Written Statement Submitted on Behalf of Grand River Enterprises Six Nations, Ltd. ("Grand River") Concerning HB 2128

Grand River submits the following written statement in opposition to HB 2128.

Grand River is Native American-owned tobacco product manufacturer whose products are sold in Oregon under the brand name "Seneca." These products are purchased and then distributed in Oregon. principally through two Native American-owned businesses – one of which, Seneca Direct LLC, is headquartered in Eugene, Oregon. The Committee heard Seneca Direct's owner, Ms. Hunter, testify in opposition to HB 2128 and about the impact it will have on Seneca Direct and similarly situated distributors and Tribal businesses in Oregon. We are writing separately to respond directly to the statements made at the hearing by those who voiced support for HB 2128. Grand River hopes to clarify for the Committee the actual operation and effect of the current law, O.R.S. 803, *et seq.*, as well as the impact of its proposed amendment by HB 2128. Grand River's goal is to inform the Committee's consideration of HB 2128, and ultimately the Committee's decisions as to its efficacy in advancing the Legislature's policy goals – both as to tobacco, generally, and more specifically the tobacco companies operating in the Oregon market.

To be sure, as the Committee heard at the hearing, the fair and equitable solution for all stakeholders in the affected spectrum – including public health advocates and manufacturers and sellers of tobacco products in Oregon alike – is to adopt an increase in Oregon's current cigarette excise tax, which would operate evenhandedly and impact all manufacturers exactly in the same way. Such was the case in 2021, when the legislature raised the Oregon cigarette excise tax by $20.00 per carton. Each manufacturer – those that joined the MSA and those that have not joined (such as Grand River) – were and remain equally bound and affected by that non-discriminatory regulatory requirement. That measure was intended to and did advance the goals of promoting temperance in tobacco consumption, while at the same time increasing revenue for the State to achieve its public health funding and related objectives – and the Legislature did so through measures that impacted all manufacturers equally and exactly in the same manner.

Critically, the stakeholders who presented statements at the hearing in support of HB 2128 failed to articulate and explain to the Committee the manner in which HB 2128 will materially change the MSA's implementing legislation, in a way that will perpetuate hundreds of millions of dollars in MSA payment exemptions to certain manufacturers that joined the MSA – commonly referred to as Exempt MSA Companies. In addition to their MSA payment exemptions, the Exempt MSA Companies would continue to have no payment obligations under Oregon's current Escrow Statute and would have no obligation to make any assessment payment imposed by HB 2128. The record before the Committee demonstrates that these Exempt MSA Companies utilized their MSA payments exemptions to price their products at levels below the prices charged by NPMs such as Grand River. HB 2128 will perpetuate and exacerbate the practice of these Exempt MSA Companies using their $200+ million in payment exemptions to target and proliferate sales at prices which lure further consumption and at which NPMs cannot compete or survive. If public health advocates maintain that lower cigarette prices promote consumption, including among youth, no justification exists to impose further and additional costs on NPMs through HB 2128, while giving Exempt MSA Companies a pass and further license to discount and proliferate sales at lower prices than NPMs charge even under the current regulatory regime.

The Committee need not take Grand River's word for the foregoing, nor the testimony of Ms. Hunter regarding the pricing data she presented from a field she has been working in each day over the past 10 years. Rather, you can look to the words and statements made by the largest Exempt MSA Company – Liggett Vector – to its investors when reporting about the cost advantages Exempt MSA Companies benefit from because of their favorable status and treatment under the MSA:

> "[Liggett Vector] will capitalize on our tobacco subsidiaries' cost advantage in the United States cigarette market due to the favorable treatment that they receive under the Master Settlement Agreement ("MSA")"
> ….
> "Under the MSA reached in November 1998 with 46 states and various territories, cigarette manufacturers selling product in the U.S. must make settlement payments to the states and territories based on how many cigarettes they sell annually. Liggett, however, is not required to make any payments unless its market share exceeds its grandfathered market share established under the MSA of approximately 1.65% of the U.S. cigarette market. Additionally, Vector Tobacco has no payment obligation unless its market share exceeds approximately 0.28% of the U.S. cigarette market. We believe our tobacco subsidiaries have gained a sustainable cost advantage over their competitors as a result of the settlement."

As Grand River noted at the outset of this written statement, an increase in Oregon's cigarette excise tax would – as it did in 2021 – operate evenhandedly across the board to all manufacturers and sellers. It would not perpetuate and exacerbate an existing cost advantage and anticompetitive benefit that Exempt MSA Companies already enjoy. Indeed, the effect of HB 2128 will be self-defeating if not regressive, as it will drive NPMs out of the market and replace their sales with that of Exempt MSA Companies who already are excused from making the first $200+ million in payments under the MSA – amounts that NPMs are otherwise required to pay either under the MSA if they join the MSA, or into escrow if they choose not to join the MSA.

The additional statements made at the hearing suggesting regulatory burdens and costs imposed on NPMs under the current law are much lower than that of MSA companies is further refuted by the very text of Oregon's current, as well as its express purpose and historical operation and effect. Before delving into that history and empirical data, it is critically important to highlight several material points.

- MSA payments are <u>settlement</u> payments paid by the major tobacco companies to settle claims for wrongdoing they were alleged to have committed.

- Several MSA companies were given and currently benefit from annual payment exemptions that amount to $200+ million per year. That is, they make no settlement payments for any cigarette sales that amount to 125% of their 1997 market share, or 100% of their 1998 market share, whichever is greater.

- The Escrow Statute recites that it "is the policy of the State of Oregon that financial burdens imposed on this state by cigarette smoking be borne by tobacco product manufacturers rather than by this State to the extent that such manufacturers either determine to enter into a settlement with the State or **are found culpable by the courts**."

- The Escrow Statute thus recites, and has at all times required, that funds be deposited into escrow for the purpose of funding either a future settlement between a NPM, or payments to the State after a NPM is found culpable by the courts.

- HB 2128 removes the entire premise and purpose of the Escrow Statute, and it does so to the considerable advantage of MSA companies that have opted to receive 100s of millions of dollars in annual payment exemptions in lieu of the alternative of depositing funds into escrow for 25 years. HB 2128 takes the choice away from NPMs such as Grand River without the concomitant exemption afforded multiple MSA companies.

Background and History of MSA and Escrow Statute

Tobacco was first grown, cultivated, harvested, and traded in the Western Hemisphere – indeed the world – by indigenous Native Americans. Tobacco has cultural and religious significance to the Native Americans of North America, and its socio-economic importance continues to play a key role for their economies. For some First Nations, the importance and role tobacco plays is existential. Consistent with this heritage, Grand Rivers' founders have been in the tobacco business for nearly 50 years. Grand River itself was formally organized almost 30 years ago, and its business model since inception has included production of tobacco products for distribution in the U.S. and Canada.

It bears repeating and re-emphasis that Grand River understands well the social and health issues surrounding tobacco and its consumption. For these reasons, Grand River has been and remains committed to ensuring that it engages in no marketing or other business practices that would make its products attractive to or accessible by youth. Federal agency surveys conducted for decades have borne this out, demonstrating that youth seek out and smoke principally three brands of cigarettes – all produced by the major companies that joined the MSA. These studies make clear that the incidence of youth smoking is directly correlated to the marketing campaigns and efforts to which they have been exposed at the hands of the major tobacco companies.

Moreover, as Ms. Hunter testified, Grand River's products are priced **higher** than products sold by those favored companies that have payment exemptions under the MSA; and Grand River – and its distributors – comply with all FDA and FTC requirements mandated for tobacco advertising and marketing. The Committee heard conjecture and speculation from several speakers about pricing for products sold by companies such as Grand River that have not joined the MSA. The empirical data refutes those statements. At least three companies that joined the MSA with payment exemptions (amounting to hundreds of millions of dollars each year) sell their products in Oregon below the price at which the products of Grand River and similarly situated companies are sold. Statements were made further that companies such as Grand River have an advantage under the current law. The data demonstrates without question that the advantage is actually skewed in favor of companies that have payment exemptions under the MSA.

To suggest that HB 2128 will remove advantages that NPMs have over MSA companies under current law is thus completely without any factual support or basis. A brief history of the MSA's adoption and its implementing legislation in Oregon confirms these points

In 1998, 46 States (including Oregon), and the major U.S. tobacco product manufacturers entered into the "Master Settlement Agreement" or "MSA." The MSA settled claims brought against these major manufacturers, allegedly arising from their marketing practices, including lying about the addictiveness of their products, manipulating nicotine content in their products, and targeting youth through marketing with these addictive properties in mind. The settlement provided a full release to the Major companies in return for their annual settlement payments to the MSA States.

At the time of negotiating the MSA, the Major companies were concerned that when they raised their prices to make the annual MSA payments, they would lose market share to smaller companies that were not sued nor accused of any wrongdoing. All of this is detailed extensively in the record of a federal lawsuit that Grand River and other companies brought in federal court commencing in 2002 against 30 States, including Oregon. To accommodate the Major companies, the States (including Oregon) agreed to two things in the MSA. First, the States agreed to allow a select few manufacturers to join the MSA with a perpetual exemption from the MSA's payment requirements. The exemptions amount to hundreds of millions of dollars each year, and are calculated based on 125% of their 1997 market share, or 100% of their 1998 market share, whichever is greater.

Second, the States agreed to include in the MSA a model law – which is the law that HB 2128 proposes to amend. The model law, commonly referred to as the "Escrow Statute," has been adopted in each MSA State (including Oregon). The Escrow Statute, O.R.S. 323.803, *et seq.*, requires companies such as Grand River that do not join the MSA to deposit money into an escrow account based on the volume of their cigarettes sold in Oregon. These companies are called Non-Participating Manufacturers (NPMs) – manufacturers that have not joined the MSA nor been sued or accused of the wrongdoing committed by the Major manufacturers as alleged in the MSA. The amount deposited into escrow by NPMs is based on the equivalent amount they would have to pay if they joined the MSA **WITHOUT ANY EXEMPTION**; and the funds are held for 25 years and can be used or accessed by a state only if a state sues and obtains a judgment against a NPM for the type of wrongdoing settled under the MSA.

As mentioned, Grand River, along with other companies, initially sued multiple states in federal court, claiming that the MSA and its Escrow Statute was unfair, unconstitutional, and anticompetitive on multiple grounds. As mentioned earlier in this Statement, Exempt MSA Companies receive hundreds of millions of dollars in payment exemptions each year under the MSA. This exemption exempts these MSA companies from making any payment under the MSA up to the volume amounts mentioned above; and as MSA participants they are exempted completely from making any Escrow payments that are required to be made by NPMs (as well as any assessment proposed under HB 2128). Neither GRE nor any of the NPMs currently on the Oregon Tobacco Directory were ever offered, and do not and cannot benefit from, any payment exemption similar to that given to these Exempt MSA companies. The competitive advantages of the these Exempt MSA Companies was highlighted above in Liggett Vector's own words in its annual report.

When confronted about this clear disadvantage to NPMs, the States have argued through their MIT Health Economist, Jonathan Gruber and otherwise, that the NPMs are not disadvantaged by the Escrow Statute vis-à-vis these Exempt MSA companies, because among other things the Escrow Statute operates as a forced savings, which NPMs may invest to earn income, and the principal is returned to the NPMs after 25 years. For these reasons, it was also argued that the Escrow Statute does not operate as a tax on NPMs, because the funds deposited into escrow remain the property of a NPM and are never paid to the States. As argued by the Federal Government in support of the Escrow Statutes adopted by the MSA States:

> In effect, an NPM must maintain a savings account for 25 years in each state in which it sells its cigarettes and retain the principal in that account as security to which a state can look to recover any future judgment or settlement for damages incurred as a result of the sale of the NPM's cigarettes in that state. Barring such a future judgment or settlement, a state has no right to an NPM's escrowed funds. After 25 years, any escrowed funds are returned to the NPM, less any payments made with respect to such judgments or settlements.
>
> Unlike settlement payments made pursuant to the MSA, an NPM retains ownership over its escrowed funds. Thus, the amended escrow statutes do not require Grand River and other NPMs to satisfy judgments for claims not yet proven, nor do they prejudge Claimants' liabilities. Rather, they secure the availability of a source of funds in the event that potential future judgments may be entered against the NPM.

Following these arguments and positions taken by the MSA States (including Oregon) and the Federal Government, the litigations brought by NPMs against multiple States, including Oregon, were either dismissed or discontinued. NPMs such as Grand River and those on the Oregon Tobacco Directory proceeded in reliance of and grounded on these position that the Escrow Statute merely implemented a regulatory regime of "forced savings" through non-taxation of NPMs. In short, the NPMs adapted to compete with those "privileged" and "favored" companies that received exemptions under the MSA, and found a way to survive in a market heavily favoring these exempt companies.

As Ms. Hunter advised the Committee, even with the earnings NPMs make on their forced savings accounts and the 20+ year expectation interests that inhere to the funds' return, the exemptions given to the Exempt MSA Companies has allowed the exempt companies to price their products in the Oregon market at levels less than what NPMs can price their products. Coupled with the bonding requirement imposed on NPMs by Oregon law (ORS.180.416) – which requires NPMs to post a bond in the amount of their escrow deposits **IN ADDITION** to making the escrow payment – the competitive balance is delicate and precarious. To now transform the escrow obligations into an outright assessment singularly applicable to NPMs would, in effect, be tantamount to a triple detriment to NPMs and grant a further unfair advantage to the Exempt MSA Companies. In short, we ask the Legislature to inquire of the proponents of this Bill as to why the Bill is needed and why now? Has any impact study or data been presented to show a competitive imbalance or other reasons that would justify HB 2128 in the face of the anticompetitive and discriminatory treatment outlined above?

To illustrate Grand River's point, the Escrow Statute currently requires NPMs to deposit and hold in escrow for 25 years approximately $8.40 per carton for each carton of the NPMs cigarettes sold in Oregon. In addition, Oregon law requires NPMs to post a bond in the amount of approximately $8.40 per carton to secure its escrow obligations going forward. In the case of Grand River, the bonding company has, and continues to require, Grand River to post 100% cash collateral for such bonding. In all, Grand River must advance and deposit (both in escrow and as bonding collateral) a total approximating $16.80 per carton for each additional carton of Grand River's cigarettes that are sold in Oregon, and the Exempt MSA Companies (whose products are already priced lower than NPM products) get away with paying $0 for every carton of cigarettes they sell in the U.S. (including Oregon) up to 100% of their 1998 market share or 125% of their 1997 market share, whichever is greater.

In short, the Amendment proposes to target for extinction NPMs such as Grand River through unfair, anticompetitive, and unconstitutional means, and no reasonable or acceptable explanation exists to consider or adopt HB 2128 in the face of such disparate, anticompetitive, and unequal treatment.

The foregoing is in addition to the unconstitutional elements of HB 2128 that amount to an unlawful taking and retroactive application of state law in violation of due process. Grand River has proceeded under a regulatory regime that has required Grand River to deposit funds into escrow for 25 years, with the understanding and legal requirement that those funds are to be returned to Grand River twenty-five years after they are deposited, unless the state were to sue Grand River and obtain a judgment based on the type of wrongful conduct defined in and settled under the MSA. Changing those requirements decades after they have been deposited is a taking and violates due process. Federal case law has confirmed that states act unconstitutionally when they change the escrow statutes retroactively, in a manner such as that proposed by HB 2128.

For all the foregoing reasons, Grand River respectfully asks the Committee to reject further consideration of HB 2128 in any respect.