SENATE PUBLIC HEALTH, WELFARE & SAFETY
EXHIBIT NO. 1
DATE 3-30-05
BILL NO. HB169

DEPARTMENT OF JUSTICE
HB 169: Enhancing Enforcement of Montana's Tobacco Manufacturer Escrow Law

Background

Montana's 1998 tobacco settlement produces revenues in excess of $25 million annually for the State. The settlement provides for a significant reduction in the payments made by the settling tobacco companies (referred to as "the NPM adjustment") if, as a result of the financial obligations and marketing restrictions agreed to in the settlement, they lose significant market share to manufacturers that did not join the settlement ("non-participating manufacturers" or "NPMs").

The settling companies agreed, however, that the effect of these reductions in payments would not apply to the settlement funds received by states that enacted and diligently enforced a "qualifying escrow statute" in the form agreed to in the settlement. **If a manufacturer invokes the NPM adjustment provisions of the settlement, Montana and all other states will be required to demonstrate that we have made diligent efforts to enforce the NPM qualifying statutes.**

Qualifying Escrow Statute

In 1999, the Montana legislature adopted a qualifying escrow statute, codified at Mont. Code Ann. § 16-11-401 to 16-11-404. The statute requires manufacturers that sell cigarettes in Montana but did not join the tobacco settlement to make payments into an escrow account that approximates the amounts they would have been required to pay had they joined the settlement. The escrowed funds remain the property of the companies, and the companies may withdraw any interest earned on the funds at any time.

However, the principal amounts deposited in the escrow funds must generally remain on deposit for 25 years. It may only be withdrawn prior to that time:

- to satisfy judgments in favor of the State on claims similar to those that were brought against the major manufacturers in our tobacco lawsuit, or
- if the company establishes that a deposit exceeds the amount it would have paid under the settlement.

NPM Enforcement Issues

The amounts each manufacturer must deposit in escrow are based on the number of cigarettes that manufacturer sold in Montana, calculated based on packs to which wholesalers have affixed Montana tax stamps. Prior to 2003, the Department encountered problems in enforcement of Montana's escrow statute. The 2003 Legislature passed HB 663, which addressed these problems through a series of measures designed to stop wholesalers and retailers from selling non-compliant NPM cigarettes in Montana.

--over--

HB 663 required all tobacco product manufacturers whose product is sold in Montana to certify to the Attorney General annually that they are in compliance with Montana's NPM law. It then directed the Attorney General to publish a directory listing the compliant manufacturers and identifying their brands, and prohibited wholesalers and retailers in Montana from selling any cigarettes not on the directory.

HB 663 provided for the recovery of penalties, attorney fees, court costs and investigative costs incurred by the Attorney General, with the intention that the recovered funds be statutorily appropriated to the Attorney General to offset the costs incurred in pursuing the cases. Due to a drafting error, the statutory appropriation did not capture the funds recovered under HB 663. Other enforcement issues have arisen since the enactment of HB 663 that require additional legislation to make Montana's NPM enforcement more effective.

Proposed Changes

HB 169 seeks to address these enforcement problems and thereby to make it easier for the State to show that it is diligently enforcing its escrow statute.

- The definition of cigarette in Montana's qualifying statute includes "roll-your-own" ("RYO") tobacco, but the definition in the statute only includes RYO sold in packages on which excise tax stamps are affixed. Montana does not tax RYO through the use of stamps, but rather taxes each package by weight. HB 169 amends the definition of "cigarette" in Mont. Code Ann. § 16-11-402 to delete the reference to tax stamps. [section 1]
- HB 169 amends the existing statutes to ensure that the attorney fees, penalties, court costs and investigative costs recovered are deposited in the Department's budget for use in tobacco enforcement. [sections 2, 6, 8, 9] The statutory appropriation will be voided, and the fees, penalties and costs deposited in the general fund, if the legislature decides to fund the Attorney General's tobacco enforcement efforts through an appropriation in HB 2. [section 11]
- HB 169 tightens the reporting requirements for wholesalers and tobacco product manufacturers by:
    - clarifying that a wholesaler who sells RYO is required to report [section 3]
    - requiring certification of compliance with all NPM enforcement statutes and rules [section 4]
    - requiring that the information be complete and accurate [section 5]
    - clarifying the penalty provisions [section 6]
    - clarifying the Attorney General's rulemaking authority [section 7]

Protecting Montana's Tobacco Settlement Funds

Enactment of HB 169 will provide important tools in the enforcement of the escrow statute. By enhancing our ability to diligently enforce the statute, the bill will reduce the potential that our receipt of settlement funds will be interrupted due to the NPM adjustment provisions of the settlement agreement.