L. Taylor, Jr.

#1154176

bcc: Anthony F. Troy, Esquire