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To: Representative Theresa Wood, Chair
House Committee on Human Services

From: Justin Kolber, Chief of the Environmental and Public Protection Division,
prepared on behalf of Attorney General Clark, Attorney General's Office

Date: January 25, 2024

Re: H.729 - An act relating to establishing a tobacco substitute directory

The Attorney General's Office provides the below Memorandum in response to the House Committee on Human Services' request for information regarding (1) the Attorney General's Office's collaboration/coordination with the Department of Taxes as it pertains to enforcement of wholesalers, and (2) information about the Attorney General's work with wholesalers about not selling any products not included on the U.S. Food and Drug Administration's ("FDA") Authorized E-cigarette Products list ("FDA Authorized E-cigarette Products List").¹

I. Background Information Regarding the Attorney General's Office's Enforcement Authority Pertaining to Tobacco Products

The Attorney General's Office is generally involved in overseeing tobacco companies' compliance with Vermont's tobacco laws. Specifically, the Attorney General's Office has three *primary* sources of enforcement authority over tobacco products, each described below.

a. The Master Settlement Agreement

On November 23, 1998, the Vermont Attorney General's Office and fifty-one (51) state and territory attorneys general signed the tobacco Master Settlement Agreement (MSA) with the four largest cigarette manufacturers in the U.S. Under the MSA, state attorneys general settled lawsuits filed against tobacco companies for violating the Consumer Protection Act and to recover health care costs associated with treating smoking-related illnesses.

¹ The scope of this memo does not include an analysis of compliance with 21 U.S.C. 387p or the U.S. Constitution.

Following the signature of the MSA by the original four major tobacco companies, other tobacco companies chose to join the MSA and agreed to be bound by its terms. To date, more than forty-five (45) tobacco companies have joined the MSA.

Under the MSA, tobacco companies are required to collectively pay Vermont millions of dollars each year and in perpetuity. The MSA also imposes certain restrictions pertaining to advertising, marketing, and promotions, including but not limited to, a prohibition on advertising and marketing to youth.

In exchange, states must enact and “diligently enforce” certain laws aimed at preventing tobacco companies that chose not to join the MSA, and consequently, are under no obligations to make annual payments to the states, from gaining a competitive commercial advantage over tobacco companies that are parties to the MSA. In Vermont, these statutes are found in 33 V.S.A. Chapter 19, Subchapters 1A and 1B.

Under the MSA, if Vermont fails to “diligently enforce” these provisions, tobacco companies that have signed the MSA could ask for an adjustment of their annual payment to Vermont, called an “NPM Adjustment”, resulting in a reduction of their yearly payment to Vermont under the MSA.

The Attorney General’s Office is charged with enforcing these statutes and ensuring that Vermont meets its obligations under the MSA. As part of its diligent enforcement work, the Attorney General’s Office reviews annual certifications filed by all tobacco manufacturers, ensures that tobacco companies that have not joined the MSA fulfil their escrow obligations as required under 33 V.S.A. § 1914, and conducts annual audits of manufacturers, wholesale dealers, and retailers to ensure that they are in compliance with all applicable Vermont laws pursuant to 33 V.S.A. Chapter 19, Subchapters 1A and 1B.

Additionally, the Attorney General’s Office maintains a list of all manufacturers that are in compliance with Vermont laws as described above. [Click here to access the Directory of Manufacturers and Brand Families Compliant with 33 V.S.A. Chapter 19, Subchapters 1A and 1B.](#) Only cigarette and roll-your-own tobacco products that are included on the Directory of Manufacturers and Brand Families can be sold in Vermont.

The MSA only applies to traditional tobacco products and does not cover e-cigarettes and other vaping products.

b. Fire Safety Compliance

On May 1, 2006, the Attorney General was given authority to enforce the provisions of 20 V.S.A. §§ 2756-2757, which require all cigarettes sold or offered for sale in Vermont to meet standards for reduced ignition propensity. Manufacturers have the obligation to re-certify their cigarettes every three years. Although, the Vermont Department of Public Safety is the agency in charge of issuing approvals for sale of fire standard compliant cigarettes in Vermont, the Attorney General’s Office enforces these provisions and ensures manufacturers are in compliance with this law.

Only cigarettes that are compliant with the fire-safe requirements of 20 V.S.A. §2757 are listed in the Directory of Manufacturers and Brand Families described in **Section I(a)** above. However, this law only applies to traditional combustible cigarettes.

c. The Vermont Delivery Sales Ban

There is currently no specific state law banning or regulating the sale of e-cigarettes and other vaping products not included on the FDA Authorized E-cigarette Products List, which we understand to be the impetus of H.729.

The Attorney General's Office's current enforcement authority pertaining to e-cigarette and vaping products is limited to enforcing the Vermont Delivery Sales Ban, 7 V.S.A. § 1010, which prohibits "any person" from shipping any tobacco products, including e-cigarettes or vaping, directly to Vermont consumers.²

In its work of enforcing both the Vermont Delivery Sales Ban and the MSA, the Vermont Attorney General's Office regularly collaborates with different state agencies, including the Department of Liquor and Lottery, the Department of Taxes, and the Department of Health.

These agencies have referred several cases to the Vermont Attorney General's Office, which have resulted, to date, in approximately **twenty-seven (27)** settlement agreements arising from violations of the Delivery Sales Ban and totaling just under **\$1 Million**.

II. Specific Responses to the Committee's Request for Information

a. The Attorney General's Office's collaboration/coordination with the Department of Taxes as it pertains to enforcement of wholesalers

Under Vermont law, wholesalers are licensed by the Department of Taxes. 32 V.S.A. § 7731. It is our understanding that the Department of Taxes oversees wholesale dealers in different aspects, including with respect to wholesale dealers' sale of e-cigarettes. We would encourage the Committee to confer with the Department of Taxes regarding any direct enforcement of their licensing regime.

The Vermont Attorney General's collaboration with the Department of Taxes with respect to wholesalers is limited to: (i) ensuring that wholesalers do not sell combustible cigarettes not included on the Directory of Manufacturers and Brand Families maintained by the Attorney General's Office; or (ii) do not sell any tobacco products (including e-cigarettes and vaping) over the internet.

² The statute provides that "[i]n addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a person has violated this section, the Attorney General may impose a civil penalty in an amount not to exceed \$5,000.00 for each violation." 7 V.S.A. § 1010(d)(2). Each shipment is considered a separate violation. *Id.* The Delivery Sales Ban statute further authorizes the award of other relief, including investigatory costs and attorney's fees, disgorgement, and injunctive relief. *Id.*

The Attorney General's Office does not have any other enforcement authority against wholesalers with respect to the sale of e-cigarettes and other vaping products, apart from as described in **Section I** above.

b. Information about the Attorney General's work vis a vis wholesalers' sale of products not included on the FDA Authorized E-cigarette Products List

Similarly, the Attorney General's Office does not have authority to enforce FDA regulations, and as such does not communicate with wholesalers as to their legal obligations to comply with federal laws, including their obligations not to sell e-cigarettes not listed on the FDA Authorized E-cigarette Products List.

III. Significant Financial Impacts of H.729

Our primary concern with H.729 is the resource allocation necessary to regulate a practically overwhelming number of vaping products, the bulk of which are either regulated by the FDA and/or come from foreign countries.

As drafted, H.729 would limit the directory to only e-cigarette products that "already obtained a marketing authorization or similar order" from the FDA, **or** e-cigarette products "[*marketed in the United States as of August 8, 2016*, [and for which] the manufacturer submitted a premarket tobacco product application for the tobacco substitute to the [FDA] pursuant to 21 U.S.C. § 387j on or before September 9, 2020, **and the application either remains under investigation by the [FDA] or a final decision on the application has not otherwise taken effect.**" See H.729 at pages 2-3 (emphasis added). Based on data released by the FDA, the number of pending applications related to e-cigarette products "marketed as of August 8, 2016" appears to be substantial. The FDA received 26 million applications pertaining to e-cigarette products "marketed as of August 8, 2016." In other words, the bill would have the Department of Liquor and Lottery (or whichever State agency you designate) maintaining a directory the scope of which could have millions of entries.

We would be happy to answer any additional questions the Committee may have.