MINUTES OF THE
SENATE COMMITTEE ON REVENUE

Seventy-sixth Session
March 31, 2011

The Senate Committee on Revenue was called to order by Chair Sheila Leslie at 1:15 p.m. on Thursday, March 31, 2011, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Sheila Leslie, Chair
Senator Steven A. Horsford, Vice Chair
Senator Michael A. Schneider
Senator Moises (Mo) Denis
Senator Mike McGinness
Senator Joseph (Joe) P. Hardy
Senator Elizabeth Halseth

STAFF MEMBERS PRESENT:

Russell Guindon, Principal Deputy Fiscal Analyst
Joe Reel, Deputy Fiscal Analyst
Brenda Erdoes, Legislative Counsel
Gayle Rankin, Committee Secretary

OTHERS PRESENT:

Russell M. Rowe, Taxpayers for the Protection of Nevada Jobs; Boyd Gaming Corporation
Matthew M. Griffin, Taxpayers for the Protection of Nevada Jobs; Boyd Gaming Corporation
Randy Robison, General Growth Properties, Inc.
Gina B. Polovina, Boyd Gaming Corporation
Joshua Griffin, MGM Resorts International
Lesley Pittman, Station Casinos, Inc.
Danny Thompson, Executive Secretary-Treasurer, Nevada State AFL-CIO

John P. Sande III, Caesars Entertainment
Keith G. Munro, Assistant Attorney General, Office of the Attorney General
Michon A. Martin, Lead Tobacco Counsel, Office of the Attorney General
Alfredo Alonso, Reynolds American
Samuel P. McMullen, Altria
Ernie Adler, Former Senator; Reno-Sparks Indian Colony

CHAIR LESLIE:
We will begin with Senate Bill (S.B.) 495 which proposes a competing measure to Initiative Petition (I.P.) 1.

SENATE BILL 495: Proposes a competing measure to Initiative Petition No. 1. (BDR 32-1275)

RUSSELL M. ROWE (Taxpayers for the Protection of Nevada Jobs; Boyd Gaming Corporation):
I am here on behalf of Taxpayers for the Protection of Nevada Jobs, which is a coalition of Nevada employers in support of S.B. 495. Our coalition consists of General Growth Properties, Inc., MGM Resorts International, Boyd Gaming Corporation, Olympia Properties, Station Casinos, Inc., Tropicana Las Vegas Hotel and Casino, and South Pointe Hotel and Casino. I would like to make a brief introduction and then turn the presentation over to Matthew Griffin. Mr. Griffin will go through the details of S.B. 495. We then would like to have a few members of our coalition make some brief remarks.

Initiative Petition (I.P.) 1 was placed on the ballot to create a special district to raise the sales tax rate within an area encompassing a three-mile radius around the gaming corridor in Las Vegas. Our coalition was formed in opposition to this initiative petition. Senate Bill 495 would place a competing alternative pursuant to the Nevada Constitution on the 2012 ballot. Although emanating from Initiative Petition 1 in the arena issues occurring in southern Nevada, S.B. 495 is not about arenas. It is about simple tax fairness to citizens, taxpayers, property owners and businesses. It is about fairness and a level playing field among competing business entities.

A basic tenet of tax policy is that the people upon whom the tax is imposed have the ability through their vote or their representatives to determine whether or not a tax should be imposed upon them. Taxation without representation is a basic principle we learned in our high school government class. Whether it is a

tax increase within a municipality, county, state or even in a local improvement district, the people upon who a special tax assessment is imposed within the chosen boundaries determine whether or not to impose that tax. Initiative Petition 1 has circumvented this basic tenet and attempts to have a sales tax increase imposed upon a very small group by a large majority of people. It does so after a local governing body rejected the very same tax increase proposal. Senate Bill 495 would correct this inherent unfairness by amending the *Taxpayers' Bill of Rights* and other relevant provisions in *Nevada Revised Statutes* (NRS) to ensure the sales tax rate must be uniform and equal throughout each county. Senate Bill 495 is also about maintaining fairness and equity among competing businesses within our State.

INITIATIVE PETITION 1: Imposes an additional sales and use tax in certain areas of larger counties for the construction, improvement, equipment, operation and maintenance of a sports and entertainment arena through public and private cooperation.

Tax policy should not be used to give any one business or group of businesses a competitive advantage over others. By definition, I.P. 1 would raise the sales tax rate within the defined district and thereby force retailers to charge more for their goods than their competitors outside of the district and in some cases, across the street. As explained above, it is a competitive disadvantage forced upon them rather than chosen by those within the boundaries of the district. This is inherently unfair and should not be tolerated within our State. Today, it is an arena district in Las Vegas. Tomorrow, it may be an artificially created district in Ely, Battle Mountain or Sparks simply because a larger majority of people outside of that district—who would not endure the tax burden—impose it upon them. On behalf of our coalition members and their 85,000 employees, we thank the Legislature for its rejection of Initiative Petition 1, and we respectively request this Committee support S.B. 495. I will turn this presentation over to Mr. Matthew Griffin, who will briefly go through the rules governing the initiative petition alternatives process and elaborate on the tax policy issues before you.

MATTHEW M. GRIFFIN (Taxpayers for the Protection of Nevada Jobs; Boyd Gaming Corporation):
I am here on behalf of the coalition to provide an explanation of NRS that relates to initiative petitions and alternatives to initiative petitions. I will describe in some detail what S.B. 495 includes and how that opposes I.P. 1. Article 19,

section 2 of the Nevada Constitution requires that a legislative alternative to an initiative petition must relate to the same subject as the initiative. Subsections 3 and 5 of section 2 state that when a competing measure is placed on the ballot, the measure receiving the highest vote becomes law and the losing measure is void. For the following reason, S.B. 495 is offered as an alternative to I.P. 1.

As an initial matter, I.P. 1 has already been adjudicated, and the primary purpose of the initiative is clear as it intends to impose additional sales and use tax within the Arena District for the purpose of construction and operation of a Qualifying Arena. On the contrary, the subject of the alternative is to prohibit the creation of a sales tax district and the imposition of a sales tax within that district. The passage of the alternative would prevent Initiative Petition 1 from achieving its purpose—no district could be created, no tax could be imposed and no construction project could be funded or qualified.

In analyzing initiative petitions and alternatives, the courts have developed a few different tests with respect to their analysis; most times, the courts come back to what is referred to as the purpose and means test. Under this analysis, we must first look at the purpose of the underlying initiative and its relation to the competing measure. We must also look to the means by which that purpose is thought to be enacted and then look to the competing measure and analyze those means. These two points are critical in understanding the alternative. First, the purpose of the initiative is to create the funding, as mentioned above, and the purpose of the alternative is to prohibit the funding. One creates the tax and one prohibits the tax, and it is that simple in this aspect of the analysis. The second aspect looks at the means and the manner in which the petition attempts to achieve its purpose and then compares that with the way the alternative attempts to achieve its purpose.

Initiative Petition 1 proposes, based on a vote of the people of Nevada, to create a district and propose a sales tax. This is a new beast in Nevada law. Nowhere is there an allowance for the people unaffected by a tax to vote on a tax and have that tax imposed on a small amount of citizens within the State. Under the means proposed in I.P. 1, the people living or shopping within a given area in Fallon can be taxed at a higher rate than the rest of the State because the people in Las Vegas voted for it. Additionally, the people in Elko will pay more for their groceries, milk, bread, etc., because the people in Washoe County or the people in Clark County decided they should. This is a question of fairness and a question of who should have control over the taxes

and services provided to a specific community or to a portion of a specific community.

Should Nevada's existing and long-standing policy to tax members of the community based upon their own vote or the decision of their own governing body stand or should the provisions of I.P. 1 alter that policy and allow the people statewide to initiate such policy? It is important to note that the provisions of S.B. 495 do not affect any existing districts nor impede the municipality's ability to generate revenue from a district. No provision in S.B. 495 would affect any existing abatements or the ability for anybody to achieve future abatements under the proposal before the Committee today. The means analysis, often employed by the courts, says the alternative before the Committee today contradicts the means in which Initiative Petition 1 attempts to establish and create a taxing district. In addition, the purpose that initiative is attempting to achieve is contradicted by the purpose in S.B. 495: that is, no taxing district can be created and no tax can be imposed. For those reasons, the coalition offers its support for the alternative before the Committee today and thanks the Committee and the Legislature for rejecting the tax proposed in Initiative Petition 1. We are hopeful that should the alternative be approved by the Legislature, the people in Nevada will have an opportunity to affirm the tax policy of this State which truly is an issue of statewide importance.

CHAIR LESLIE:
Any questions from the Committee.

MR. ROWE:
Could we have some of our members testify on behalf of S.B. 495?

CHAIR LESLIE:
We will take testimony in favor of the bill before we move to the opponents.

RANDY ROBISON (General Growth Properties, Inc.):
Each of you should have received a copy of this letter (Exhibit C) from Fashion Show Las Vegas with the signature of Laurie Paquette, Vice President, Asset Management. This letter states our support for S.B. 495. I would like to point out—as mentioned earlier by Mr. Rowe—this is a tax and fairness issue. For the retailers we have throughout our properties in Las Vegas Valley, it becomes important for many of them, particularly the small businesses, to have that uniformity. They may have shops in one of our properties at the Fashion Show

as well as a shop in one of our other properties. For them to manage different tax rates becomes burdensome but more important, it can create a competitive disadvantage between themselves. For those reasons, we stand to support S.B. 495 as an issue of fairness and tax policy.

GINA B. POLOVINA (Boyd Gaming Corporation):
You have heard the previous testimony that Initiative Petition 1 seeks to raise the sales tax 0.9 percent within a three-mile radius with proceeds used to fund a 20,000-seat arena. The passage of I.P. 1 would create disparate sales tax rates within a county, resulting in individuals and businesses charging a higher sales tax rate within that three-mile area than their neighbors and business competitors just outside that radius. If I.P. 1 were enacted, you could purchase a new top-of-the-line iPad 2, like the one the Senate Majority Leader enjoys, at the Apple Store at either the Forum Shops or the Fashion Show Mall. If you had only driven a few miles down the street to the Town Square location, you could have saved more than $70. Should shoppers be required to keep this disparity in mind? Why should the retailers be penalized for a possible unforeseen tax increase they would have to assess? In relation to my own company, why should our guests at the Gold Coast be taxed differently than our Suncoast guests?

Senate Bill 495 would amend the *Taxpayers' Bill of Rights* to require uniform and equal tax rates. Currently, all sales tax rates within each county are uniform, but it is not required by law. It has occurred because it is a matter of fairness that individuals and businesses do not pay different tax rates within a county. Because it is a statutory change, S.B. 495 does not bind the hands of future Legislatures or governors. Municipal governments are also not hampered as they would need legislative approval for a sales tax increase which the Legislature has the authority to grant if it so chooses. Senate Bill 495 will codify as law that which is the recognized norm by protecting taxpayers from disparate sales tax rates within a county. It is good, sound tax policy. Boyd Gaming is part of the coalition of companies that support the adoption of S.B. 495, and we encourage your favorable consideration.

JOSHUA GRIFFIN (MGM Resorts International):
I will keep this brief. MGM Resorts strongly supports S.B. 495 for all the reasons our coalition partners have articulated.

CHAIR LESLIE:
Thank you. We appreciate that.

LESLEY PITTMAN (Station Casinos, Inc.):
I would like to testify on the record. While we have and continue to remain neutral on the various arena project proposals that have been put forth at the state and local level, we are in full support of S.B. 495 in terms of its desire and effort to put forth, in statute, uniformity for sales tax percentages within the individual counties.

CHAIR LESLIE:
Any questions from the Committee? Is there anyone else who would like to testify in favor of S.B. 495? Seeing none, we will move to the opponents.

DANNY THOMPSON (Executive Secretary-Treasurer, Nevada State AFL-CIO):
Today, I am representing the Board of Directors of the arena in question. I understand how this bill came about as a result of the desire to build an arena in Las Vegas. We are at a place now where we have the highest unemployment in the nation. We are losing vital shows to venues outside of Nevada because of an aging system that is not adequate. Thomas and Mack was never meant to hold a rodeo. I was here when the Thomas and Mack Center was bid. The organizers ran out of money and could not put the seats in, and we told them to go back and find ways to make it work. They started doing the National Finals Rodeo (NFR) and other shows they have attracted there. It was never intended to do that. Because of that, this group of people came together knowing that if we do not do something in the future, we are going to lose the NFR. It is a critical piece of business for the gaming industry and to the State budget at the end of the year when everything else is quiet.

Other venues have been lost to other places. The arena project is an attempt to put people back to work. It is an attempt to keep what we already have. We are in fierce competition for shows like this that are critical to our economy, not just in Las Vegas, also Nevada. It is important to the people in Elko that the Las Vegas Strip do well and that they not lose that kind of show to other venues. When this group was formed and tried to go to the Clark County Commissioners to do what we want to do here, we were not able to. We went to the people. We circulated a petition and got 220,000 signatures. The ultimate arbiter of this is not the Governor, not the Legislature; it is the people. I understand this bill looks like it is about arenas, and it is somewhat. The people should decide if

that is a good idea. The way this bill is drafted is a mistake. There are unintended consequences. You are tying the hands of other things in the future that may otherwise be possible.

Back in the early 1990s, we had one pipe coming out of Lake Mead. Ninety percent of the water in southern Nevada comes from Lake Mead. If there was a lightning strike to the pumping system or a catastrophic failure, the entire State would collapse. We all came together and came up with the idea to increase the sales tax to pay for a system that would take care of that problem. This would benefit everyone, including the people in Esmeralda County who depend on that tax revenue from the Las Vegas Strip. We did it in this manner. To come with this bill today is a mistake. I understand some of you may want to express your opposition to Initiative Petition 1 and the way it was done. What if the people of Mesquite want to build a new water system, and they want to create a taxing district within their gaming area or within their farming area? This would not allow them to do that. That is a mistake for the future.

If we had not constructed the tunnel through the River Mountains to get water from Lake Mead, potentially all of the people who just sat up here would not have been able to turn on their water. It was financed through an increase in the sales tax. For these reasons, we are opposed to this bill.

CHAIR LESLIE:
Any questions for Mr. Thompson?

JOHN P. SANDE III (Caesars Entertainment):
I have a brief testimony. I want to talk about the economic benefits of the arena. The arena will be a key economic engine during construction. After opening, it will create jobs for construction, culinary and other sectors. It will create significant economic activity. Our analysis has shown the development of the arena during construction is estimated to directly create 2,095 jobs with another 1,300 secondary jobs created throughout the county. Once it begins operations, it will employ 3,000 with another 1,000 secondary jobs created throughout the county. Our analysis also indicates the arena project would have an annual $20 million impact in terms of tax revenue to the state and local government. This includes Live Entertainment Tax of $4.8 million, Real Property Transfer Tax of $4 million, sales and use tax of $2.2 million, Modified Business Tax of $400,000 and taxes from incremental visitors of $10.1 million. The arena bolsters Las Vegas's position as entertainment capital of the world and

could accommodate National Basketball Association basketball, the National Hockey League, boxing, the NFR, University of Nevada, Las Vegas, athletics and other local events.

The Initiative Petition 1 put forward by Caesars Entertainment gathered approximately 220,000 signatures. We believe Caesars followed the law qualifying an initiative petition on the ballot. The Initiative Petition 1 seeks to impose a 0.9 percent sales tax in a discrete district around The Strip which would cause the vast majority of money to be paid by tourists.

We have a few problems with S.B. 495. First of all, there are some constitutional defects. This is something you want to listen to very carefully. Section 2 of Article 19 is the section of the Nevada Constitution that provides for initiative petitions. Subsection 3 of section 2 says if the Legislature rejects such proposed statute or amendment, then the Governor may recommend to the Legislature and the Legislature may propose a different measure on the same subject. It specifically says the Governor and the Legislature have to be involved initially, and the Governor has to make the recommendation. That is very important. Since the Governor has not recommended this measure to the Legislature, we believe that it is not in compliance with the Constitution and would not pass court scrutiny. The other issue is the same subject. Subsection 3 of section 2 of Article 19 of the Nevada Constitution also makes it clear that the different measure or the competing measure must be on the same subject. We do not believe that S.B. 495 is on the same subject as I.P. 1.

Initiative Petition 1 seeks to amend NRS 244A to define, finance and construct an arena. Initiative Petition 1 defines an Arena District, a Qualifying Arena and other terms. Initiative Petition 1 imposes a 0.9 percent sales and use tax increase within the defined Arena District to support the construction, improvement, equipment operation and maintenance of the Qualifying Arena. It provides for mechanisms necessary to appropriate, distribute and use sales and use tax collected within the Arena District. Additionally, S.B. 495 amends NRS 360.291, which is not mentioned in the petition, to provide that sales and use tax administered throughout the counties must be uniform and equal within each county. Senate Bill 495 also amends NRS 244A for the sole purposes of providing that a special district cannot be created if it would cause the rate of sales and use tax to be higher in one part of the county than in another part of the county. Senate Bill 495 is clearly an attempt to stop the financing of a

Qualifying Arena, but is not on the same subject. It is much broader than Initiative Petition 1 and it applies to all counties, not just Clark County. Mr. Rowe testified S.B. 495 is not about arenas. We say it is not on the same subject.

The final thing I want to talk about is the statutory defects. We believe that S.B. 495 is a defective bill that creates a whole host of problems of interpretation and unintended consequences. Section 3 of S.B. 495 creates a new section in NRS 244A and uses the term "special district," although that term is not defined either in the bill or NRS 244A. Section 3 also includes an "arena district" in a "special district," although arena district is not defined in the bill or in NRS 244A. The title of NRS 244A is "Counties: Financing of Public Improvements." Chapter 244A of NRS breaks down into various sections that provide for tax assessments to fund certain projects, and the implementation is delegated to local governments. No regulations have been adopted under NRS 244A, and no state agency has jurisdiction to clarify unidentified terms as set forth in section 3 of S.B. 495. Therefore, any uncertainties created by section 3 of S.B. 495 would presumptively be cleared up by local governments during the implementation process. Section 3 of S.B. 495 does not grant a right to impose an assessment like the provisions of NRS 244A or like those I.P. 1 envisions. Instead, section 3 represents a blanket prohibition on sales and use tax assessment. Who will define the terms like "special district" or "arena district"? You could have 17 different definitions if the counties are left to define these terms.

CHAIR LESLIE:
We will have our legal staff review those issues you brought up. Is there anyone else who would like to testify in opposition to this bill? Hearing none, we will close the hearing on S.B. 495. We will move to Senate Bill 79. This bill makes various changes relating to the tobacco Master Settlement Agreement (MSA) (Exhibit D, original is on file in the Research Library). We have the Attorney General's staff here. I understand you are going to give us a quick background on the issue to set the stage, and then we will move through the bill.

SENATE BILL 79: Makes various changes relating to the Tobacco Master Settlement Agreement. (BDR 32-291)

KEITH G. MUNRO (Assistant Attorney General, Office of the Attorney General): Michon Martin is here, and she manages our Tobacco Enforcement Unit. Also with me is Senior Deputy Attorney General Troy Jordan. The legislation before you marks the fourth time the Nevada Legislature has considered legislation regarding the tobacco Master Settlement Agreement, Exhibit D. It was signed by Nevada along with 46 other states in 1998. In 1999, the Legislature passed Nevada's qualifying statute. In 2003, complementary legislation to the qualifying statute failed to pass the Legislature. In 2005, the Legislature passed the complementary legislation to qualifying statute. This current legislation evolves from Nevada's involvement in a nationwide arbitration with a group of tobacco companies.

This arbitration is over the MSA, Exhibit D. We are involved in the arbitration because in January 2009, the Nevada Supreme Court ordered the State of Nevada to arbitrate its dispute with big tobacco companies concerning Nevada's enforcement of its qualifying statute. At issue is whether our State diligently enforced its legal obligations under the MSA from 2003 to present. The stakes of the arbitration are significant. Nevada's potential liability is up to $44 million in calendar year 2003. The same risk is assessed for each year up to and including the present year. Nevada will be required to participate in each of the subsequent arbitrations. During this time, Nevada will need to continue to enforce its qualifying statute. Because there is a risk of losing substantial amounts of money year after year, we are here to request additional tools to continue to efficiently and successfully enforce Nevada's qualifying statute. You will need some background on the MSA, Exhibit D, as you consider this legislation.

For decades states were saddled with unfunded mandates. As our citizens contracted lung cancer or other diseases from smoking, states incurred massive costs in subsidizing the medical treatment of elderly and uninsured smokers. The United States Supreme Court stated that tobacco use, particularly among children and adolescents, poses the single most significant threat to public health in the United States. States did not cause that health crisis, yet they spend billions of dollars over the course of decades in caring for citizens afflicted by it. Meanwhile, the tobacco companies shared none of the burden for the health costs incurred by the use of their products.

In 1994, Mississippi was the first state to file suit. Former Mississippi Attorney General Michael Moore said this lawsuit is based on a simple notion. You

caused the health crisis, you pay for it. The free ride is over. Nevada and many other states followed suit and filed their own actions. The claims vary from state to state, but causes of action included strict liability for selling an unreasonably dangerous product, product liability, unjust enrichment, breach of warranties, deceptive trade, fraud, conspiracy, racketeering, unlawfully marketing and contributing to the delinquencies of minors, and antitrust violations. These lawsuits along with increasing publicity about the harms associated with smoking put the tobacco companies in a bind. Their methods were under scrutiny, and they faced substantial financial exposure if juries held them responsible for the states' medical costs associated with smoking. Tobacco companies had a lot to lose if they did not settle, and that dilemma sparked one of the most remarkable documents in American legal history, the MSA, Exhibit D.

The MSA, Exhibit D, was initially a contract between the Nation's four largest tobacco manufacturers, Philip Morris, R.J. Reynolds, Brown and Williamson, and Lorillard. It included 46 actual states and six territories. The MSA gave the tobacco companies what they needed, an end to lawsuits in which they faced staggering exposure. The states agreed to permanently release all claims for damages against the tobacco companies. In return, the tobacco manufacturers agreed to pay a designated sum of money to the states annually. Nevada's share of that payment is over $40 million annually. This is the money the tobacco companies now want back in arbitration. They want it back for every year since 2003. The MSA permits other cigarette manufacturers to sign the agreement and thereby settle state claims against them comparable to those asserted by the states against the original participating manufacturers. Since the MSA's execution, more than 40 additional tobacco companies have signed the agreement.

Many other tobacco companies doing business in the United States have not signed the MSA, Exhibit D. These tobacco companies are referred to as the nonparticipating manufacturers and are neither bound by the MSA's marketing restrictions nor required to make annual payments to the states. However, the nonparticipating manufacturers remain potentially liable to the states for the health care costs of smoking-related illness. Because only four tobacco companies initially signed the MSA, the parties were concerned that companies that did not sign the MSA would gain a market advantage. Participating manufacturers thought their annual payment would increase their per cigarette cost, but nonparticipating manufacturers would not share those costs. Whereas

participating manufacturers did not want to lose their market share to other manufacturers, the states were concerned that nonparticipating manufacturers could increase sales of lower-priced cigarettes, particularly to youth, and undermine the MSA's public health gains. Nonparticipating manufacturers were still potentially liable for lawsuits, but the states had no assurance they could satisfy judgments.

The parties created the Nonparticipating Manufacturers Adjustment (NPM) and the corresponding model escrow statute, which Nevada enacted as its qualifying statute—NRS 370A—in an effort to address those concerns. When the NPM Adjustment applies, it acts as an offset on future payments for the participating manufacturers. The NPM Adjustment is allocated among the states based on their allocable share. When a state is found to be diligent, its share is reallocated among the nondiligent states. Therefore, a nondiligent state's loss, due the NPM Adjustment, increases with each state found diligent. However, a state cannot lose more than its total MSA payment for the year in question. The entirety of the MSA payment—which is over $40 million for each year since 2003—is at risk in the arbitration for Nevada. Do we think the tobacco companies will oppose this legislation or show up here today and say they are neutral but express concerns that sound like opposition? Probably. Do we think the wholesalers will oppose this legislation or show up here today and say they are neutral but express concerns that sound like opposition? Probably. We suspect no one will be truly happy with the middle ground we are seeking. The opposition or concerns from both sides tell us we have placed Nevada on the right track. We are heading where we need to be, in a position that is tough but fair to all involved. While we may receive opposition, we have reached out to both sides.

We sent over two proposed amendments yesterday. Amendment 1 (Exhibit E) was the product of our conversation with the tobacco companies. Amendment 2 (Exhibit F) was based on concerns raised on behalf of wholesalers. We are trying to be fair to all involved. Nevada needs to be in the best position possible to continue to meet its obligations under the MSA with its litigation with the participating manufacturers. What we are proposing today is not unique. Other states have enacted similar laws or are in the process of enactment as we are. The Legislature has a large legal staff and research staff. We strongly urge you to utilize your staff to speak to other states and see what they are considering to place themselves in a strong position. We are giving you the best advice, and this is our starting point. Michon Martin, our lead tobacco

counsel, will provide an update on the current nationwide arbitration and go through the sections of the legislation before you.

MICHON A. MARTIN (Lead Tobacco Counsel, Office of the Attorney General):
I would like to provide you with a brief update on the nationwide tobacco arbitration. We are currently representing Nevada in the 2003 NPM Adjustment arbitration which is nationwide, involving 46 states and six territories against the Nation's largest tobacco manufacturers. The arbitration began in July 2010. We are in the first phase of the arbitration, which involves deciding preliminary legal issues common to all the states as well as conducting discovery that involves the handling and review of millions of pages of documents. Once discovery is complete, the second phase of the arbitration will begin. This involves state-specific hearings to determine whether each state diligently enforced its qualifying statute. Once this arbitration concludes, each subsequent arbitration will follow. With each arbitration, Nevada is risking up to the entirety of its MSA payment, which is more than $40 million per year.

I will briefly summarize each section of the bill and talk about the mechanics. Senate Bill 79 is being proposed to combat certain enforcement issues that increase Nevada's future risk of losing more than $40 million per year in ongoing arbitrations. This bill is designed to take a proactive instead of reactive approach to enforcement in this State. To provide some context, the Nevada Tobacco Directory contains 23 nonparticipating manufacturers. Eight of these nonparticipating manufacturers have either been delisted or refused listing in at least one other state, but they remain on our Directory. A look at the history of many of these companies shows a pattern of moving across the Country, predominantly from East to West, refusing to pay escrow in any state and then moving into states, such as ours, that do not have provisions where prior activities in other states can be considered in listing and delisting decisions.

Sections 2 and 3 of S.B. 79 seek to increase the State's ability to collect these delinquent escrow judgments by creating additional responsibility for escrow deposits to ensure accurate escrow deposits are made as required by our statutes. Section 2 will ensure that an escrow deposit required per the qualifying statute is made by the wholesaler if a nonparticipating manufacturer fails or refuses to pay the escrow deposit. This provision also provides protection for the wholesaler by ample notice of the shortfall, allowing the wholesaler to require prepayment of the escrow. We are creating a cause of action against the nonparticipating manufacturer for failure to pay out escrow.

This provision significantly improves the State's efficiency and effectiveness in enforcing escrow provisions of the qualifying statutes while providing protections for wholesalers who deal with these nonparticipating manufacturers and their products.

Section 3 of S.B. 79 requires a bond be posted by a nonparticipating manufacturer if they are new to the Directory or delinquent in payments. This provision will be helpful in dealing with companies that have either not proven compliance in this State or have proven to be noncompliant in the past. This section will ensure the timely payment of escrow because our State can convert the bond money to make the required escrow payments. This is another tool to allow Nevada to demonstrate its diligent enforcement and attempt to avoid the future risk.

Another issue facing Nevada in enforcement is the lack of proactive enforcement against bad actors. For example, one of the current nonparticipating manufacturers on the Nevada Directory recently paid the federal government over $1 million in a settlement agreement for both criminal and civil violations involving the sale and manufacture of tobacco products. This same nonparticipating manufacturer gave false information to other states during its certification process that was in direct contrast to representations made in the agreement with the federal government. Further, this same nonparticipating manufacturer, in a letter sent to two sister states, stated it had no intention of complying with the Pact Act, which is a recently passed federal law that requires state taxes to be paid on delivery sales. None of this information was revealed during the certification process in Nevada. Despite such information, Nevada has no authority to delist this particular nonparticipating manufacturer because our statutes do not allow for it. A second and separate nonparticipating manufacturer was recently indicted by the federal government. The search warrant served on the property of the nonparticipating manufacturer indicated several instances of unreported, untaxed sales by the manufacturer to several sister states. This nonparticipating manufacturer was delisted several times in other states before applying in Nevada. This manufacturer remains on the current Nevada Directory because our laws do not allow us to be proactive regarding this type of enforcement issue. Nevada must wait until this nonparticipating manufacturer violates our laws and fails to pay escrow to consider removing it from the Directory.

MS. MARTIN:
Section 4 of S.B. 79 would provide the necessary tools to allow the State to evaluate the prior conduct of a wholesaler or a manufacturer to determine whether the wholesaler should be licensed or the manufacturer should be placed on the Tobacco Directory. Section 4 of S.B. 79 allows the state to delist or refuse to list a nonparticipating manufacturer that knowingly provides false information about its certification. As in the criminal context, we would be able to evaluate prior conduct in another state to assess future conduct in our State, potentially avoiding the liability of its doing business in our State while diligently enforcing the qualifying statute to keep the entirety of our MSA payments. Under Nevada law, a nonparticipating manufacturer can give false information to Nevada; even if we can prove the information provided is false, Nevada has no ability to delist or refuse to list the manufacturer. Taking it one step further, if a manufacturer has committed crimes in other states involving the smuggling of tobacco, there is no current provision to remove it from the Tobacco Directory in our State.

Section 5 of S.B. 79 creates an account for tobacco enforcement, and section 6 allows the Attorney General's Office to deposit money from the potential penalty assessments into that account. These sections also allow private industry funds, grants or other sources of additional revenue to be deposited in the account for the purpose of enforcing the qualifying statute. Between 2008 and 2010, approximately one-third of the nonparticipating manufacturers either reported sales late or inaccurately that required corrective action by the State. The Department of Taxation reports that approximately 15 percent of wholesalers do not report timely or accurately.

Section 7 of S.B. 79 intends to correct this problem by allowing the State to seek a penalty assessment against a wholesaler or nonparticipating manufacturer for failure to submit timely or accurate reports. This delay puts the State in a position where it cannot rely on information regarding the volume of cigarettes sold in Nevada, making the State's ability to enforce its qualifying statute more difficult. With this enactment, Nevada will become more efficient and better able to enforce the qualifying statute as required by the MSA, Exhibit D.

Section 8 of S.B. 79 allows the State to seek a penalty assessment against a tobacco manufacturer for submitting false tobacco manufacturing reports.

Historically, some manufacturers do not report accurately. With this enactment, Nevada will become more efficient and better able to enforce.

Section 9 of S.B. 79 is an amendment to allow the Attorney General's Office to seek a court order to divulge what would otherwise be confidential information so we are better able to defend the State in the nationwide arbitration.

Sections 10 through 14 include reference language to these new sections.

In conclusion, enacting S.B. 79 will allow the State to have the necessary tools to enforce its qualifying statute and help secure the entirety of our MSA entitlement that supports such important programs as the Millennium Scholarship. It is up to this Committee to determine whether S.B. 79 is good for Nevada and its further enforcement efforts.

CHAIR LESLIE:
That was an excellent review. Who is going to go through the proposed amendments? We need to go through those carefully so we know the intent.

MS. MARTIN:
I will first address Amendment 1, Exhibit E. Amendment 1 is the product of our conversations with the participating manufacturers. They brought to our attention that one component of section 4—dealing with what to use in evaluating whether someone should be placed in our Directory—needed to be tightened up. There were some constitutional issues. We made our best effort to do that. We included only convictions for tobacco-related crimes, and we are requiring a mandatory report of investigations if the manufacturers are aware of them. We can make an informed decision about whom we allow to sell tobacco in our State.

Amendment 2, Exhibit F, is a product of several meetings we had with Former Senator Ernie Adler: It relates to the wholesalers. We added language to give further protection for the wholesalers. In section 2, we are also giving a larger notice requirement to those wholesalers of a full 90 days after we have verified an escrow shortfall. They have 90 days to cure that deficiency. The wholesaler or the nonparticipating manufacturer can cure it. The wholesalers were concerned about what type of due process they were entitled to, so we clearly laid it out in statute, referencing NRS 233B.121 to 233B.150.

CHAIR LESLIE:
Can you describe the due process? I am not sure what that means.

MS. MARTIN:
If the State needs to revoke or terminate wholesalers' licenses, NRS 233B.121 gives all the requirements. If we went before an administrative law judge, there would be notice requirements. The parties are entitled to be represented by counsel. They can produce evidence. They can make a record. Findings have to be based on whatever happens in that hearing. They get that protection as a full and fair opportunity to be heard, and someone makes the judgment.

CHAIR LESLIE:
These provisions are all in those reference sections of NRS, and you are saying the amendment applies to this particular situation.

MS. MARTIN:
Yes.

CHAIR LESLIE:
Are there any questions on the bill or either amendment?

SENATOR HARDY:
I appreciate the understanding you have given us. In the prior years that those wholesalers have been doing this in other states or in our State, can we retroactively recoup what they did in our State when they were here, or can we recoup what they did in other states?

MS. MARTIN:
I wish we could. We cannot attach retroactively. We are looking to create these enforcement tools going forward so we are in a better position.

SENATOR HARDY:
If they were licensed now in our State, we cannot attach other things they had somewhere else because we are enforcing now?

MS. MARTIN:
Yes, you are correct.

CHAIR LESLIE:
Are there other questions from the Committee?

SENATOR MCGINNESS:
Section 2, subsection 4 says a wholesale dealer may require a nonparticipating manufacturer, as a condition of the agreement, to prepay the escrow deposit amount to the wholesale dealer. Does that make the wholesale dealer an agent of the state? Is that normal because the dealer is collecting the escrow amount?

MS. MARTIN:
It does not make the wholesaler an agent of the state. It further protects wholesalers so they will come out of pocket if they choose. They can get a prepayment of that escrow that then could be placed in the nonparticipating manufacturer's escrow account. It is not the State's account, it is an escrow account that will exist for purposes of the MSA, Exhibit D, and that nonparticipating manufacturer.

CHAIR LESLIE:
Other questions? Excellent job. Anyone who would like to testify, come up.

ALFREDO ALONSO (Reynolds American):
For the most part, we are in agreement with the Attorney General's Office. The nonparticipating manufacturers have been an issue for years. We have tried to tackle the issue through legislation. While we agree with the majority of what the Attorney General is trying to do, this is a nonparticipating measure that should apply to the nonparticipating manufacturers.

Regarding section 4 where the language deals with the manufacturer and in Amendment 1, Exhibit E, proposed by the Attorney General—we have not taken a position on this yet, that language gets to where we are trying to go in dealing with this issue. The other issue we are concerned about is the wholesalers. We need to find a way to protect the wholesaler, but our concern is those wholesalers should not be selling a product from a nonparticipating manufacturer that may owe other states money and ultimately owe Nevada money. We suggest continuing that discussion to find a place they can land where they are still subject to some liability if they continue to sell the product. In an attempt to protect them, I am not sure the Attorney General's language goes far enough. I have an amendment to section 4 (Exhibit G).

CHAIR LESLIE:
If I understand it right, Exhibit G says Amendment 1, but this is really an amendment to Amendment 1?

MR. ALONSO:
No, Exhibit G is an amendment to the bill itself.

CHAIR LESLIE:
It is similar to Amendment 1 in Exhibit E except you put in nonparticipating. I do not see any other difference.

MR. ALONSO:
It should apply to nonparticipating only.

CHAIR LESLIE:
Questions for Mr. Alonso from the Committee?

SAMUEL P. MCMULLEN (Altria):
I will echo Mr. Alonso's comments and not restate them. I want to make one specific point so you understand it. Fundamentally, I represent one of the participating manufacturers that is subject to the MSA and compliance provisions. There are remedies and there are compliance features in that document. There are already tools for participating manufacturers. The area where the statutes apply are for nonparticipating manufacturers and the remedies—or tools as the Attorney General called them—on their part. We are in support of the amendment Mr. Alonso proposed.

CHAIR LESLIE:
Questions for Mr. McMullen? Senator Adler, do you want to come up and offer some testimony?

ERNIE ADLER (Former Senator; Reno-Sparks Indian Colony):
To make it clear for the record, the Reno-Sparks Indian Colony is a retailer, and this bill does not impact retailers. We did receive some information from our wholesalers. The wholesalers are small businessmen. They received late notice on this hearing, and they do not have a full-time lobbyist. One of their key points in the letter from Capitol Distributing in this packet (Exhibit H) says liability is imposed on Capitol Distributing for the nonparticipating manufacturer

not making the escrow payment, even if Capitol has no idea whether or not they make that payment.

The Attorney General got close to it with her amendment because it gives a 90-day notice to procure payment. At the end of the 90-day period, if the manufacturer—whom the wholesaler has no control over—still has not made that payment, the wholesaler has to make that payment. The nonparticipating manufacturer can continue in business because the wholesaler has made the payment for them even though the nonparticipating manufacturer did not have sufficient funds to make the payment. It would make more sense to give the wholesaler 90-day notice that the payment has not been made and at the end of 90 days, the wholesaler needs to stop distributing that product from the manufacturer or face penalties. The wholesaler could put the nonparticipating manufacturer out of business rather than having the wholesaler cover for the manufacturer. That would be my only comment. That is what Capitol Distributing is saying in the letter, Exhibit H.

CHAIR LESLIE:
That is helpful. Is there a response from the Attorney General's Office while you are here? I would like to speed up the process. I would like to process this bill next week. If there are further amendments, we need to get them to our staff for review.

MR. MUNRO:
I will address both of the amendments proposed by Mr. Alonso and Mr. McMullen. We were trying to be evenhanded between participating and nonparticipating manufacturers. We are happy to be neutral on their amendment, providing your legal staff has a comfort level that there is a rational basis for treating them differently. We just got Senator Adler's information today. We will look at it and get back to your staff promptly.

CHAIR LESLIE:
I will close the hearing on S.B. 79.

This meeting is adjourned at 2:21 p.m.

RESPECTFULLY SUBMITTED:

Gayle Rankin,
Committee Secretary

APPROVED BY:

Senator Sheila Leslie, Chair

DATE:

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Roster
S.B. 495	C	Randy Robison	Fashion Show Letter
S.B. 79	D	Keith Munro	Master Settlement Agreement
S.B. 79	E	Keith Munro	Proposed Amendment 1
S.B. 79	F	Keith Munro	Proposed Amendment 2
S.B. 79	G	Alfredo Alonso	Amendment 1
S.B. 79	H	Ernie Adler	Capitol Distributing Letter