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May 16, 2008

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 188

Dear Governor O'Malley:

We have reviewed Senate Bill 188 for constitutionality and legal sufficiency. While we approve the bill, we write to indicate that the current definition of cigarette "manufacturer," in § 16-201(j) of the Business Regulation Article, would likely be subject to challenge if it were to be enforced in such a way as to cause violations of the federal commerce clause or the Master Settlement Agreement ("MSA"). Senate Bill 188, though it highlights the potential problems with that definition, does not make them substantially worse. While we approve the bill for signing, we urge the Comptroller to undertake a comprehensive review of the law governing Maryland cigarette manufacturer's licenses.

Under current Maryland law, it is grounds for denial, suspension, or revocation of the license, or reprimand of a Maryland licensee, for the licensee to buy cigarettes for resale in Maryland from a person who is not a cigarette manufacturer (whether Maryland-licensed or not), a licensed subwholesaler, a licensed vending machine operator, or a licensed wholesaler. Md. Bus. Reg. Ann. Code, § 16-210(a)(5)(ii). The term "manufacturer" is defined as a "person who:

- (1) operates one or more cigarette manufacturing plants within the United States; and
- (2) (i) sells unstamped cigarettes to a licensed cigarette wholesaler located in Maryland;

- (ii) unless otherwise prohibited or restricted under local law, this article, or the Criminal Law Article, distributes sample cigarettes to consumers *located in Maryland*; or
- (iii) stores unstamped cigarettes in a cigarette storage warehouse *in Maryland* for subsequent shipment to licensed wholesalers, federal reservations, or persons out of state."

§ 16-201(i) (emphasis added). Although it is not clear on the face of the law, the Comptroller's Office does not require a manufacturer seeking to establish a Maryland presence to sell, distribute, or store *all* of its cigarettes as described, only *some*. Thus, to be a cigarette "manufacturer" under existing Maryland law, one must both operate a United States domestic manufacturing facility and establish a presence in Maryland through any of three means: (1) by selling *some* portion of the cigarettes bound for the Maryland marketplace through a Maryland-based *and* Maryland-licensed wholesaler; (2) by giving away *some* sample cigarettes to Maryland customers; or (3) by storing *some* cigarettes in a Maryland warehouse.

We understand that Maryland licensees commonly purchase cigarettes for resale in Maryland from foreign cigarette-makers and from out-of-state cigarette-makers who have not sold some of their cigarettes through a Maryland-based and Maryland-licensed wholesaler, distributed free samples in Maryland, or stored unstamped cigarettes in a Maryland warehouse. In fact, Maryland has entered into the Master Settlement Agreement with certain foreign cigarette-makers with the understanding that those companies will be allowed to sell their cigarettes to Maryland licensees provided that they are in compliance with the MSA.

A hyper-technical enforcement of the existing definition of "manufacturer" might result in exclusion from the Maryland marketplace of foreign-made cigarettes or unfair treatment of out-of-state cigarette manufacturers that have not demonstrated presence in Maryland. Such enforcement could well implicate commerce clause concerns or violate provisions of the MSA. The Comptroller's Office has instead enforced the definition in a way that avoids these potential problems.

It is in this statutory and enforcement framework that Senate Bill 188 must be considered. The bill makes a one-word adjustment to the licensure penalty provisions, which has the effect of preventing Maryland licensees from purchasing cigarettes for resale in Maryland from an unlicensed manufacturer. Under Senate Bill 188,

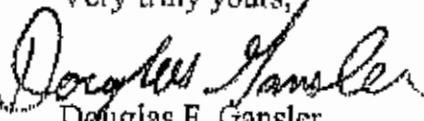
The Comptroller may deny a license to an applicant, reprimand a licensee, or suspend or revoke a license if the applicant or licensee ... buys cigarettes for resale: (!) in

violation of a license; or (ii) from a person who is not a LICENSED cigarette manufacturer, licensed subwholesaler, licensed vending machine operator, or licensed wholesaler.

The result is to require that Maryland licensees purchase cigarettes from a (1) a "manufacturer," (2) licensed by the State of Maryland. So long as the Comptroller's Office continues to enforce the definition of "manufacturer" as that office historically has, Senate Bill 188 does not raise commerce clause issues. The criteria for obtaining a Maryland cigarette manufacturer's license are not onerous. Section 16-204(a) requires "an applicant for a license to act as a manufacturer" to "submit an application to the Comptroller on the form and containing the information that the Comptroller requires" and pay \$225 in fees. § 16-204(a)(2), § 16-204(h)(1)(i). The manufacturer must also "maintain an established place of business for the manufacture and storage of cigarettes." § 16-203(a). Although the Comptroller is required to investigate all applicants for licensure, § 16-210(d), if an applicant meets the criteria, the Comptroller "shall" issue the license. § 16-205(a). Thus, so long as the existing law continues to be applied so as to avoid unconstitutional burdens, the amendment provided by Senate Bill 188 does not create an impermissible burden on interstate commerce nor cause a violation of the Master Settlement Agreement.

We recommend however, that the Comptroller's Office undertake a comprehensive review of the cigarette manufacturer's licensure provisions and propose legislation at the next session of the General Assembly to improve the definition of manufacturer. We believe that House Bill 1584 of the 2008 legislative session may provide a useful starting point for those considerations. The Office of the Attorney General is willing to assist in any such efforts.

Very truly yours,


Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable Peter V.R. Franchot
The Honorable Thomas M. Middleton
The Honorable Dennis C. Schnepfe
Joseph Bryce
Karl Aro